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10

CIVIL AND CRIMINAL

Fourth Edition

V. R. MANOHAR
&
W. W. CHITALEY

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* * * * * * * *

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THE

A. I. R. MANUAL

UNREPEALED CENTRAL ACTS

(CIVIL AND CRIMINAL)

4th Edition

BY

V. R. MANOHAR, ADVOCATE.

AND

W. W. CHITALEY, B.A., LL.B.

VOLUME X

Constitution of India, Arts. 310--311

To

Contract Act (1872), S. 58

Case law and the statute law stated in this Volume is as on
30th September, 1980.

FIRST EDITION 1946—1948.
SECOND EDITION 1959 —1962.
THIRD EDITION 1969 — 1974.
FOURTH EDITION 1979.

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FOURTH EDITION 1979
Vols. 1 to 8
W. W. CHITALEY, B.A., LL.B.
AND
V. B. BAKHALE, M.A., LL.B.
Vol. 9 onwards
V. R. MANOHAR, ADVOCATE.
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W. W. CHITALEY, B.A., LL.B.

THE ALL INDIA REPORTER LTD.

Registered Offices :
Medows House, Nagindas Master Road,
Fort-BOMBAY.

Address for Correspondence :
Post Box No. 209, NAGPUR.

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Topical Index not necessary.

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A.I.R. 1914 All., Bom., etc. ... All India Reporter, Allahabad, Bombay, etc., sections of the respective years.
A.I.R. N.O.C.... All India Reporter Notes of Cases (All., Andh. Pra.) etc.
Agra H.C.R.... Agra High Court Reports.
A. M. L. J. ... Ajmer-Merwara Law Journal.
All. or I. L. R. All....Indian Law Reports, Allahabad Series.
All. Cr. C. ... Allahabad Criminal Cases.
All. Cr. R.... Allahabad Criminal Reports.
All. L. J. ... Allahabad Law Journal.
All. L. J. N. O. C. ... Allahabad Law Journal Notes of Cases.
All. L. R. ... Allahabad Law Reports.
All. L. T. ... Allahabad Law Times.
All. W. C. ... Allahabad Weekly Cases.
All. W. N. ... Allahabad Weekly Notes.
All. W. R. ...Allahabad Weekly Reporter.
I. L. R. Andhra (Andh. Pra.) ... Indian Law Reports, Andhra (Andhra Pradesh) Series.
A. P. L. J. ... Andhra Pradesh Law Journal.
Andh. L. T....Andhra Law Times.
Andhra W. R. ... Andhra Weekly Reporter.
I. L. R. Assam ... Indian Law Reports, Assam Series.
A. L. R. ... Assam Law Reports.
Beng. L. R. ... Bengal Law Reports.
B. B. C. J. ... Bihar Bar Council Journal.
B. L. J. ... Bihar Law Judgments.
B. L. J. or Bihar L. J. R. ... Bihar Law Journal Reports.
Bom. or I. L. R. Bom. ... Indian Law Reports, Bombay Series.
Bom. C. R. ... Bombay Cases Reporter.
Bom. L. R. ... Bombay Law Reporter.
Bom. P. J. ... Bombay Printed Judgments.
Bur. L. Jour. ... Burma Law Journal.
Bur. L. R. ... Burma Law Reports.
Bur. L. T. ... Burma Law Times.
Cal. or I. L. R. Cal. ... Indian Law Reports, Calcutta Series.
Cal. H. N. ... Calcutta High Court Notes.
Cal. L. J. ... Calcutta Law Journal.
Cal. L. R. ... Calcutta Law Reports.
Cal. W. N. ... Calcutta Weekly Notes.
Cal. W. N. (D. R.) ... Calcutta Weekly Notes (Dacca Reports).
C. P. L. R. — Central Provinces Law Reports.
Chand. L. R. ... Chandigarah Law Reports.
Chand. L. R. (Cri.) ... Chandigarh Law Reports (Criminal).
Cri. App. Rep. (S. C.) ... Criminal Appeals Reporter (Supreme Court).
Cr. or Cri. L. Jour ... Criminal Law Journal.
Cri. L. J. NOC ... Criminal Law Journal Notes of Cases (All. Andh. Pra.) etc.
Cri. L. R. (S. C.) ... Criminal Law Reporter (Supreme Court).
Cri. L. T....Criminal Law Times. (Punj).
C. I. S. ... Current Indian Statutes.
Cur. L. J. ... Current Law Journal.
Cur. L. J. (Cri.) ... Current Law Journal (Criminal).
I. L. R. Cut. ... Indian Law Reports, Cuttack Series.
Cut. L. R. (Cri.) ... Cuttack Law Reports (Criminal).
Cut. L. T. ... Cuttack Law Times.
Cut. W. R. ... Cuttack Weekly Reports.
I. L. R. Delhi ... Indian Law Reports, Delhi.
D. L. T. ... Delhi Law Times.
E. P. or East Punj. ... East Punjab.
I. L. R. E. P. or East Punj. ... Indian Law Reports, East Punjab Series.
E. L. T. ... Excise Law Time.
F. A. C. ... Prevention of Food Adulteration Cases.
F. A. J. ... Prevention of Food Adulteration Journal.
F. C. R. ... Federal Court Reports.
F. L. J. ... Federal Law Journal.
I. L. R. Guj. ... Indian Law Reports, Gujarat.
Guj. L. R. ... Gujarat Law Reports.

Him. Prs. ... Himachal Pradesh.
Hyde. ... Hyde's Reports.
Hyd. or I. L. R. Hyd. ... Indian Law Reports, Hyderabad Series.
Ind. App. ... Law Reports, Indian Appeals.
Ind. Cas. ... Indian Cases.
Ind. Jur. (N. S.) ... Indian Jurist (New Series)
Ind. Jur. (O. S.) ... Indian Jurist (Old Series.)
Ind. R. ... Indian Rulings.
I. C. R. ... Industrial Court Reporter.
Int. L. R. ... International Law Reporter.
J. & K. ... Jammu & Kashmir.
J. & K. L. R....Jammu and Kashmir Law Reports.
J. L. R. or Jaipur L. R. ... Jaipur Law Reports.
Jab. L. J. ... Jabalpur Law Journal.
I. L. R. Kar. ... Indian Law Reports, Karachi Series.
Kant. L. J. ... Karnataka Law Journal.
Kash. L. J. ... Kashmir Law Journal.
I. L. R Ker. ... Indian Law Reports, Kerala.
K. H. C. N. ... Kerala High Court Notes.
K. L. J. or Ker. L. J. ... Kerala Law Journal.
K. L. R. or Ker. L. R. ... Kerala Law Reporter.
K. L. T. or Ker. L. T. ... Kerala Law Times.
L. I. C. or Lab. I. C. ... Labour and Industrial Cases.
I. L. R. Lah. ... Indian Law Reports, Lahore Series.
Lah. L. Jour. ... Lahore Law Journal.
Lah. L. T.... Lahore Law Times.
L. R. A. ... Law Reporter, Allahabad.
L. S. (A. P.) ... Law Summary (Andhra Pradesh).
Low. Bur. R. ... Lower Burma Rulings.
Luck. or I. L. R. Luck. ... Indian Law Reports, Lucknow Series.
Madh. B. or M. B. ... Madhya Bharat.
I. L. R. Madh. B. ... Indian Law Reports, Madhya Bharat Series.
Madh. B. L. J. ... Madhya Bharat Law Journal.
Madh. B. L. R. ... Madhya Bharat Law Reporter.
I. L. R. M. P. ... Indian Law Reports Madhya Pradesh.
M. P. C. ... Madhya Pradesh Cases.
M. P. L. J. ... Madhya Pradesh Law Journal.
M. P. W. R. ... Madhya Pradesh Weekly Reporter.
Mad. or I. L. R. Mad. ... Indian Law Reports, Madras Series.
Mad. H. C. R. ... Madras High Court Reports.
Mad. L. J. ... Madras Law Journal.
Mad. L. J. or M. L. J (Cri.) ... Madras Law Journal (Criminal).
Mad. L. Tim. ... Madras Law Times.
Mad. L. W. ... Madras Law Weekly.
Mad. L. W. or M. L. W. (Cri.) ... Madras Law Weekly (Criminal).
Mad. W. N. ... Madras Weekly Notes.
Mah. L. J. ... Maharashtra Law Journal.
Mah. L. R. ... Maharashtra Law Reporter.
M. L. R. or Marwar L. R. ... Marwar Law Reporter.
Mer. L. R. ... Mercantile Law Reporter.
Moo. Ind. App. ... Moore's Indian Appeals.
Moo. P. C. C. ... Moore's Privy Council Cases.
Mys. ... Mysore.
I. L. R. Mys. ... Indian Law Reports, Mysore Series.
Mys. H. C. R. ... Mysore High Court Reports.
Mys. L. J. ... Mysore Law Journal.
I. L. R. Nag. ... Indian Law Reports, Nagpur Series.
Nag. L. Jour. ... Nagpur Law Journal.
Nag. L. R. ... Nagpur Law Reports.
N. W. P. H. C. R....North West Provinces High Court Reports.
O. J. D. ... Orissa Judicial Decisions.
Oudh Cas. ... Oudh Cases.
Oudh L. J. ... Oudh Law Journal.
Oudh L. R. ... Oudh Law Reports.
Oudh S. C. ... Oudh Select Cases.
Oudh W. N. ... Oudh Weekly Notes.
Pak. L. R. Lahore ... Pakistan Law Reports, Lahore.
I. L. R. Patiala ... Indian Law Reports Patiala Series.

Pat. or I. L. R. Pat. ... Indian Law Reports, Patna Series.

Pat. H. C. C. ... Patna High Court Cases.

Pat. L. Jour. ... Patna Law Journal.

P. L. J. R. or Pat. L. J. R. ... Patna Law Journal Reports.

Pat. L. R. ... Patna Law Reporter.

Pat. L. Tim. ... Patna Law Times.

Pat. L. W. ... Patna Law Weekly.

Pat. W. N. ... Patna Weekly Notes.

Pepsu L. R. ... Pepsu Law Reports.

I. L. R. Punj. ... Indian Law Reports, Punjab Series.

P. L. J. or Pun. L. J. ... Punjab Law Journal.

Pun. L. J. (Cri.) ... Punjab Law Journal (Criminal).

Pun. L. R. ... Punjab Law Reporter.

Pun. L. R. (D.) ... Punjab Law Reporter (Delhi).

Pun. Re. ... Punjab Records.

Pun. W. R. ... Punjab Weekly Reporter.

Raj. ... Rajasthan.

I. L. R. Raj. ... Indian Law Reports, Rajasthan Series.

Raj. Cri. C. ... Rajasthan Criminal Cases.

Rajdhani L. R. ... Rajdhani Law Reporter.

R. L. W. or Raj. L. W. ... Rajasthan Law Weekly.

Rang. or I. L. R. Rang. ... Indian Law Reports, Rangoon Series.

Rang. L. R. ... Rangoon Law Reports.

Rat. or Rat. Un. Cr. C. ... Ratanlal's Unreported Criminal Cases.

R. D. ... Revenue Decisions.

R. L. R. or Rev. L. R. ... Revenue Law Reporter.

R. R. or Rev. Rul. ... Revenue Rulings.

Sau. ... Saurashtra.

Sau. L. R. ... Saurashtra Law Reporter.

Sikkim L.J. ... Sikkim Law Journal.

Sim. L. C. ... Simla Law Cases.

Sim. L. J. ... Simla Law Journal.

Sind L. R. ... Sind Law Reporter.

S. C. A. ... Supreme Court Appeals.

S. C. C. ... Supreme Court Cases.

S. C. Cr. R. ... Supreme Court Criminal Rulings.

S. C. D. ... Supreme Court Decisions.

S. C. J. ... Supreme Court Journal.

S. C. N. ... Supreme Court Notes.

S. C. R. ... Supreme Court Reports.

S. C. W. R. ... Supreme Court Weekly Reporter.

Suther ... Sutherland's Privy Council Judgments.

Suth. W. R. ... Sutherland's Weekly Reporter.

Tax ... Taxation.

T. L. R. or Tax. L. R. ... Taxation Law Reports.

T. A. C. ... All India Transport and Accidents Cases.

Trav. Co. or T. C. ... Travancore-Cochin,

I. L. R. Trav-Co. or T. C. ... Indian Law Reports, Travancore-Cochin Series,

T. C. L. R. or Trav.-Co. L. R. ... Travancore-Cochin Law Reports.

T. L. J. or Trav. L. J. ... Travancore Law Journal.

U. C. R. (Bom) ... Unreported Cases Reporter (Bombay).

Uch. N. P. ... Uchcha Nyayalaya Nirnaya Patrika.

Um. N. P. ... Uchchatam Nyayalaya Nirnaya Patrika.

U. P. L. R. ... United Provinces Law Reports.

U. P. L. T. (NOC) ... Uttar Pradesh Law Tribune (Notes of Cases).

U. J. (S C) ... Unreported Judgments (Supreme Court).

Upp. Bur. Rul. ... Upper Burma Rulings.

Vind. Pra. or V. P. ... Vindhya Pradesh.

Weir ... Weir's Criminal Rulings.

W. L. N. ... Weekly Law Notes.

W. L. N. (U. C.) ... Weekly Law Notes (Unreported Cases).

(ii) Other Abbreviations

App. ... Appeal.
Appln. ... Application.
Appr. ... Approved.
Art. or A. ... Article.
B. R. ... Board of Revenue.
C. ... Case Number.
C. A. ... Court of Appeal.
C. N. ... Case Number.
Ch. ... Chapter.
Civ. ... Civil.
Cl. ... Clause.
Cons. ... Considered.
Cr. ... Criminal.
Diss. ... Dissented.
Dist. ... Distinguished.
D. B. ... Division Bench.
Expl. ... Explained.
Expln. ... Explanation.
F. A. ... First Appeal.
F. B. ... Full Bench.
F. C. ... Federal Court.
F. N. ... Foot Note.
Foll. ... Followed.
G. I. ... Government of India Act, 1935.
Illus. ... Illustration.
Jour. ... Journal.
L. P. A. ... Letters Patent Appeal.
N. ... Note.
N. U. C. ... Notes of Unreported Cases.
O. ... Order.
Over. ... Overruled.
P. ... Page.
Pr. or P. ... Para.
Pt. ... Point.
P. C. ... Privy Council.
Pre. ... Preamble.
R. ... Rule.
Ref. ... Referred or Referer ..
Regn. ... Regulation.
Rel. on. ... Relied on.
Rev. ... Revenue.
Revn. ... Revision.
S. ... Section.
S. A. ... Second Appeal.
S. B. ... Special Bench.
S. C. ... Supreme Court.
Sch. ... Schedule.
U. S. ... Supreme Court Reports (America).
11 & 12 Vict. C. 12... Reignal year 11&12 Victoria Chapter 12.
6 & 7 Geo. 5 C 8 ... Reignal year 6 & 7 George the 5th, Chapter 8.

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UNREPEALED CENTRAL ACTS
(CIVIL & CRIMINAL)

VOLUME X

CONSTITUTION OF INDIA (contd.)

310. Tenure of office of persons serving the Union or a State.— (1) Except as expressly provided by this Constitution, every person who is a member of a defence service or of a civil service of the Union or of an all-India service or holds any post connected with defence or any civil post under the Union, holds office during the pleasure of the President, and every person who is a member of a civil service of a State or holds any civil post under a State holds office during the pleasure of the Governor [a][* * *] of the State,

(2) Notwithstanding that a person holding a civil post under the Union or a State holds office during the pleasure of the President or, as the case may be, of the Governor [b][* * *] of the State, any contract under which a person, not being a member of a defence service or of an all-India service or of a civil service of the Union or a State, is appointed under this Constitution to hold such a post may, if the President or the Governor [b][* * *], as the case may be, deems it necessary in order to secure the services of a person having special qualifications, provide for the payment to him of compensation, if before the expiration of an agreed period that post is abolished or he is, for reasons not connected with any misconduct on his part, required to vacate that post.

(a) Words "or as the case may be, the Rajpramukh" omitted by the Constitution (Seventh Amendment) Act, 1956, S. 29 and Sch. (1-11-56).

(b) Words "or Rajpramukh" and "or the Rajpramukh" respectively omitted, ibid.

311. Dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or a State.— (1) No person who is a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed.

ARTICLES 310 AND 311 — SYNOPSIS

1A. Legislative changes.
1. Scope and applicability.
2. Retrospective effect.
3. Conditions of service and recruitment. — See also ibid, Art. 309.
4. Appointment and dismissal of members of judicial service — See also Note 52.
5. Persons to whom Articles apply.
6. Persons in temporary service — See also under Notes 24 and 104.
7. Probationers — See also Notes 39 and 112.
8. Persons in defence services.
9. Servants of co-operative societies.
10. Servants of educational bodies.
11. Servants of Statutory Corporations.
12. Members of Police Service.

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[a][(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges [b][* *]:

[c][Provided that where it is proposed after such inquiry, to impose upon him any such penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed:

Provided further that this clause shall not apply—]

(a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or

(b) where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry; or

(c) where the President or the Governor, as the case may be, is satisfied that in the interest of the security of the State it is not expedient to hold such inquiry.

Articles 310 & 311 — Synopsis (contd.)

13. Service under Municipalities, local boards and panchayats.
14. Contract service — See also Note 5.
15. Civil Posts and Civil Services — See also Note 5.
16. Members of Indian Civil Service — See also Article 314.
17. "Except as expressly provided by this Constitution" — See also Note 18.
18. "Holds office during the pleasure of ....." — Rule of pleasure in Art. 310 (1) — Its scope and limitation.
19. English Law.
20. Age of superannuation — Alteration of rule as to.
21. Scales of pay, alteration of.
22. Pleasure, whether can be delegated.
23. Right to hold office, whether Fundamental Right — See also Article 309.
24. "Dismissed" or "removed" — General.
25. Article 311 (2) applies only when there is punishment.
26. Termination of service, when amounts to punishment — Tests and illustrations.
27. Termination of service of temporary servants.
28. Termination on basis of misconduct, negligence, etc.
29. Termination in terms of Service Rule or contract of service.
30. Phraseology of order does not determine its nature.
31. Automatic termination of service under Service Rules.
32. Distinction between 'removal' and 'dismissal' — See also Note 24.
33. Removal of honorary servant.
34. Discharge.
35. Retrenchment.
36. Discharge on account of abolition of post.
37. Termination upon integration of States.
38. Discharge from temporary posts — Right to lien on substantive post — See also Note 135.
39. Discharge of probationer.
40. Termination on ground of lack of competency or on ground of medical unfitness.
41. Removal on ground of being member of political party — See also Note 125.
42. Withholding of salary.
43. Termination after extension of superannuation — See also Note 103.
44. Authority by whom Government servant can be dismissed or removed — Article 311 (1) — General.
45. Delegation of power of dismissal.
46. Appeal from dismissal.
47. "Subordinate", meaning of.
48. Appointing authority.
49. Who can dismiss or remove or order compulsory retirement or suspension — Illustrative cases.
50. Who can order reduction in rank.
51. Prevention of Corruption Act — Who can sanction prosecution.
52. Officers and servants of High Court — Power to appoint and remove — See also Note 4.
53. Enquiry and report by authority different from that empowered to dismiss.
54. Authority who can issue notice — See also Note 80.
55. Order of suspension pending final order of dismissal by another authority.
56. Service Rules — General — See also Article 309.
57. Rules contravening Article 311 (2).
58. Two types of Rules.
59. Rules, whether "laws in force" — See also Article 313.
60. Alterability of Rules — See also Note 20.
61. Rules not legally enforceable.
62. Rules legally enforceable.
63. Termination of service according to terms of contract or conditions of service — See also Note 29.
64. Reasonable opportunity to show cause against proposed action — General.

(3) If, in respect of any such person as aforesaid, a question arises whether it is reasonably practicable to hold such inquiry as is referred to in clause (2), the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank shall be final.]

(a) Cls. 2 and 3, substituted by Constitution (Fifteenth Amendment) Act, 1963, S. 10.

(b) Words "and where it is proposed, after such inquiry to impose on him any such penalty, until he has been given a reasonable opportunity of making representation on the penalty proposed, but only on the basis of the evidence adduced during such inquiry" omitted by Constitution (Forty-second Amendment) Act, 1976, S. 44 (3-1-77).

(c) Substituted for words "Provided that this clause shall not apply—", ibid.

OBJECTS AND REASONS

Cl. 44— This clause seeks to amend article 311 (2) denying the Government servant the opportunity to make a representation at the second stage of the enquiry against the penalty proposed to be imposed on him. S. O. R.—Gaz. of Ind. 1-10-76, Pt. II, S. 2, Ext., p. 1403.

Articles 310 & 311 — Synopsis (contd.)

65. Scope and ambit of right conferred by Article 311 (2).
66. Temporary civil servants.
67. Charge-sheet, right of civil servant to.
68. Charges not to be vague.
69. Notice to specify particular punishment to be awarded and grounds thereof.
70. Enhancement of punishment by higher authority.
71. Additional charges and amendment of charges.
72. Powers of revising authority.
73. Bias and want of bona fide — See also Note 75 (d).
74. Reasonable opportunity, what amounts to — General.
    (a) Two opportunities.
    (b) Right to copy of findings of enquiry and other documents.
    (c) Right to personal hearing.
    (d) Right to be represented.
    (e) Right to call witnesses.
    (f) Right to cross-examine.
    (g) Reasonable opportunity given — Illustrative cases.
    (h) Reasonable opportunity not given — Illustrative cases.
75. Departmental enquiry — General.
    (a) Findings of.
    (b) Evidence.
    (c) Natural justice, rules of.
    (d) Bias and bona fides — See also Note 73.
    (e) Procedure.
    (f) Departmental inquiry after acquittal in criminal prosecution — See also Note 126.
    (g) Powers of appellate authority.
76. Waiver of enquiry and objections to defects in it.
77. Opportunity given but not availed of.
78. Apology by civil servant — Effect.
79. Public Service Commission — Reference to — See also Note 136 and Article 320.
80. Show cause notice, by whom to be given.
81. Authority who can frame charges.
82. Order must show that authority applied its mind.
83. Reinstatement — Effect of.
84. Domestic enquiry.
85. Fresh proceedings in respect of same matter.
86. "Article 311 (2), Second Proviso."
87. Article 311 (3).
87A. Transfers.
88. Voluntary resignation or voluntary retirement.
89. Suspension — See also Note 105.
90. Retirement on superannuation.
90A. Premature retirement.
91. Withholding increments.
92. Compulsory retirement.
93. Compulsory retirement on proportionate pension in terms of specific Service Rule, is not dismissal or removal.
94. Compulsory retirement, when dismissal or removal.
95. Except where authorised by specific Rules, compulsory retirement before age of superannuation is dismissal or removal.
96. Compulsory retirement based on charges of misconduct, negligence, etc., is dismissal or removal.
97. Compulsory retirement coupled with loss of benefits already earned is dismissal or removal.
98. Compulsory retirement amounting to removal — No right to pension.
99. Alteration of superannuation rule — See Note 20.
100. Right of ministerial servant to continue in service till age of sixty.
101. Compulsory retirement with retrospective effect.
102. Reduction of pension as punishment.
103. Extension of superannuation.
104. "Reduction in rank".
105. Suspension is not reduction.
106. Reduction must be by way of penalty.
107. Tests for determining whether reversion amounts to reduction in rank and illustrative cases.
108. Instances where reversion does not amount to reduction in rank.
109. Mala fide order of reduction.
110. Reversion from officiating post on ground of incompetency or unfitness.

Articles 310 & 311 — Synopsis (contd.)

111. Demotion on ground of financial stringency.
112. Extension of probationary period — See also Note 7.
113. Officiating appointments and temporary posts.
114. Reversion from officiating post to permanent post not reduction where incapacity is only background or motive and not basis of reversion.
115. Retrospective reversion.
116. Abolition of post and reversion to lower rank.
117. Integration of services upon abolition of former Indian States and on reorganisation of States.
117A. Promotion.
118. Cancellation of promotion.
119. Refusal to promote.
120. Reversion and departmental enquiry for same cause.
121. Retrospective orders under the Articles.
122. Censure.
123. Determining order of seniority.
124. Grounds of dismissal or removal.
125. Grounds of dismissal — Subversive activities — See also Note 41.
126. Criminal proceedings against officer
127. Suit for declaration.
128. Suit for salary.
129. Suit for pension.
130. Suit for damages.
131. Suit for mandatory injunction.
132. Claim for dearness allowance.
133. Writ proceedings — See also Arts. 226 and 32.
134. Equality clauses in the Constitution.
135. Lien.
136. Public Service Commission, consultation with — See also Article 320.
137. Public Servants (Inquiries) Act, 37 of 1850.
138. High Court's power of superintendence under Article 227.
139. Practice.

1A. Legislative changes—

(i) Art. 310 has not undergone any legislative changes except omission of certain words consequential to abolition of the post of Rajpramukh.

(ii) Cl. (1) of Art. 311 has also not undergone any change.

(iii) Original Cls. (2) and (3) of Art. 311 were substituted by the Constitution (15th Amendment) Act, 1963.

(iv) Cl. (2) of Art. 311 is again amended by the Constitution (42nd Amendment) Act, 1976 whereby certain words are omitted and a new proviso is added. This has resulted in an important change. Previous to 42nd Amendment "second opportunity" against proposed penalty had to be given to the delinquent. This requirement is now dispensed with and the penalty is to be imposed on the basis of the evidence adduced during the inquiry — Ed.

1. Scope and applicability.— (1) Article 310 fetters Article 309 while Art. 309 does not control Articles 310 and 311. (1966) 70 Cal WN 925 (929) (DB).

(2) Articles 309, 310 and 311 should be read together. A 1959 Andh Pra 497 (500) (DB).

(3) Article 309 has to be read subject to Arts. 310 and 311. Article 310 has to be read subject to Art. 313. Article 311 is not subject to any other provision of the Constitution. "Doctrine of pleasure" has lost some of its majesty and power because it is controlled by provisions of Article 311. A 1967 All 197 (200). **(Reversed** on another point in 1970 Lab IC 131).

(3A) Rule 56 (j) of Fundamental Rules embodies a facet of "doctrine of pleasure". **A 1971 SC 40 : 1971 Lab IC 8**

(4) Article 311 (2) is not controlled by any rule framed under Article 309. ILR (1972) 2 Cal 230.

(5) Clauses (1) and (2) of Article 311 have to be read as qualifications or provisos to Article 310 (1). **A 1958 SC 300 (304).**

(6) Articles 309 and 310 are on completely different footing. Article 310 in its opening words says "Except as expressly provided by the Constitution". Article 309 says "subject to the provisions of this Constitution". Thus in case of Article 310, only express provision of the Constitution can curtail the power conferred under this Article. On the other hand, Article 309 is subject to all the provisions of the Constitution. This vital difference in the wording of the two Articles makes all the difference. 1977 Lab IC 803 (Pat).

(7) Provisions of Articles 309 and 310 are subject to provisions of Article 229. A 1964 Punj 285 (287) (DB).

(8) Article 311 is a mandatory provision which has to be complied with, before the pleasure as envisaged in Article 310 can be exercised. A 1966 Cal 252 (257) (DB).

(9) Article 311 is mandatory and no attempt should be made to circumvent or bypass it by colourable acts; nor is it advisable to do anything which may even reasonably give such an impression, for, justice must not only be done but it must also be seen to be done. 1963 Cur LJ 260 (266) (Punj).

(10) A violation of Article 311 (1) or 311 (2) is a justiciable issue in a Court of law, as the terms thereof are mandatory and not permissive, qualifying the provisions of Article 310 and providing a condition precedent to the exercise of the power under Article 310. A 1961 Mad 486 (489, 490) (DB).

(11) Article 311 only covers certain forms of punishment against a Government servant. A 1954 Madh B 49 (51).

(12) Article 311 (2) applies only where an order of dismissal, removal or reduction is passed — Other minor punishments are regulated by rules. 1972 Lab IC 1443 (1445) (All). **(Reversed** on another point in 1973 Lab IC 1430.) ** 1977 Lab IC (NOC) 42 : 1977 Serv LJ 188 (Delhi).

(13) When Punishment proposed is reduction in salary Art. 311 is not applicable. 1977 Lab IC 1194 (Cal).

(14) Article 311 gives a two-fold protection to persons who come within the Article, namely (1) against removal or dismissal by an authority subordinate to that by

Articles 310 & 311 — Note 1 (contd.)
which they were appointed and (2) against dismissal or removal or reduction in rank without giving them a reasonable opportunity of showing cause against the action proposed to be taken in regard to them. **A 1958 SC 36 (41)** ** A 1956 Madh B 259 (261) (DB) ** 1973 All Serv Rep 735.

(15) Termination of service except as punishment is not covered by Art. 311. (1957) 70 Mad LW 965 (969) ** A 1967 Madh Pra 79 (80) (DB) ** (1963) 76 Mad LW 164 (165) ** A 1961 All 316 (318) ** A 1961 Ker 203 (207) (DB) ** A 1959 Mad 1 (5) (DB) ** 1957 Ker LT 772 (773).

(16) If the duties of an employee relate to activities which fall directly within sphere of the Union or the State and his services are under the direction and control as also his appointment was by either Union or State, then Article 311 will apply. A 1966 All 552 (554).

(17) A person who is not a member of a civil service of the Union or an All India service or a civil service of a State or holds a Civil post under the Union or a State cannot claim protection of Article 311. **A 1968 Punj 312 (313): 1968 Lab IC 967 (FB)** ** A 1967 Pat 160 (165) (DB).

(18) In order to see whether a person was entitled to benefits of Article 311, one has to look to the post he is holding at the time the disciplinary action is taken against him. A 1969 Delhi 170 (177, 178): (1969) Lab IC 649 (DB). (School run by Government transferred to society registered under Societies Registration Act — Some members of Board of Society, Government nominated — Services of petitioner who was employee of school continued by Board after termination by Government does not remain a Government servant.)

(19) Protection under Article 311 is not available to a workman of private employer. A 1960 Tripura 35 (39, 40).

(20) Protection under Article 311 is not available to a machinist in Ordnance Factory. A 1966 Madh Pra 82 (84, 85)

(21) Mysore Village Offices Abolition Act (XIV of 1961) is valid. Aricle 311 is not relevant in this respect. A 1964 Mys 84 (94) (DB).

(22) Analogy of the Article not to be made in view of difference in language of the Article and Sec. 298 of Assam Act 15 of 1957. **A 1967 SC 1398 (1400).** (A 1966 Assam & Nagaland 120, **Reversed.**)

(23) The word State in Article 311 is not the State as defined in Article 12, but State as defined in Article 308. A 1962 Madh Pra 50 (54) (DB) ** A 1960 Punj 554 (556) (DB) ** A 1960 Cal 549 (550, 551).

(24) Service Chapter of the Constitution relates only to recruitment, conditions and tenure of service of persons, citizens or otherwise, appointed to a civil service or to posts in connection with affairs of the Union or any State. **A 1961 SC 564 (569 to 573).**

(25) Unless there is valid appointment the person is not entitled to the benefit of Article 311 (2). A 1957 Him Pra 49 (51) ** A 1955 Nag 163 (164) (DB) ** A 1965 Madh Pra 48 (52). ** A 1970 Assam 57 (58, 59).

(26) Government's order appointing a person as police patel with effect from future date — He has no right to the post till the future date arrives — Revocation of the order before that date does not attract Article 311. (1967) 2 Lab LJ 813 (815) (Guj) (DB).

(27) Article 310 (2) contemplates premature termination of contractual service. (1967) 10 Law Rep 555 (594) (DB).

(28) Order for recovery of misappropriated sum from a servant found guilty of misconduct — Does not fall under Art. 311. 1973 Lab IC 1430 (All).

(29) The ordinary law of master and servant is that the tenure of a servant is governed by the contract between the master and the servant. The general law applies except in certain cases, viz. (a) cases of public servants falling under Art. 311 (2) of the Constitution of India, (b) cases falling under the industrial law, and (c) cases where acts of statutory bodies are in breach of a mandatory obligation imposed by a statute. 1974 BBCJ 237 (Pat).

(30) Security of tenure is guaranteed under Article 311. Where the State Government transferred services of its servants to State Road Transport Corporation guaranteeing their security of tenure the protection under Art. 311 is there and cannot be taken away by the Regulations of the Corporation. 1979 MP LJ 550 (554) (DB).

(31) Order directing that employees already appointed would count their period of previous service towards probation period for new post — **Held** though the order was unusual and extraordinary and created a sort of fiction unknown to service rules matter being pre-Constitution one High Court would not interfere — Mere fact that representations or appeals against impugned order were pending would not confer jurisdiction on High Court. 1974 Lab IC 1153 (1158) (J and K) (DB).

2. Retrospective effect.— (1) Article 311 does not apply to an order of dismissal, removal or reduction in rank passed before the Constitution. A 1956 Pat 23 (28) (DB) **** A 1971 SC 1085 (1086)** ** A 1956 Punj 106 (108): ILR (1956) Punj 77 (DB) ** A 1955 Hyd 168 (169): ILR (1955) Hyd 370 (DB) ** A 1955 Punj 157 (158) (DB) ** A 1959 Pat 326 (327): 1959 BLJR 279 (DB).

(2) Enquiry into charges — Order of compulsory retirement passed after commencement of Constitution — Order is governed by Article 311. A 1964 Andh Pra 206 (212): (1965) 1 Lab LJ 34 (DB).

(3) As regards pre-Constitution misconduct, the provisions of the Constitution only should govern matters in relation to public office after the coming into force of the Constitution. A 1960 Andh Pra 479 (481, 482, 485): ILR (1960) 2 Andh Pra 148 (DB).

(4) Where a suit by a retired Government servant against Government for certain declaration about conditions of service and recovery of arrears of pay was brought long before the Constitution of India came into force Art. 310 has no application. A 1959 All 393 (396) (DB).

(5) The Constitution is prospective in effect, but not retrospective, unless otherwise provided by the Constitution itself. Article 311 has improved the position of

Articles 310 & 311 — Note 2 (contd.)
civil servants inasmuch as the guarantee under it extends even to a case of removal. A 1964 Andh Pra 206 (210): (1965) 1 Lab LJ 34 (DB).

(6) Amendment made by Constitution (15th Amendment) Act, 1963 is not retrospective. A 1970 Delhi 52 (56) (DB).

3. Conditions of service and recruitment.— See also ibid, Art. 309. — (1) The conditions of service of a Government servant appointed to a post, permanent or temporary, are regulated by the terms of the contract or employment expressed or implied and, subject thereto, by the rules applicable to the members of the particular service. **A 1958 SC 36 (42).**

(2) A person, who has been appointed temporarily to a post but has been in continuous service for more than three years or has been certified by the appointing authority as fit for employment in a quasi-permanent capacity, acquires what is known as a quasi-permanent status under the Rules. **A 1958 SC 36 (48).**

[See **A 1958 SC 419 (431).**]

(3) Where a person is appointed substantively to a permanent post in Government service, he acquires a right to hold the post until, under the rules, he attains the age of superannuation or is compulsorily retired on proportionate pension on attaining the prescribed age or completing the prescribed number of years' service for such retirement. **A 1958 SC 36 (42).** ** A 1970 Delhi 132.

(4) Once it is held that the servant has acquired the status of a permanent Government servant, his subsequent transfer to a post, whether that post is permanent or temporary, would not derogate from his status and rights as such. A 1970 Delhi 132 (141, 142): 1970 Lab IC 814.

(5) Appointee was appointed and worked as an Assistant Engineer in the West Bengal Public Health department which was a gazetted post, but the letter of appointment stated that he will not have gazetted rank thus denying him benefits thereof. It was held that the appointee could not be denied any benefits attached to a post 1974 Lab IC 219 (220) (Cal).

(6) Ad hocist — No right on the post on which ad hoc appointment is made. 1979 Lab IC 1097 (1099) (DB) (Him Pra).

(7) Where a Government servant has been appointed to a specific post and that post is in its very nature such that it can be performed at the particular place only, he cannot under rule 15 of the Fundamental Rules be transferred to another post. A 1959 All 629 (630, 631).

(8) When one State is absorbed in another, whether by accession, conquest, merger or integration all contracts of service between the prior Government and its servants automatically terminate and thereafter those who elect to serve in the new State, and are taken on by it, serve on such terms and conditions as the new State may choose to impose. (1975) 2 Serv LR 360: ILR (1974) Him Pra 665. (After the merger any letter issued by the erstwhile prince regarding the age of superannuation etc. stands superseded and becomes ineffective. Employee would be governed by R. 56 (i) of the Fundamental Rules.)

(9) On the merger of the former Indian State of Mandi in Himachal Pradesh (later a Part C State of the Union of India) the old contracts of service came to an end. The right to enforce an assurance with respect to the services remains only with the high contracting parties. A 1959 Him Pra 32 (33).

(10) Passing of recruitment examination — Confers no right to service — Cancellation of examination — High Court will not interfere by way of writ unless right of a party is affected in any matter. A 1960 All 123 (123) (DB).

(11) Temporary appointments can be only under Rule 7-A, Madras Subordinate Civil Judicial Service Rules — Conditions for such appointment — Satisfaction of Governor regarding existence of the conditions — Function is administrative and not justiciable. A 1961 Andh Pra 229 (234 to 237) (DB).

(12) Order of appointment of Mauzadar who is in effect agent for collection of revenue on behalf of State Government, on basis of commission — Cancellation of appointment for failure to give security — Government has absolute right to pass order of appointment and cancelling the same. A 1959 Assam 118 (119) (DB).

(13) Complaints as to service conditions — Not amenable to Judicial review under Article 226. A 1960 Ker 82 (83).

(14) Where person was initially appointed subject to certain conditions but the conditions of service were not mentioned in the second order of appointment could not give rise to an implied contract that the petitioner would continue to be employed till the Department continued to exist or till he attains the age of 55. The very use of the words 'has been pleased to re-appoint' in the second order implied that the appointment was subject to the same conditions. A 1958 Tripura 38 (39, 40).

(15) State Road Transport Corporation procedure of abolishing old posts of employees of State Undertaking and giving them option to come into its service of new Corporation and thereby guaranteeing continuity of service does not violate Article 311. The process adopted is not a transfer of service but one of termination of service under the State and commencement of fresh service under the Corporation. The steps are taken by Government in exercise of power under Sec. 34 of the Road Transport Corporations Act. In this process, there is no variation of condition of service of employees to their disadvantage, and there is no termination of service of any of the employees in contravention of Art. 311 of the Constitution. (1970) 2 Mys LJ 519 (DB).

(16) Where the grievance is that a civil right of Government servant is taken away on basis of an executive instruction which is not applicable to him in the matter of his seniority in service and the grievance is found to be justified, High Court has jurisdiction to grant relief. A 1969 Punj 257. (A 1966 Punj 443 **Reversed.**)

(17) The change in conditions of service by administrative instructions is not invalid in the absence of proof that the Govern-

Articles 310 & 311 — Note 3 (contd.)
ment does not have the power to change the conditions of service of its employees by administrative instructions and when the administrative instructions changing the conditions do not contravene any statutory rules or law. (1973) 1 Serv LR 928 : 1973 Serv LC 458 (Delhi).

(18) Terms of service — Can be altered unilaterally by Government — No vested contractual right for servant. **A 1967 SC 1889 (1894, 1895).** ** 1973 Lab IC 1300 (J & K).

(19) It is true that the conditions of service of a Government servant can be laid down either by the appropriate Legislature and in the absence of the same having been so laid down, by the Governor of a State. But the mere fact that there is such a power does not affect the jurisdiction of a properly constituted Tribunal to adjudicate in relation to an industrial dispute between the Government servant and the State. 1977 Lab IC 803 (Pat).

(20) Change in quota of promotions is not change in conditions of service. 1977 SLJ 48 : (1976) 1 Serv LR 600 (Punj).

(21) Scales of pay — Alteration of — Government can take decision unilaterally — Employees not entitled to be heard therefor. 1979 Lab IC 781 (783) (DB) (Punj).

(22) Government servant — Ordinance issued under Article 123 relating to conditions of service and Service Rules framed under Proviso to Article 309, affecting fundamental rights — Validity is justiciable under Article 226 — Article 310 no bar. A 1962 Bom 53 (60, 61) (DB) **(Reversed** on another point in A 1963 SC 812.)

(23) Alteration of conditions of service — Absorption of deputationist in permanent service — Their repatriation to parent department cannot be affected without their concurrence. 1980 Lab IC (NOC) 30 : (1979) 2 Serv LR 253 (Delhi).

(24) Appointment on temporary basis — Rules not providing for such appointment — Appointment is under Governor's powers under Art. 310. ILR (1965) 15 Raj 664 : 1966 RLW 262 (266) (DB).

(25) Resignation — Withdrawal before acceptance of resignation — Effect — Resignation letter could not be accepted after its withdrawal so as to effect a termination of the service retrospectively from the date of the letter of resignation — The servant must be deemed to continue in service. 1979 Lab IC 404 (406, 407, 409) (Him Pra). ** 1976 Lab IC 375 (376) (DB) (Orissa) ** (1978) 2 Serv LR 846 (Him Pra).

(26) Government servant — Resignation — Acceptance by Government — Withdrawal of resignation not permissible even before communication of order of acceptance. **A 1969 SC 180 (182): 1969 Lab IC 310.** ** A 1972 Cal 378 : 1972 Lab IC 1148.

(27) Candidate enlisted in the list of approved candidate appointed to the post of Registration clerk — Order of Inspector General of Registration directing him to stop work — Order does not amount to removal — Candidates' name cannot be removed from the list of approved Candidates in view of Rule 97 of Registration Manual. 1976 Lab IC 478 (481) (All).

(28) Ex-servicemen — Appointment in public service — Benefit of military service, under Rule 4 (ii) of Punjab Government National Emergency (Concession) Rules (1965) is available even on second or subsequent appointment. 1979 Lab IC 1007 (1011) (Punj) (DB).

(29) Policy statement by Government that those who volunteer to work when staff was on strike would be appointed to regular post — 'A' who was already working as extra-departmental hand did not join strike but did his normal work and, in addition, work of those who went on strike — Government, held, was bound to consider 'A's case for 'regular appointment' as he had worked even for those who went on strike and was a volunteer. 1977 SLJ 423 (AP).

(30) Appointment of persons from panel — Panel of four persons — Appointment of some of them — Subsequently, life of panel fixed as one year without notice to remaining candidates — Notice before passing order held not imperative — Non-communication of order to them did not invalidate order. (1971) 1 Lab LJ 414 (Delhi).

(31) Creation of supernumerary post with retrospective effect is illegal — It will take effect only from date of such creation. 1979 Lab IC (NOC) 40 : ILR (1978) Him Pra 465.

(32) Petitioner appointed specifically to a non-cadre post which was created specifically for Engineering section of H. farm — He cannot be transferred permanently to another section of H Farm, though he may be deputed for any work in it for such period as authorities think fit and proper and petitioner will be liable to discharge his duties in such other section. (1975) 1 Cal LJ 50.

(33) Medical Education and Research Act (1966) — Rules thereunder — Meeting of selection committee for selecting candidate for certain post — Quorum — Absence of any provision regulating quorum for meeting — Majority of total member of the Committee should be present in meeting so as to make its proceedings valid — Absence of five out of seven members cannot be deemed to be valid. 1979 Lab IC 15 (17) (DB) (Punj).

4. Appointment and dismissal of members of judicial service — See also Note 52. — (1) Judges are entitled to protection under Art. 311 (2). 1966 All WR (HC) 705 (713).

(2) The power of control of the High Court over judicial officers under Art. 235 has to be exercised in accordance with the conditions of service prescribed by law under Art. 309. But this only refers to matters of procedure. A 1955 Andhra 65 (68)) (DB).

(3) Disciplinary jurisdiction of High Court over District Judge and Judges subordinate to them, vests exclusively in High Court except making order of dismissal or removal — Exercise of Governor's powers has to be in consultation with High Court. A 1965 Bom 156 (163) (DB) **** A 1961 Cal 1 (9, 11, 12) (SB).**

(4) Disciplinary proceedings against judicial officers — High Court alone competent to hold enquiry. 1970 Lab IC 1627 : A 1970 Mys 309.

(5) Under Article 235 of the Constitution the High Court is the sole custodian of the

Articles 310 & 311 — Note 4 (contd.)
control over the Judiciary including disciplinary matters and that control is complete. In exercise of that power of control the High Court has to decide what punishment is deserved by the delinquent officer and if the punishment proposed is within its own jurisdiction, it can pass the necessary order itself, but if the same can be inflicted only by the Governor it has to forward the papers to him for passing the necessary order. The power to pass these orders does not give the power of control to the Governor so as to entitle him to review the whole case himself in order to find out whether the recommendation made by the High Court is correct or not. In the exercise of his power of passing an order of removal from service or dismissal from service the Governor cannot decide whether the delinquent officer is guilty or not; he has to accept the verdict of the High Court in this matter. **A 1975 Punj 265 (273, 276) (FB).**

(6) Disciplinary enquiry against member of subordinate judiciary — High Court recommending removal from service — Consultation with State Public Service Commission by Government is not justified — Order of reinstatement by Government held void. A 1975 Punj 265 (279).

(7) Order by Government on recommendations of High Court — Ancillary recommendation of High Court to confirm member as Subordinate Judge before retiring him compulsorily not accepted — Mere non-acceptance did not affect validity of main order of punishment. A 1965 Orissa 183 (186) (DB).

(8) Where the appointing authority is the High Court, it can remove a person from service. But the power of Governor to remove him under Art. 310 is not affected. A 1954 Mad 1043 (1045).

(9) Where an appointment is not in accordance with the provisions of Article 233 or Article 234, it will be invalid. But this will not affect the jurisdiction exercised by the person appointed as a member of the judicial service. A 1956 Raj 104 (107) (DB).

(10) The Chief Justice of a High Court has the power of appointment, dismissal and discipline in regard to the staff of the High Court. **A 1953 SC 285 (291).**

(11) Under the Patna High Court Rules, the position of a copyist is not that of a licensee and a copyist once employed in the copying department is entitled to work as copyist so long as his work is not inaccurate or in other respects unsatisfactory. A 1956 Pat 257 (267) (DB).

(12) Rules 4 and 5, Andhra C. S. (D. P. T.) Rules — Enquiry — Cases of judicial officers are taken away from purview of Tribunal. A 1959 Andh Pra 497 (500) (DB).

(13) Respondent was appointed as a Civil Judge (Junior Division) and Judicial Magistrate, First Class on probation — Probation period expired but respondent not confirmed — His appointment was terminated by a single termination order.

Held that the period of probation stood extended beyond two years unless and until he was confirmed and that his services could be terminated by a notice. **Held** further that the termination order was not passed contravening Art. 311 nor was it arbitrary or mala fide. **A 1980 SC 42: 1979 Lab IC 1389: (1979) 2 Lab LJ 393 (399, 400).**

(14) Where the order of the State Government exonerating a subordinate judiciary from all charges and reinstating him, was not passed in accordance with the mandatory provision of the Constitution embodied in Article 235 of the Constitution held, the order was void and non est being ultra vires Article 235 and the High Court was right in not giving effect to it. **A 1975 Punj 265 (273, 283, 291, 292) (FB).**

5. Persons to whom Articles apply.— (1) The true test of determining whether a person comes within Art. 311 is whether he is a member of a Civil Service of a State or whether he holds a civil post under a State. A 1956 Pat 398 (402, 403) (DB).

(2) The protection of Art. 311 (2) extends only to persons referred to in Art. 311 (1), viz., (i) persons who are members of (a) a Civil Service of the Union, or (b) an All-India Service or (c) a Civil Service of a State, or (ii) hold a civil post under the Union or a State. Category (i) refers to the standing services which have been created in the Union and the States and which are permanently maintained in strength. In addition to the standing services there are certain posts which are outside the permanent services, viz, such posts on the civil side as opposed to the military side. Incumbents of such posts also receive protection. **A 1970 SC 1150 (1152): 1970 Lab IC 1029.**

(3) A person who is not a member of a civil service of the Union or the All India service or a civil service of a State or holds a civil post under the Union or a State cannot claim protection of Article 311. **A 1968 Punj 312 (313) (FB).**

(4) The expression 'civil post under a State' does not include the post held by persons in the service of any local authority within the territory of the State. A 1952 Punj 58 (59, 60): 53 Pun LR 268 (DB).

(5) Aricle 311 itself does not exempt the case of civil servants who enter into service under Government on a contractual basis. It applies to all civil servants of the State and also applies to a case where a person had become a servant of State by virtue of a contract entered into between him and Government. A 1958 Mys 23 (24, 25) (DB).

(6) The person whose service agreement is not in conformity with requirements of Sec. 175 (3) Government of India Act, 1935 or Art. 299 of the Constitution, is not a servant of Union of India and as such he cannot take advantage of Art. 311 (2). A 1953 Cal 319 (320).

(7) In Art. 311, the words "civil service" and "civil post" are used in contradistinction to "service, in or post under the defence forces" of Government of India, A 1955 Cal 556 (557, 558).

(8) Contingent servants can by no stretch of imagination be treated as holding a civil post within meaning of Article 311. A 1959 Tripura 21 (24).

(9) Article 311 does not apply to servants of Companies even though they may be Government companies or companies con-

Articles 310 & 311 — Note 5 (contd.)
trolled by Government. 1978 Lab IC 1349 (1356) (All) ** 1978 Lab IC 1708 (1713) (Cal)) (DB).

(10) The expression 'civil post' means an appointment or office on civil side and it includes all personnel, whether permanent or temporary. A 1959 Tripura 2 (6).

(11) Protection of Art. 311 extends to all Government servants holding permanent or temporary posts or officiating in them. **A 1966 SC 1529 (1531, 1532, 1534)** ** 1973 All Serv Rep 78 : 1972 Ker LJ 966.

(12) It is for the petitioner to satisfy the Court that he was holding a civil post under the State. A 1959 J and K 26 (27) (DB).

(13) Article 311 applies to the case of a railway servant. A 1959 Punj 401 (402) : 60 Punj LR 597.

(14) Where a temporary Government servant is arbitrarily picked out and discharged, there would be a violation of the provisions of Art. 16, Clause (1). A 1959 Bom 134 (137, 138) : ILR (1958) Bom 1266 (DB).

(15) A person appointed under Sec. 81-A of the Bihar Act is not a Government servant so as to attract the provisions of Article 311 of the Constitution. A 1971 Pat 146 (149).

(16) The N. M. R. Workers of the Public Works Department of Kerala do not hold civil posts coming within ambit of Art. 311. Their dismissal without giving them opportunity of hearing is not protected under Art. 311. 1973 Ker LJ 466.

(17) Panchayat service under the Gujarat Panchayats Act, 1962 is civil service under the State. **1976 Cri LJ 1256 (1273) (FB) (Guj).**

6. Persons in temporary service — See also under Notes 24 and 104. — (1) Both for purposes of Articles 310 and 311, Clauses (1) and (2) there is no difference between temporary and permanent members of the services or between persons holding permanent or temporary posts. **A 1958 SC 36 (44).** (A 1956 Nag 113 and A 1957 Punj 42 and A 1957 Punj 191 and A 1957 Raj 81 **Overruled.**) — (The decision in A 1956 Punj 207 on this point was **Reversed.** But the decision was confirmed on the ground that the reduction in rank did not operate as a punishment.) **** A 1964 SC 1854 (1860 to 1863) ** A 1964 SC 449 (452) ** A 1963 SC 601 (604) ** A 1963 SC 531 (532) ** A 1962 SC 1711 (1715, 1716)** ** 1975 Lab IC 1094 (1095) (All) ** (1974) 2 Cut WR 1077 (Petitioner working as manmulia in project work on a salary — Termination of service on ground of absence from duty after calling only for his explanation — Art. 311 (2) held violated and order of termination quashed.) ** 1972 Lab IC 115 (117) (Pat). ** A 1969 Cal 164 (165) ** A 1967 All 197 (201). **(Reversed** on another point in 1970 Lab IC 131) ** (1967) 1 Lab LJ 718 (720) (SC) ** A 1964 All 528 (530) (DB) ** A 1961 All 45 (49, 50) **(Reversed** on another point in A 1963 All 94.) **** 1958 All LJ 372 (380) (SC)** ** A 1958 Tripura 29 (33) ** A 1959 Bom 134 (136) (DB) ** A 1957 Bom 175 (176, 177, 178) (DB) ** 1967 All WR (HC) 607 (608) ** (1968) 69 Punj LR 482 (483) ** ILR (1966) Cut 503 (523) (DB) ** A 1966 Ori 173 (178) (DB) ** A 1965 Raj 108 (109) (DB).

(2) Temporary employee — Who is — Even provisional confirmation of employee amounts to substantive appointment and he is not a temporary employee. (1976) 1 Serv LR 317 : 1975 Lab IC 845 (Raj).

(3) Temporary clerk — Not confirmed — Presumption to be temporary till discharged. A 1956 Bom 455 (457) (DB).

(4) Temporary or provisional appointment — Mere continuance in certain posts for a considerably long time does not make holders' appointments permanent — Nor does continuance mean that they were retained, as they were found suitable for the job. **A 1971 Andh Pra 1 (18, 19) : 1971 Lab IC 30 (FB) ** (1971) 2 Serv LR 314 : (1971) 2 Civ App (SC) 145** ** A 1971 Pat 283 (284) : 1971 Lab IC 1215.

(5) Person holding a post in a temporary substantive capacity cannot be equated with a permanent Government servant — He cannot claim to be a permanent Government servant till he is declared or appointed as such — His services can be terminated on one month's notice. **(1969) 2 SCA 124 : 1969 Serv LR 458.**

(6) Temporary employee — Temporary officiating employee appointed in leave vacancy until further orders has no right to the post even though the post may be permanent and even though a permanent vacancy arose on the death of the permanent incumbent. 1972 Lab LC 488 (495) (Assam).

(7) Article 311 cannot have application to provisional appointment, subject, by its express terms, to the qualification of character and antecedents being found satisfactory on assessment. Where an appointment was made before assessing the character and antecedent it was an inchoate, or void appointment and its termination cannot involve the requirement of opportunity or violation of the principles of natural justice. 1979 Lab IC NOC 45 : (1979) 1 Serv LR 94 (103) (Ker).

(8) The mere fact that a person who is given temporary employment is asked to serve in a post which is normally held by a permanent employee is not proof of his engagement as a permanent servant. A 1959 Bom 134 (135, 136) (DB).

(9) Temporary or quasi-permanent appointment earlier to appointment to substantive post — Latter appointment to be taken into consideration for purpose of Article 311 (1). A 1970 Delhi 52 (55) (DB).

(10) Merely because there is no other person having a lien on an appointment to a temporary post, it cannot be said that a person is appointed to a post in a substantive and not officiating capacity. A 1954 Ajmer 22 (23).

(11) Temporary Posts of Village Level Workers — Distinct class created in Andhra Pradesh General Subordinate service consisting of temporary posts — Persons appointed to posts have no right to the posts nor does the completion of probation confer any right on them to the posts. A 1968 Andh Pra 307 (308) : 1968 Lab IC 1293.

Articles 310 & 311 — Note 6 (contd.)

(12) The question whether a particular employee of the State is on temporary service or in permanent service is a mixed question of fact and law. 1964 Raj LW 353 (355) ** A 1959 Bom 134 (135, 136) (DB). **(Reversed** on another point in A 1962 SC 630.)

(13) Just as a post may be permanent or temporary so the appointment to such post may be substantive or on probation or on an officiating basis. But in all cases the person appointed will be one who "holds" a civil post and will be entitled to the protection of Article 311 just as he will be governed by the provisions of Article 310. **A 1958 SC 36 (42).**

(14) Two ingredients are necessary to make an employee quasi-permanent. (1) three years' continuous Government service, and (2) a declaration made in regard to him as indicated in Rule 3 (ii). If both these factors exist, then his service cannot be terminated except in manner provided in relevant rules. A 1967 Cal 326 (331) (DB).

(15) Employee on contingency staff are not even temporary employees and are not entitled to the protection of Article 311. A 1955 Pepsu 25 (27).

(16) Promotion of an employee on a 'temporary' basis and 'until further orders' — Reversion to his substantive post — His promotion was an officiating or provisional arrangement and he did not acquire any legal right to hold higher post. (1967) 14 FLR 449 (451) (Cal) ** (1973) 2 Serv LR 854 (Punj).

(17) Retired Government servant — Re-employment for a specified period in a temporary post -- Employee, held, governed by the Rules promulgated by U. P. State by the Notification dated 30-1-1953 — His service could be terminated before expiry of the fixed period. 1970 Lab IC 131 (All) (DB). (A 1967 All 197 **Reversed.)**

(18) Temporary service based on contract — Service terminated against principles of natural justice — Writ of certiorari applied for — Contract expiring afterwards — Writ can still be issued. A 1969 Cal 164 (167) : 1969 Lab IC 406.

7. Probationers — See also Notes 39 and 112. — (1) Article 311 applies to a probationer. A 1958 All 141 (145) °° A 1958 Andh Pra 269 (272) (DB) °° A 1957 All 241 (243) °° 1957 MPLJ 469 (473) (DB) (Nag) °° A 1957 Pat 357 (362) (DB) °° A 1956 Sau 41 (42, 43) (DB) °° A 1955 Nag 107 (108) (DB) °° A 1955 Pat 372 (375) (DB) °° A 1953 Nag 138 (141) °° **A 1964 SC 449 (452) °° A 1960 SC 689 (692) °°** 1968 Serv LR 232 (234) (Punj) °° 1973 Serv LJ 915 (Punj).

(2) No abstract proposition can be laid down that where the services of a probationer are terminated it can never amount to a punishment. The fact of holding an inquiry is not always conclusive. What is decisive is whether the order is really by way of punishment. If the facts and circumstances of the case indicate that the substance of the order is that the termination is by way of punishment then a probationer is entitled to the protection of Article 311. The substance of the order and not the form would be decisive. **Held** that the order of termination of the services of the appellant was clearly by way of punishment in the facts and circumstances of the case. The High Court denied him the protection under Article 311. The order of termination was illegal and liable to be set aside. **A 1974 SC** 2192 (2205, 2206, 2208) : 1974 Lab IC 1380.

(3) If an enquiry is held with a view to ascertain whether a probationer is fit to be confirmed and if as a result of enquiry, his services are terminated, provisions of Article 311 would not be attracted. A 1969 Cal 180 (197) : 1969 Lab IC 409 (DB) °° **A 1978 SC 363 (367) : 1978 Lab IC 312** °° 1978 Lab IC 991 : 1978 All LJ 950 °° ILR (1978) 1 Cal 472 (477) (DB).

(4) If the service of a probationer is terminated merely on the ground of his work being unsatisfactory and terminated in accordance with the terms of the employment, no question of any penalty being imposed, arises. But even a probationer can be proceeded against for misconduct and proceedings with a view to imposing a penalty can be taken against a probationer as well. If before the probationary period is over or if the Government servant concerned is still holding the status of a probationer, some misconduct is alleged against him and proceedings are started with a view to punishing him for such misconduct, the provisions of Art. 311 (2) will apply. A 1959 Cal 100 (101, 102) (DB).

(5) Probationer cannot after expiry of probationary period automatically acquire status of permanent member of a service, unless of course the rules under which he is appointed expressly provide for such a result. **A 1966 SC 175 (179)** °° A 1969 Orissa 215 (218) : 1969 Lab IC 1118 (DB) °° 1967 Cur LJ 187 (190) (Punj) °° A 1966 Madh Pra 333 (334) (DB) °° (1965) 11 FLR 127 (130) (Cal) °° ILR (1963) Andh Pra 1130 (1138) °° A 1963 Manipur 25 (27) °° **A 1961 All 450 (454, 455, 456) : 1961 All LJ 458 (FB).** (A 1959 All 536 and ILR (1959) 1 All 226, **Overruled.)** °° A 1958 Mad 216 (217) (DB) °° 1976 Lab IC 960 (Andh Pra) °° 1973 Lab IC 56 (Raj) °° 1971 Lab IC 1249 (1251) (Assam) °° A 1970 Orissa 201 (202) : 1970 Lab IC 1395 °° 1970 BLJR 447 (DB) °° A 1970 Tripura 66 (70) : 1970 Lab IC 1326.

(6) Where, the service rules fix a certain period of time beyond which the probationary period cannot be extended, and an employee appointed or promoted to a post on probation is allowed to continue in that post after completion of the maximum period of probation without an express order of confirmation, he cannot be deemed to continue in that post as a probationer by implication. The reason is that such an implication is negatived by the service rule forbidding extension of the probationary period beyond the maximum period fixed by it. In such a case, it is permissible to draw the inference that the employee allowed to continue in the post on completion of the maximum period of probation has been confirmed in the post by implication. **A 1968 SC 1210 (1212)** °° 1973 BLJR 187 (Pat). (Probationer officiating in a permanent post — No rule permitting extension of probationary period — His continuance in service after probationary period must be deemed to be in a substantive post — This is so notwithstanding that he is shown as temporary in the Civil List.) °° A 1970 Delhi 132 (139, 141) : 1970 Lab IC 814.

Articles 310 & 311 — Note 7 (contd.)

(7) A Government servant on probation is not to be deemed to be confirmed on expiry of period of his probation, if no orders confirming him in his substantive post or extending his period of probation are passed by competent authority. **A 1961 All 450 (456) (FB).** (A 1959 All 536 and ILR (1959) 1 All 226, **Overruled.**) °° 1970 Lab IC 593 (596) (Delhi).

(8) The object of extending the period of probation is to find out whether the employee is a fit person. He cannot be confirmed, till the period of probation or the extended period of probation to find out his fitness, has expired. Therefore he could not be held to have been stood confirmed on an intervening date before the period of probation expired. **A 1974 SC 2263 (2264) : 1974 Lab IC 1427.**

(9) A condition of appointment of a civil servant in the temporary post to the effect that he shall be on probation for a fixed period and that his probationership shall not be extended, is not such as cannot be varied by agreement mutually arrived at. When the civil servant is not made permanent in the temporary post even after the expiry of his initial probationary period, he may refuse to serve another period on probation. But where the probationership of the civil servant is sought to be extended and the civil servant accepts the extensions and works under those terms, it is not open to him to contend later on that such extensions were illegal and could not be made by his appointing authority. A 1963 Cal 359 (362).

(10) Civil servant — Appointment to permanent post on probation — Service terminable during probation without giving reasons — Continuance in service after probation period without any confirmation — In such a case, no automatic extension of period of probation but automatic confirmation in permanent office instead — Article 311 (2) attracted. A 1962 Cal 349 (354, 357, 359) °° A 1956 All 330 (332). (A 1956 Mad 216, Not foll.)

(11) When a person is appointed on probation to a substantive post, it cannot be said that he was appointed temporarily either for an indefinite period or for a specific period. During the period of his probation in such a substantive post, the Government can, no doubt, discharge him from service and Article 311 will not apply to such a discharge. But when once the probation period is over and the Government servant is not discharged at the end of the probation period and is allowed to continue in the substantive post without his probation being extended and without order of confirmation he gets substantively appointed to the post and he acquires a right to hold the post. Article 311 will apply to such service. A 1960 Manipur 45 (47, 48, 49).

(12) Plea of automatic confirmation after 3 years under Rule 7 of Punjab Civil Medical Service Class II (Recruitment and Conditions of Service), Rules 1949 — Rule of automatic confirmation not applicable to probationer appointed against temporary vacancy — Article 311 could not therefore be relied upon by him. A 1967 Punj 213 (214) (DB).

(13) Person appointed on probation — Probation to be extended or reduced at discretion of appointing authority — According to terms of appointment employee to be given fresh offer of appointment for three years — Period of probation expiring — Fresh offer not given — He must be regarded as continuing his probation as in temporary appointment. A 1963 Cal 421 (428).

(14) Section 126 of Constitution of Jammu and Kashmir does not make any distinction between temporary servant on probation or permanent servant and is applicable to a servant who is appointed to a temporary post on probation, provided that appointing authority chooses to proceed against him by way of punishment. A 1961 J and K 7 (8).

(15) It is within the province of the State Government to extend the period of probation of a Government servant from time to time according to circumstances. A 1953 Nag 138 (140) (DB).

(16) Probationer may terminate his service by one month's notice. A 1963 Cal 359 (364).

(17) Resignation from service — Before probationer resigns he must give reasonable notice of termination of his service. A 1963 Cal 359 (364).

(18) Probationary service — Appointment of petitioner in — Government as employer has right to review work done by probationer. A 1964 Guj 145 (151) (DB).

(19) Normally a probationer will not be allowed to draw an increment unless he has completed his probation satisfactorily — Servant allowed to draw increments — Intention is not to treat him as probationer. A 1960 Manipur 45 (48).

(20) Confirmation of a probationer under Punjab Police Rules can only be if departmental examination has been cleared — **Held,** petitioner could not be automatically confirmed after expiry of period of probation and Art. 311 (2) did not apply. 1967 Cur LJ 187 (190) (Punj).

(21) Services of permanent servant or probationer cannot be terminated by way of punishment without following provisions of Art. 311 (2) — He has right to be personally present before enquiry officer and cross-examine Government witnesses. A 1967 Cal 461 (468) (DB).

(22) Probationer — Services can be terminated during period fixed — Probationary status may also extend to reasonable period beyond expiry of fixed probationary period — Probationary status is to be determined according to facts and circumstances of each case. A 1967 Cal 461 (464) (DB).

(23) It is of the very essence of concept of probation that the person is on trial regarding his suitability for regular appointment and is liable to be discharged on being found to be unsuitable for permanent absorption. A 1969 Ker 313 (315, 316) : 1969 Lab IC 1473.

(24) A person appointed on probation does not ordinarily get automatic confirmation in service on expiry of stipulated probation period and if he is allowed to continue in service without any action being taken by employer either by way of confirmation or by way of termination he continues only as a probationer even after the expiration of period of probation. A 1969 Ker 313 (315) : 1969 Lab IC 1473.

(25) Advertisement stating period of probation — Appointment letter not making any reference to advertisement nor mentioning any probationary period — Conditions of service mentioned in the order in explicit terms —

Articles 310 & 311 — Note 7 (contd.)
Held, condition mentioned in the advertisement could not be read as conditions of service — The appointment order did not envisage any probationary period. 1978 Lab IC 420 (422) (DB) (Punj). (1975 Serv LJ 170 (Punj), Reversed.)

(26) Person appointed as special grade clerk on probation for one year — Probation neither extended nor person confirmed — Person continuing to work as such for five years and also in a higher post for some years — Sudden order reverting him to post of ordinary clerk — Order held amounted to punishment — Article 311, applied. 1961 MPLJ 986 (992) (DB).

(27) Probationer — Order of termination merely stated that his service was no longer required — Termination was not by way of penalty — Article 311 not attracted. (1965) 11 FLR 127 (130) (Cal) °° 1977 Lab IC 1657 (1659) (DB) (Guj). (Termination of employment of probationer — Order not casting any aspersion or stigma — Article 311 not attracted.) °° ILR (1971) 2 Cal 15.

(28) Person on probation — Petitioner appointed in a purely temporary post — Required to be on probation for two years — Services liable to be terminated without notice — Not entitled to privileges conferred by Art. 311. 1970 Lab IC 535 (542) (FB) (Punj).

(29) Where it is sought to terminate the probation of a Tahsildar and revert him to his substantive post of a Naib Tahsildar, as a measure of punishment on the basis of his alleged misconduct in drawing double travelling allowance he must be given an opportunity to show cause against the proposed punishment. A 1963 All 377 (380, 381, 382, 383) (DB).

(30) Railway Establishment Manual, Sec. B, Chap. I, R. 4 — Reversion three months after completion of probationary period — Reversion not invalid as employee had acquired no right to the promotion post. 1979 Lab IC 768 (770) (Pat).

(31) Employer not satisfied with employee at the end of probation — Termination of service is not penal in nature. (1964) 1 Mad LJ 70 (79) °° 1976 Lab IC 960 (Andh Pra) °° (1975) 48 FJR 303 (DB) (Andh Pra). (Termination of probationer — Order stating unsatisfactory performance and irregular work habits and misconduct — Does not amount to casting any stigma.) °° 1974 Raj LW 302. (Notice under R. 25 (2) of Railway Protection Force Rules given — Work and conduct of servant held to be unsatisfactory and unbecoming — Held Art. 311 (2) was not attracted.)

(32) Abolition of post — Incumbent holding post on probation reverted to his substantive post — Article 311 (2) not attracted. 1977 Lab IC 759 (Orissa).

(33) Civil servant — Appointment to permanent post on probation — Service terminable during probation without giving reason — Continuance in service after probationary period without any confirmation — Termination of service on certain charges — Non-compliance of Art. 311 (2) — The probation not having been terminated within the prescribed period, the plaintiff became a permanent incumbent to the office after the expiry of the probationary period of two years. A 1962 Cal 349 (354, 357, 359).

(34) Official, officiating in higher post on probation — Service Rules prescribing six months' probation but not prescribing maximum period — Notwithstanding the fact that he had been allowed regular increments in higher post he can be reverted at any time even after the expiry of six months and not only within the first six months. A 1971 Punj 312 (315 to 317) : 1971 Lab IC 876.

(35) A civil servant on probation, who had successfully completed period of probation and had passed his departmental examinations must be deemed to have been confirmed on his post, in view of R. 8 (6) of the M. P. Civil Services (General Conditions of Service) Rules (1961). 1971 Lab IC 822 (823) (DB) (Madh Pra).

(36) Where the order confirming the services of probationer was not conveyed to him but instead the authority decided to extend the period of probation, held, that the order of confirmation was not acted upon and did not take effect. 1978 Lab IC 232 (233) (Delhi).

8. Persons in defence services.— (1) 'Person holding a post connected with defence' cannot be stated to be included in the class of persons 'holding civil post under the Union'. He is not entitled to any protection under Art. 311. A 1960 Bom 101 (103, 104) °° 1980 Lab IC 451 (456) (Andh Pra). (Holder of civil post connected with defence — Not entitled to protection of Central Civil Services (C. C. A.) Rules (1965).) °° 1970 Lab IC 1448 (1451) (J & K).

(2) While Art. 310 applies both to persons in the civil employ of the Government and in the defence services, Art. 311 applies only to the former, and does not apply to the defence services or persons holding civil posts in them. ILR (1957) Punj 1695 (1698) °° A 1956 Bom 601 (602, 605) °° A 1956 Cal 532 (536, 537) °° A 1956 Punj 42 (44) °° 1963 All LJ 464 (468) °° ILR (1961) 2 All 90 (94) °° 59 Punj LR 472 (474) °° 1977 J & K LR 11 (18) (DB) °° (1975) 1 Serv LR 424 (Delhi).

(3) Civilian employee of Defence Service removed from service — He cannot claim protection of Article 311. 1980 Lab IC 287 (288) (All) °° 1972 Lab IC 791 (793) (FB) °° (1975) 2 Serv LR 286 (Delhi) °° 1974 All Serv Rep 386 (Punj) °° 1973 Lab IC 1572 (1574, 1575) (Raj).

(4) The employment of a member of the Defence Services can be terminated without assigning any reason. Even in the case of wrongful dismissal, no action for damages or compensation can be entertained in Courts. Article 310 (2) of the Constitution excludes from its purview all personnel of the Defence Services. A 1961 Ker 155 (157, 158).

(5) Article 311 does not apply to member of defence service or one holding any post connected with defence — Article 310 governs defence department employees only in respect of tenure of office — It follows that there is no constitutional provision affecting as to a member of defence service or to one holding any post with defence — As such, department rules not founded on constitutional provisions are merely directory — Such rules therefore cannot affect right of the President under Art. 310. 70 Cal WN 925 (929, 937) (DB) °° A 1969 Delhi 220 (224) : 1969 Lab IC 802. (Reversed

Articles 310 & 311 — Note 8 (contd.)
on another point in 1972 Lab IC 51.) ** A 1966 Cal 252 (256) ** ILR (1967) 1 Punj 704 (710).

(6) A person holding a civilian post and paid salary from the defence estimates cannot claim protection of Art. 311 — He is not entitled to invoke principles of natural justice even under general law of master and servant. **A 1971 SC 2111 (2112 to 2114) : 1971 Lab IC 1240.**

(7) Petitioner promoted to post of Lt. Colonel on ad hoc basis — Petitioner cannot enjoy safeguard under Art. 311 and can only take advantage of rule of law setting out the condition of service. 1974 Serv LWR 396 (Delhi).

(8) Article 311 does not apply to civilian personnel of defence department — Civilian personnel in defence department will get protection of Art. 311 by virtue of rules framed under Arts. 309 and 310. A 1960 Madh Pra 119 (121, 123).

(9) Person serving in Civilian Defence Forces — Termination of services — As the government servant serving in Civilian Defence Forces was not entitled to the protection of Art. 311 the only effect of the Central Civil Services (Classification, Control and Appeal) Rules, 1965, upon his case was that they could be applied if disciplinary proceedings had been taken against him as the holder of the post "connected with defence". In other cases of such servants where no such disciplinary proceedings are instituted the 1965 Rules, governing procedure for punishments to be imposed, will not apply at all. **A 1976 SC 2433 (2438, 2439).** (1975 Lab IC 213 (Ker), **Reversed.**)

(10) Termination of services of temporary servant paid out of Civil defence estimates — Once it is found that termination was by way of punishment employee must be given opportunity of hearing. The question is not whether Art. 311 would apply or not. A 1977 Andh Pra 4 (7) (DB).

(11) Army instructions are made for the purpose of guidance of military authorities in connection with civilians employed in defence service and have no binding force in themselves. These rules have no force of affecting the provisions of Article 310 regarding the tenure of office of persons employed in the service of Government of India or State. The tenure of office of persons employed in such service continues to be at pleasure of the President or the Governor as the case may be. A 1960 Bom 101 (105).

(12) Machinist in Ordnance Factory removed from service by General Manager — Protection under Article 311 is not available to such person — Civilians in Defence Services (Classification, Control and Appeal) Rules (1952), R. 15 — Non-compliance with — Person not holding civil post and thus excluded from Article 311 cannot claim benefit of any rule made under Article 309. A 1966 Madh Pra 82 (84, 85) (DB).

(13) Prior to the framing of the Air Force Rules, 1969 the tenure of service of the employee subject to the Air Force Act, 1950 was during the pleasure of the President under Article 310 without any fetters imposed on it either by the Air Force Act or the Rules of 1933 and the relationship between the employee and the Government being that of master and servant the rules of natural justice could not apply to the removal of the employee under Section 20 or Article 310 inasmuch as the master can dispense with the services of the servant without giving him a hearing. 1976 Lab IC 59 (60) (Delhi) (DB).

(14) Article 311 does not apply to Defence forces — President can dismiss Air Force Officer, without giving reasons or hearing, in view of Section 18 of Air Force Act (1950). 1976 Lab IC 528 (531, 532) (Delhi).

(15) Central Civil Services (C. C. & A.) Rules, 1965, Rule 10 — Civilian in defence service — Suspension in terms of Rule 10 (2) — Termination of service by order of President — **Held**, order not illegal, as the Rule does not operate to divest the President of the power under Article 310 (1). 1975 Lab IC 715 (717) (Delhi).

(16) The Constitution recognises various services under the Union of India under Art. 310. The Defence Services and Civil Services of the Union are two different categories. Therefore when general principles were prescribed for the determination of seniority in the Central Service, it could not 'proprio vigore' apply to either the Defence Services or to persons holding any post connected with the defence. (1976) 2 Mad LJ 97 (101).

9. Servants of co-operative societies.— (1) A servant of the State Co-operative Bank does not hold a "civil post" under the State within the meaning of Article 311. A 1955 Pat 223 (225) (DB) ** ILR (1978) 1 Cuttack 211. (Employee of Central Co-operative Bank.)

(2) An employee of a Co-operative Society is not a Government servant. A 1952 Trav-Co 264 (266).

(3) Co-operative society registered under M. P. Co-operative Societies Act — Not a statutory body — Amenable to writ jurisdiction if its employee is dismissed in violation of the Act, Rules or Bye-laws. **A 1976 Madh Pra 152 (FB).** (A 1961 Madh Pra 289, **Overruled.**)

(4) The manager or other employee of a co-operative society is not a member of the civil service of the State or of the Union. A 1959 Madh Pra 218 (220) (DB).

(5) Termination of services of the employees of co-operative societies provisionally absorbed as secretaries in centralised services — Does not violate Article 311 — Termination neither dismissal nor removal from service. 1979 All LJ (NOC) 39 (Cal).

10. Servants of educational bodies.— (1) A teacher in private college affiliated to a statutory university is not a Government servant and is not entitled to the benefit of Article 311. See A 1954 Trav-Co 199 (200, 201) (DB) ** 1974 Lab IC 621 (623) (Pat). (When his termination is wrongful he can claim only damages and not reinstatement.) ** (1973) 1 Andh WR 94 ** 1971 All LJ 1294 ** ILR (1969) Delhi 1184 (DB).

(2) If the contract gives a power to the University to terminate the services of a teacher of the University without assigning any reasons and by giving a notice or salary in lieu thereof, the University is certainly entitled to adopt that course. In such a situation the aggrieved party has no remedy by way of a suit for a declaration that the order of termination of the contract is illegal and that he is deemed to continue in service. If on the other hand there is violation of any statutory rules or obligations imposed on the university the aggrieved teacher of a University is entitled to obtain a declara-

Articles 310 & 311 — Note 10 (contd.)

tion in a Court of law either by way of a writ or by a suit. (1974) 2 APLJ 8 ** A 1976 SC 1073 (1074). (Dayanand Mahavidyalaya Degree College, an institution affiliated to Banaras Hindu University is not a creature of statute. Court cannot order reinstatement of a servant who has been dismissed by college authorities.) ** 1972 Lab IC 1252 (Madh Pra).

(3) Service of an Institution such as Murshidabad Institute of Technology which is sponsored and aided Engineering Institute for diploma courses is not "a civil service of a State" or "a civil post under a State" within the meaning of Article 311 (1). A 1963 Cal 161 (162) ** 1954 Ker LT 557 (560) (DB).

(4) Council of Scientific and Industrial Research — Neither a public body nor part of Government — Article 311, not applicable. A 1969 Cal 525 (528) : 1969 Lab IC 1334 (DB).

(5) Institute of Technology Act (1961), S. 26 — Statutes under, made by Indian Institute of Technolgy, Madras — Statute 13 — Assistant Professor of Metallurgy in service of Indian Institute of Technology at Madras — Article 311 of Constitution held inapplicable — But Statute 13 embodied similar provision — Services of employee petitioner held were terminated under Statute 13 (5) and non-observance of procedure under Statute 13 (9) did not vitiate the order. ILR (1965) 2 Mad 24 (29, 38) (DB).

(6) As a result of Section 28 (b) of the Travancore University Act, the servants of the University of Travancore must be deemed to be employees holding appointments under the Government. ILR (1954) Trav-Co 836 (838).

(7) Punjab University created by East Punjab University Act 7 of 1947, an autonomous body — Not a State within the meaning of that expression in Part XIV of the Constitution — Its employees cannot claim the benefits under Article 311. A 1969 Punj 391 (393) : 1969 Lab IC 1406.

(8) Sarojini Naidu College for Women, Dum Dum not a State — Its Vice-Principal, not a person holding civil post under the State and as such was not entitled to the constitutional safeguards provided in Article 311. A 1962 Cal 420 (427, 428) : 66 Cal WN 931.

(9) A Government aided school is not a Government institution, nor are the Administrator and the teachers thereof Government employees under the Bengal Primary Education Act, 1919. (1963) 6 Fac LR 42 (45) (Cal).

(10) Employee of Government managed school is not a Government servant and as such is not entitled to protection of Art. 311. (1974) 2 Cut WR 876.

(11) Compulsory retirement of Osmania University Teachers — Vice-Chancellor had powers to order premature retirement according to resolution passed by the syndicate. 1978 Lab IC (NOC) 54 (DB) (Andh Pra).

(12) Himachal Pradesh University Statutes, Para. 38 (2) — Does not contravene Art. 311 (2) in ground of compulsory transfer of Government servants to University employment. (1973) 1 Serv LR 1112 (Him Pra).

(13) Where the petitioners obviously entered into the employment of the University subject to the basic understanding that the terms and conditions on which services of the Government employees would be transferred to the University under Statute 38 (2) of the statutes framed under Section 38, H. P. University Act, 1970, were likely to affect their service conditions, it was not open to the petitioners to make any grievance against those terms and conditions. 1978 Lab IC 1294 (1309) (Him Pra) (DB).

(14) Punjab Agricultural University Act (1961), S. 29 (q) — Rule 20 (9) framed under — Permanent employee of University — Termination of service under Rule without giving him notice — Principles of natural justice violated Article 311 held did not apply. (1980) 1 Serv LR 464 (474) (Punj).

(15) Civil post — Clerk in school — His salary paid out of amalgamated funds of school — Post, an ex-cadre and isolated post, not paid out of Government fund — Post cannot be included in category of "civil post" within Articles 310, 311 — Facts that appointment to this post rested with Head of institution and/or that post was under administrative control of D. P. I., was immaterial. 1977 Lab IC (NOC) 130 (Punj).

(16) The plain language of S. 4A shows that at least as regards Chairman, Vice-Chairman and members of the Board Section 4-A of the Haryana Board of School Education Act, 1969 (as amended by Act of 1979) brings in the doctrine of pleasure so far as the holding of the said offices by them is concerned. In fact, this is a replica of Article 310 of the Constitution of India. Whilst under the Constitution, the pleasure doctrine has been hedged by safeguards provided by Article 311 of the Constitution of India, in the Haryana Act the legislature in its wisdom has not chosen to incorporate those provisions. No fault can be found with the constitutionality of the provision on this score alone. There is nothing in the provisions of Section 4-A which can possibly be said to be basically and inherently violative of Article 14 of the Constitution. (1980) 2 Serv LR 139 (143) (DB) (Punj).

11. Servants of Statutory Corporations.— (1) India is evolving three basis legal patterns for State enterprises namely (1) Statutory corporations formed by and under special Statutes, both Parliamentary and State, (2) Government departmental undertakings and (3) Gonvernment companies under the Companies Act with special Articles and Memoranda — Statutory Corporations are governed entirely by the terms and conditions of the particular statutes creating such corporations. Its service is generally regarded not as a civil service or civil post under the State within the meaning of Art. 311. The second type of pattern of State enterprises is provided by the usual departmental undertakings. Many Government departments like the Railway and the Post Office and Public Works provide numerous examples of such departmental undertakings — The third basic pattern is the Government Companies under the Companies Act. There is perhaps another kind of State enterprise which may be described to be 'non-Government Companies but with Government control'. Its example is Chemicals and Allied Products Export Promotion Council. A 1963 Cal 421 (424 to 427).

(2) The mere fact that Government exercises control over statutory bodies or local authorities or statutory corporations does not make the employees Government servants for the purpose of Article 311. A 1958 J & K 6 (8) (DB) ** A 1957 Punj 219 (220) (DB) ** A 1955 Pat 223 (225) (DB).

Articles 310 & 311 — Note 11 (contd.)

(3) Employees of statutory corporation — Not entitled to invoke Article 311 but can invoke statutory regulations governing their conditions of service. A 1969 Madh Pra 216 (216) : 1969 Lab IC 1211 (DB) ** 1978 BLJR 309 (310) (DB) (Pat) ** 1977 Lab IC 739 (745) (Delhi) ** 1977 Lab IC 1659 (1662) (J & K).

(4) Employee of statutory corporation — Termination of service found to be void — Relief of reinstatement — Grant of, is discretionary. **1974 Lab IC 891 (Delhi) (FB).**

(5) Any order of dismissal or discharge passed by Corporate bodies cannot be questioned on the ground that the same was in contravention of Art. 311; the remedy for wrongful dismissal or discharge in such cases is to file a suit for damages. 1976 Lab IC 616 (Pat).

(6) Employees of a Statutory Corporation — Though they do not enjoy same status as that enjoyed by Government servants, regulations governing their service have a force of law and breach of them creates an enforceable right. 1980 Lab IC 11 (15) : (1979) 2 Serv LR 438 (Bom).

(7) A statutory corporation, which is an independent body, is not part of the Government and an employee of the corporation is not a Government servant for the purposes of Article 311. A 1957 Pat 10 (14, 15) (DB) ** A 1955 Cal 56 (58) ** ILR (1954) Patiala 300 (303) ** A 1953 Cal 581 (582) ** A 1953 Him Pra 103 (104) ** A 1953 Pepsu 99 (99) ** ILR (1967) Guj 102 ** **A 1970 SC 1150 (1152) : 1970 Lab IC 1029.** (Hindusthan Steel Limited is a corporation. Its employees are not entitled to the protection of Article 311.)

(8) A person serving under the Commissioners for the Port of Calcutta is not a civil servant in the employ of Government and cannot claim the protection of Article 311 (2). A 1957 Cal 720 (726) (DB).

(9) M. P. Financial Corporation not being "other authority within Article 12" provisions of Article 311 (2) do not apply to its employees. 1973 Lab IC 1414 (1416, 1417) (Madh Pra).

(10) An employee of State Bank of India is not a civil servant under the State or Union but is an employee of a limited company incorporated under special statute namely State Bank Act 1955. A 1962 Cal 72 (74) ** A 1958 Pat 418 (419) (DB) ** 1974 Lab IC 1340 (1343, 1344) (Raj).

(11) Employee of Union Bank of India being an employee of a corporate body, which is a separate legal entity is not entitled to protection of Art. 311, **1974 Lab IC 1459 (1463, 1464)** (Pat).

(12) Though under the Damodar Valley Corporation Act, Government exercises a considerable amount of control over the Corporation, that does not mean that Article 311 applies to the Corporation employees. The employees of the Damodar Valley Corporation are not civil servants within the meaning of Article 311. A 1960 Cal 549 (550, 551) ** (1956) 60 Cal WN 1023 (1025).

(13) "State" — Meaning of — Khadi and Village Industries Board — Dismissal of employee — Infringement of Article 311 — Plea not available. ILR (1974) 2 Ker 226.

(14) Company incorporated under Companies Act — Chemicals and Allied Products Export Promotion Council — Employee of — Not a civil servant not entitled to privileges of Article 311. A 1962 Cal 10 (12).

(15) Employees of a Government Company within Section 617 of the Companies Act 1956 not entitled to protection of Article 311. A 1968 Cal 322 (325, 327) (DB) ** 1977 Lab IC (NOC) 77 (All). (U. P. State Cement Corporation registered under Companies Act is Government company — Its employees are not entitled to protection under Art. 311.)

(16) Employees of Calcutta State Transport Corporation are not persons holding civil posts. The fact that the State Government exercises administrative control under Sections 34, 44 and 45 of the Road Transport Corporation Act over the Corporation will not affect its separate legal entity. A 1963 Cal 116 (119, 120) ** A 1968 Mys 69 (71) : 1968 Lab IC 337 (DB).

(17) Employee of a State-owned undertaking transferred to Corporation constituted under statute — Employee ceases to hold a civil post after the transfer — Protection under Art. 311 does not apply to him. 1964 MPLJ 432 (434) (DB).

(18) A. P. State Electricity Board constituted under Section 5 of Electricity (Supply) Act (1948) is not part and parcel of State Government — It is an autonomous body constituted and functioning under provisions of said Act — Article 311 does not apply to Board. A 1969 Andh Pra 328 (334) : 1969 Lab IC 1080 (DB).

(19) Though the LIC is a State and the employee is deemed to be in the Civil Service of a State within the meaning of Article 311 there can be a remedy only if it acted in breach of a mandatory obligation imposed by statute and the order amounts to punishment. Therefore where order of termination of service of a probationer was passed under the LIC Regulations which do not have the statutory force there is no question of any mandatory obligation imposed by the regulations the breach of which can be enforced or the act of LIC being declared invalid. 1976 Lab IC 960 (DB) (Andh Pra).

[See also A 1971 Bom 288 (292). (A 1969 Bom 337 held impliedly not good law in view of A 1969 SC 1306).]

(20) Articles 311, 39, 41 and 47 — Applicability — Insurance Medical Officer under Employeee's State Insurance Scheme — He is not an employee of State Government. A 1970 Cal 1 (5, 6) : 1970 Lab IC 24 (DB).

(21) Government taking over management of private trust fund and treating its employees as Government Servants — Services rendered by them in Trust fund are to be treated as part of services rendered under Government. A 1969 Mys 346 (350).

(22) Clause (12) of Section 21 of Penal Code has got nothing to do with the determination of the question whether one is Government servant within the meaning of Article 311 employees of Hindustan Cables Ltd. are not entitled to privileges conferred on civil servant by Art. 311. 72 Cal WN 398 (401).

(23) Employees of J. & K. Minerals, Ltd. — Cannot be held to be servants of State or Union Government — Any action taken against such employees is not amenable to writ jurisdiction of High Court — Section 311 does not apply. 1968 Lab IC 1323 (1324, 1325) (J & K).

(24) Dismissal of employee of U. P. Warehousing Corporation in total breach of principles of natural justice — Illegal. **A 1980 SC 840 (843, 844) : 1980 All LJ 358.**

(25) Service under the University Grants Commission, a statutory body constituted under the

Articles 310 & 311 — Note 11 (contd.)
University Grants Commission Act, 1956, is not Government service. When a permanent employee under Central Government joined the service under the University Grants Commission, be ceased to be a Government Servant the moment his lien in the Government post was terminated and hence he was not entitled to claim superannuation or retiring pension for his past 17 years Government service. (1975) 2 Serv LR 642 (DB) (Delhi).

(26) Air Corporation Act (1953), S. 45 — Rule 13 under — Permanent employee — Letters written to the President of India and Prime Minister casting aspersions on the Chairman of the Corporation — Order of termination simpliciter under Rule 13 — Action of Corporation not mala fide or colourable exercise of power. A 1977 Delhi 114 (119).

12. Members of Police Service.— (1) The Police Regulations in so far as they are inconsistent with the provisions of Article 311 Clauses (1) and (2) will now be invalid. But otherwise, such Regulations will continue in force under Article 313. A 1953 Cal 316 (318) •• A 1951 Cal 179 (181).

(2) Though the rules of discipline should be enforced against a member of the Police rather rigorously, this does not necessarily lead to the conclusion that in a serious matter like his dismissal from service he should be deprived of the constitutional rights. A 1958 Punj 327 (330) (DB).

(3) The power of the Governor of a State to dismiss at pleasure a police officer of subordinate rank is not affected by the rules under the Police Act under which the Inspector-General of Police and some other officers have such power of dismissal. A 1954 All 629 (632) (DB).

(4) By the Constitution of India, the distinction between police officers and other civil servants in the matter of protection by constitutional guarantees is abolished and as from January 26, 1950, the recruitment and conditions of service of all persons serving the Union or the State are now governed by Article 309 and their tenure by Article 310 of the Constitution. **A 1961 SC 1245 (1249, 1250).**

(5) Government of India Act (1935), Ss. 243, 240 (3) — Dismissal of Head Constable of Police — Section 240 (3) not applicable — Section 243 will apply — Second notice under Section 240 (3) is not necessary. **A 1960 SC 1210 (1213).**

(6) The removal or dismissal of a special constable is covered by Article 311 (2) even though he does not get any remuneration, because such removal or dismissal may have the effect of casting a slur on his character or may affect in respect of some other office which he may be holding. A 1955 Cal 556 (558).

(7) A police officer of the Madhya Pradesh Police Service, who was deputed to Hyderabad Police Service, continued to belong to the Madhya Pradesh Police Service and charges against him must be enquired into according to the rules in force in the Madhya Pradesh. A 1955 Nag 160 (162, 163) : 1955 Cri LJ 974 (DB).

(8) Where a police officer in Assam is charged with a cognizable offence and the charges are proved against him, he is unfit for the post of a Police officer and as such, he can be dismissed under Section 7, Police Act, on a departmental enquiry. There is no question of any trial by a competent Court before a departmental action is taken. A 1962 Assam 34 (36) : 1962 (1) Cri LJ 265 (DB).

(9) Dismissal of Sub-Inspector and some constables after conviction for certain offences — Formation of Andhra State during pendency of appeal — Released under general Amnesty — Appeals withdrawn as not pressed — Being dismissed, their names not included in postings — **Held**, that order of Amnesty was not one under Article 161 but was one under Section 401 of Criminal P. C. — **Held** also that Article 311 (2) did not apply — Under Rule 3 (b) of Madras Police S. S. D. and A Rules Authority could dismiss police officer pending his appeal against conviction and sentence. **A 1960 Andh Pra 259 (262, 263) : 1960 Cri LJ 565 (SB).**

(10) Adverse report against police officer — Representation to competent authority under Police Rules — Non-speaking order by authority — Mandamus to pass fresh order after complying with rules and regulations. **1974 SLWR 539 (Delhi).**

(11) Police official attending public meeting held to lend support to general demands of police force — Does not contravene either R. 14.27 of Punjab Police Rules or R. 20 of Central Civil Service (Conduct) Rules (1964). 1979 Lab IC 863 (866) (Delhi).

(12) Dismissal of police constable for misbehaviour — Writ petition against — No interference when department has not used discretion wantonly or arbitrarily. A 1970 Punj 81.

13. Service under municipalities, local boards and panchayats.— (1) Expression 'Civil Post under a State' in Article 311 does not include post held by person in the service of any local authority within the State. A 1960 Punj 554 (556) (DB). **(Overruled on another point in 1975 Lab IC 478 (Punj) (FB).)** •• 1969 Lab IC 475 (476) (All). (Article 311, not applicable) •• 1967 All LJ 767 (771).

(2) The servant of a Municipality or other local authority is not the holder of a civil post under the Government. A 1958 J & K 6 (8) (DB) •• A 1958 Mad 211 (212, 213) •• A 1957 Pat 333 (337) (DB) •• A 1956 All 460 (461) •• A 1956 All 181 (183) •• A 1956 Punj 220 (221) •• 1956 MBLJ (HCR) 1307 (1313) (DB) •• ILR (1955) Hyd 711 (712) (DB) •• 1975 Lab IC 1520 (All) •• 1974 Lab IC 503 (Bom) •• 1974 Lab IC 292 (294) •• (1973) 27 Fac LR 169 (All). (Constitutional guarantee under Article 311 (2) is not available to municipal employee.) •• 1973 Lab IC 1257 (1261) (Him Pra).

(3) The principle that office is held during the pleasure of the Government is not applicable to a statutory body like a municipal board and the right to dispense with the services of an employee at pleasure cannot be claimed by such body. A 1956 All 460 •• A 1956 All 181 (183).

(4) Person appointed Secretary under Bombay Village Panchayats Act, 1933, though deemed appointed by the State Government retains same status as before — Person continues to be subject to the conditions of service and disciplinary rules of Panchayat — The post though a civil one is not under the State — Protection under Article 311 not available. **A 1967 Guj 92 (96, 97, 98, 100) (DB).**

(5) Termination of services of Municipal employees without show cause notice would not invalidate it — Paras on pages 454 and 654 of U. P. Municipal Manuals providing for a hearing by municipal boards, have no statutory force

Articles 310 & 311 — Note 13 (contd.)
and their breach does not confer a right of action. A 1958 All 841 (842, 843).

(6) Municipal servant — Dismissal from service in breach of statutory rules or bye-laws or in violation of principles of Natural Justice — He is entitled to obtain a declaratory decree from a Civil Court to the effect that the order of his dismissal from service is void and non-existent in law, and he continues to enjoy the status of a municipal employees enjoyed by him before the wrongful order was passed. No decree for reinstatement can be passed by the Civil Court in a suit for declaration though in a suitable case a writ in the nature of Mandamus may be issued by the High Court under Article 226 of the Constitution directing reinstatement of a municipal employee. **1974 Lab IC 1220 (1224) (Punj) (FB).**

(7) Application of civil service rule to servants of municipality — Does not confer status of civil servant on municipal employees. ILR (1955) Hyd 711 (713) (DB).

(8) Service under Municipalities and Local boards — Article 311 does not apply at the time of suspension. A 1966 All 552 (554).

(9) An employee in the service of the kendra panchayat which owes its existence to the Madhya Bharat Panchayat Vidhan is not a member of the civil service of the Union or a civil service of the State or a person who holds a post under the Union or the State. A 1962 Madh Pra 50 (54) (DB).

(10) It is not the factum of appointment by an agency that determines the character of the post that one holds. Though the appointment is made by the Government the Executive Officer of a Panchayat is a servant of the Panchayat Board. A 1959 Andh Pra 506 (506, 507) (DB) •• (1966) 68 Punj LR 213 (215, 216).

(11) U. P. Town Improvement Act (8 of 1919), Sections 18, 19 — Trust has power to dismiss employees — Neither Section 240, Government of India Act 1935, nor Article 311 of Constitution applies to employees of local bodies. ILR (1962) 1 All 163 (166, 167) (DB).

(12) The post of a teacher in a school under the management of a District Board cannot be said to be a civil post within the meaning of Article 311. Order of Local Board removing such a teacher from service cannot be quashed under Article 226. A 1960 Andh Pra 342 (343) (DB).

(13) A person holding a substantive appointment in a permanent post in the Hyderabad Municipal Corporation before his services were transferred to the Government must be deemed to be in the civil service of the State under Section 3 of the Hyderabad Local Government Service (Declaration as State Civil Services) Act (20 of 1956). (1960) 2 Lab LJ 391 (393) (DB) (Andh Pra).

(14) Employees of Devaswom Board — Petitioners held had ceased to be Government servants and the question whether Article 311 of the Constitution or Article 346 of the Travancore Service Reg. were violated did not arise. ILR (1958) Ker 949 (958) (DB).

(15) Sanction for prosecution of Chairman of Municipal Board was necessary as 'removable' in Section 197 Cr. P. C. must be construed in sense of office coming to end on some superior authority forcing public servant to vacate it and not in sense of its coming to end by operation of law. A 1968 Raj 136 (137).

(16) Appointment of Educational Panchayat Officer — Circular requiring law degree as qualification — Petitioner not a law graduate — Still appointed and confirmed — Reversion of petitioner as clerk — Article 311 of the Constitution held applied. (1973) 3 Sim LJ (Him Pra) 167 (176).

14. Contract service — See also Note 5.— (1) The person whose service agreement is not in conformity with the requirements of Sec. 175 (3), Government of India Act, 1935, or Art. 299 of the Constitution is not a servant of the Union of India and as such he cannot take advantage of Art. 311 (2). A 1953 Cal 319 (320).

(2) Employment under Government is a matter of status and not of contract even though it may be said to have started initially, by a contract in the sense that the offer of appointment is accepted by the employee. **A 1978 SC 17 : 1977 Lab IC 1852.**

(3) Article 310 (2) is a special provision which deals with a special situation where a contract is entered between the Government and a person appointed under the Constitution to hold a civil post. But simply because there may be, in a given case, a contractual employment, as envisaged under Article 310 (2), the relationship of all other Government servants, as a class, and the Government, cannot be said to be contractual. Employment under the Government is a matter of status and not of contract. **1977 Lab IC 1852 (1856) (SC).**

(4) In case of a contractual appointment, the incumbent of the office acquires a right to hold that post for the period agreed upon and the same cannot be put an end to unless there is a provision to that effect in the agreement itself. No doubt the Government has a right to abolish a post, temporary or permanent, but this postulates a bona fide exercise of power. When the exercise of authority is not honest, an official cannot be deprived of the protection available to him under Article 311 of the Constitution simply because the State Government had a right to abolish the post. As the post was abolished due to mala fides of respondents and the petitioner had otherwise a right to hold that post for the full tenure of five years, the action assumed a penal complexion entitling the petitioner to the protection of Art. 311 of the Constitution which was denied to him. A 1971 Punj 188 (193, 194) : 1971 Lab IC 682.

(5) Acquisition of territory by conquest — Automatic termination of service of servants under prior Government — Servants when become servants of new Government — Principle underlying law of Master and Servant applies — Servants of T. A. I. P. (Air Transport Service of Portuguese India) of former Portuguese concern in Goa could not claim status of servants of Government of India. A 1969 Goa 76 (84) : 1969 Lab IC 942.

(6) Rules under Section 31 of Calcutta Port Act, not approved by Central Government — Besides statutory powers under the Act, Commissioners for Port have powers of a master to employ servant and to impose terms with re-

Articles 310 & 311 — Note 14 (contd.)
gard to service. 1968 Lab IC 826 (828) (Cal).

(7) Temporary servant — Contract to terminate services without notice and without assigning reasons — Contract is not hit by Art. 311 — What is hit is removal or dismissal. 1962 Mys LJ (Supp) 487.

15. Civil Posts and Civil Services — See also Note 5 — (1) In the context of Arts. 309, 310 and 311 a post denotes an office. A post is an employment, but every employment is not a post. A casual labourer is not the holder of a post. A post may exist apart from the holder of office. A post under the State means a post under the administrative control of the State. A 1967 SC 884 (886) ** (1971) 75 Cal WN 284. (Casual labour employed by Railways does not hold any civil post.)

(2) Where a situation has been created and filled in, the holder of the post is not normally allowed to hold another substantive post simultaneously. The service rules generally do not visualise and it is not the normal practice that the same individual is allowed to hold simultaneously two substantive posts. 1971 Lab IC 933 (936) (Mad).

(3) The expression 'civil post' used in Article 311 means an appointment or office on the civil side of the administration as distinguished from the military side and the said expression does not include civilian personnel of the defence Department. (1962) 1 Lab LJ 674 (677, 678) (All) ** A 1967 SC 884 (886). (A 1957 Orissa 112, Overruled.) ** A 1969 Tripura 2 (6).

(4) Expression 'Member of a civil service' refers to several services existing at the time the Constitution came into force, viz., Indian Civil Service, Indian Engineering Service, the Central Services, Indian Medical Service etc. (Obiter). A 1967 Guj .92 (98) (DB).

(5) A member of Civil Service (Judicial Branch) holds a Civil Post — Security of tenure is provided under Article 311. A 1977 Punj 7.

(6) The term "civil post" has not been defined in the Constitution, but, having regard to Arts. 310 and 311, seems to have been used as distinguished from defence service. A 1955 Cal 556 (558) ** A 1955 Nag 175 (176) (DB) ** A 1954 Pepsu 136 (139, 142) (DB).

(7) Civil post means post other than post connected with defence — Person on daily wages serving State in civil capacity in the sphere of its non-sovereign functions is also person who holds civil post. A 1966 All 97 (99, 100).

(8) A person holds a civil post under the State provided (i) that his duties fall under any sphere of activities connected with the State. (ii) that the post which he holds is created by the State and could be abolished by it; (iii) that the conditions of service of that person are regulated and controlled by the State; and (iv) that he is paid a monthly salary out of State funds. A 1959 J & K 26 (27) (DB) ** 1966 All LJ 978 (979) : 1968 Lab IC 49 (DB) ** A 1963 Cal 116 (119).

(9) The true test to determine whether a person holds a civil post under the Union or the State has primarily to be applied in relation to the functions which he performs. If his duties relate to activities which fall directly within the sphere of the Union or the State and his services are under the direction and control as also his appointment is by either the Union or the State, then his case comes under Art. 311; but if the sphere of activity of the person falls within the sphere of activity of a local authority constituted by a statute having a separate legal existence then his case falls outside Art. 311. A 1958 All 353 (359, 360) (FB) ** A 1957 Punj 219 (220) (DB). (A 1954 Punj 255, Reversed.)

(10) The term "civil post" does not refer only to posts which are borne on the cadre of any regularly constituted service. All posts held by any public servant, not being military or defence posts, must be held to be civil posts. A 1937 PC 31 (31) ** A 1955 Cal 556 (557) ** A 1954 Assam 18 (22) : 1954 Cri LJ 31 ** A 1954 Pepsu 136 (139, 142) (DB).

(11) A person holding a post under a State is a person serving or employed under the State — There is a relationship of master and servant between the State and a person said to be holding a post under it. A 1967 SC 884 (886, 887).

(12) The notion of a public servant is far wider than that of a servant of the State or Union or a member of a service under State or Union or an all-India service and should not be confused with those expressions. A 1962 Madh Pra 50 (54) (DB).

(13) A public servant holds a civil office during pleasure of the President or the Governor according as he holds office under Union or State. A 1963 SC 601 (604).

(14) Every public servant within the meaning of Section 21 of the Penal Code is not necessarily a person who holds civil post. ILR (1954) Patiala 300 (305).

(15) Fact that a person was not wholetime employee nor drew a salary but commission did not alter status of his post. A 1967 SC 884 (887).

(16) A khalassi employed by the Orissa Public Works Department on work-charge basis, i. e., for a temporary period till the work is completed, drawing a scale of pay and subject to leave rules under Rule 173 of Orissa Service Code is a Class IV Government servant and a holder of a civil post under the State within Article 311 (1). (1970) 36 Cut LT 559.

(17) The mere fact that the holder of an office under Government does not get any remuneration does not make him any the less the holder of a civil post. A 1955 Cal 556 (558) ** A 1971 Manipur 32 (33, 34) : 1971 Lab IC 1530.

(18) The Government service is a matter of status and not of contract and merely because services of an employee are transferred it does not mean that a contract has come into existence with the employer to whom services have been transferred or with whom he has been sent on deputation. Merely because such employer exercises the power of control over the employee and pays him salary it could not be taken to mean that the contract has come into existence between the employee and the corporation and he ceased to be Government servant. (1980) 6 All LR 91 (95) (DB).

(19) Additional Government Advocate is a State servant holding a civil post. A 1959 All 169 (171, 177) (DB).

(20) An employee of a statutory corporation is not a Government servant for the purpose of Art. 311 though he is appointed and removable by Government and draws his pay from Government and though he may be a 'public servant' within the meaning of Section 21 of the

Articles 310 & 311 — Note 15 (contd.)
Penal Code. ILR (1954) Patiala 300 (304) ** A 1961 All 502 (504 to 507) ** 1978 Lab IC 1633 (1634, 1635) (Pat).

(21) State Governor nominating 'Director' under a Corporation's articles — State Civil Service Rules applied mutatis mutandis — Director does not hold 'Civil Post' and not entitled to Article 311 protection. (1974) 40 Cut LT 336.

(22) Post of Managing Director of Orissa State Commercial Transport Corporation is not Civil Post though Orissa Civil Services (Classification, Control and Appeal) Rules made applicable to the post by Corporation memorandum. (1974) 40 Cut LT 336.

(23) The question whether a particular person is a municipal servant or a Government servant is determined by the functions which he performs. A 1958 Punj 402 (404) (DB).

(24) There is no decisive test for determining whether a person holds a civil post under the State or not. For a civil post under the State within the meaning of Article 311 though it is always relevant and almost sometimes crucial to see the nature of the control which the State exercises in the particular case, still even where it exists, such "control" may not be decisive of the question. Courts should have to find in each case on its own merits whether a particular service in a particular case is a civil service or civil post under the State within the meaning of Article 311 (1). A 1963 Cal 161 (162, 163).

(25) Government of India Act (1935), Section 241 (3), Cls. (a) and (b) apply to persons who were serving in civil capacity in India before commencement of Part III of Government of India Act — Onus is on person claiming that he is governed by Civil Service Rules of 1930 to show that he was in this category — Otherwise his case is governed by Cl. (c) of Section 241 (3). ILR (1956) Punj 1213 (1226, 1227).

(26) A person is entitled to the benefit of Article 311 if he holds a civil post at the time when disciplinary action is taken against him. (1964) 66 Pun LR 1040 (1041).

(27) An Assistant Sub-Inspecor or Sub-Inspector of Police holds a civil post and is not member of a service like the Indian Police or India Police Service or the Punjab Police and therefore dismissal by a District Superintendent is not a contravention of Article 311 (1). A 1959 Punj 402 (404, 408) (DB).

(28) A member of the Madhya Pradesh Home Guards holds a civil post, as under the C. P. and Berar Home Guards Act 1947, he has the powers, privileges and protection of a police officer. A 1955 Nag 175 (176) (DB) ** 1974 Lab IC 17 (18, 19) (J & K).

(29) A quasi-permanent servant is entitled to protection under Article 311. ILR (1961) Mys 1129 (1132) (DB).

(30) The General Manager of Court of Wards in Bihar holds a civil post under the State of Bihar within the meaning of Art. 311 and he is entitled to receive notice in terms of the Article before the order of dismissal is passed by the Board of Revenue. A 1960 Pat 366 (368, 369) (DB).

(31) Manager appointed by Court of Wards under Ajmer Government Court of Wards Regulation (1888), Section 10, is a servant holding a civil post in the State. A 1971 Raj 142 (144, 145, 146).

(32) A member of Civil Service (Judicial Branch) holds a Civil Post — Security of tenure is provided under Art. 311. 1977 Lab IC 345 (348) (DB) (Punj).

(33) A person appointed as a Special First Class Honorary Magistrate under Section 14 (1) of the Cr. P. Code for a certain period holds a civil post within the meaning of Article 311 even though he is not a salaried employee. 1961 (1) Cri LJ 657 (658) (Ker).

(34) Applicability to copyists and typists in the establishment of Patna Courts — Copyists and typists are paid remuneration and not salary — Not Government servants because though they are serving under the Government there is no relationship of master and servant — Provisions of Article 311 not applicable — They therefore cannot as a right claim any increment in the cost of living allowance which has been given to other Government servants. 1973 Pat LJR 104.

(35) A village officer under the Madras Hereditary Village Offices Act (3 of 1895) is a holder of a civil post under Article 311 (1), under the Madras State. A 1956 Mad 460 (462): 1956 Cri LJ 1081 ** A 1961 SC 564 (569).

(36) Employee of Reserve Bank of India — Not a holder of civil post under the State — Hence not entitled to protection of Article 311. 1979 Lab IC 486 (487) (Bom) ** 1980 Lab IC 313 (316) (Kant).

(37) Employee of State Bank of India — Not a civil servant — As such, Art. 311 does not apply. 1978 Lab IC 441 (443) (DB) (All).

(38) The Bank of Patiala is not an independent corporation but only a commercial concern owned and controlled by the State and an employee of the Bank is the holder of a civil post under the State. A 1954 Pepsu 136 (142) (DB).

(39) An employee of nationalised Bank cannot claim himself to be a civil servant entitled to the protection of Art. 311, as a result of nationalisation he has merely acquired a statutory status. (1979) 2 Lab LJ 274 (277) (DB) (Mad).

[But see 1977 Lab IC 1013 (Cal). (After the nationalisation of the Banks the employee acquired a status as public servant and in terminating the services of the employee which affected the status of public employment, the same must be done in consonance with the principles of natural justice.)]

(40) "Civil post under the State" — Security Officer in Govt. owned Mill — Holds a civil post within the provisions of Article 311 — Dismissal by an authority other than the appointing one was therefore, bad in law. 1978 Lab IC 1620 (1624) (Kant).

(41) Private committee giving institution in gift to Government — Government accepting gift and starting workshop for physically handicapped persons under Social Welfare Deptt. — Government giving grant to carry on activities of institution and to pay staff employed therein — Government also providing certain amount in budget for that purpose — Held, that workshop was part of Social Welfare Deptt. and persons employed therein were Government servants and hence they would be entitled to benefits of, recommendations of Pay Commission. 1974 Serv LWR 513 (Punj).

Articles 310 & 311 — Note 15 (contd.)

(42) Company registered under the Companies Act and owned by Government — Employees not persons holding "civil posts under the State" — Article 311 (2) does not apply. (1970) 20 Fac LR 49 (Cal).

(43) As, the Treasurer of the Government Treasury, is an employee of the State and not an independent contractor the principle laid down in A 1955 SC 404 becomes directly applicable and though the Tahvildar under him was not appointed directly by the State he could in the circumstances, claim to hold a civil post under the State and to have the benefit of Art. 311. A 1961 All 515 (516, 517, 518) •• A 1965 SC 360 (361, 362, 363, 364) •• A 1957 All 779 (781).

(44) Tahvildars in sub-treasury are not entitled to protection under Art. 311. A 1959 All 739 (741, 742).

(45) An employee under the Hindustan Cables Ltd. does not hold a civil post 'under Union or State' — He cannot claim protection of Article 311. A 1968 Cal 124 (126).

(46) The person holding the post of General Manager and the person holding under contract the post of Superintendent Coke and Oven Department, of the Durgapur Steel Plant appertaining to Hindustan Steel Ltd., do not hold civil post under the Government of the Union within the meaning of Art. 311, so as to attract Clause (2) thereof. A 1969 Cal 95 (99, 103) : 1969 Lab IC 142.

(47) Employee of State Electricity Board is not covered by protection afforded under Article 311 — Fact that the State Govt. has certain power in respect of Electricity Board does not affect or alter legal entity of Board set up by statute. A 1965 Punj 316 (317) (DB) •• 1979 Lab IC 869 (871) (Raj).

(48) Inspector of Station Accounts is not a 'ministerial servant'. A 1970 Delhi 71 (75) (DB).

(49) An employee under the Life Insurance Corporation of India is not a person holding a civil post under the Union of India — Article 311 is not applicable. 1973 Ker LJ 373 •• 1971 Lab IC 362 (363) (Delhi).

(50) Mysore Village Offices Abolition Act abolishing all hereditary village offices — Act challenged on ground that village post 'Karnam' in South Kanara District was 'Civil Post' and that abolition thereof under Act amounted to 'removal' within Art. 311 — Held, that 'Karnam' was not 'Civil Post' to attract provisions of Art. 311. A 1966 SC 1571 (1576, 1577).

(51) Balimala Dam Project, a joint venture of Governments of Andhra Pradesh and Orissa and under the administrative control of Orissa Government — Post of chargeman held by petitioner in that department is a Civil Post within Art. 311. 1978 Lab IC 109 (111) (DB) (Orissa).

(52) West Bengal Panchayat Act (1 of 1957), S. 48 — Post of Secretary of anchal panchayat — Not a civil post under the State. 1979 Lab IC 64 (69) (DB) (Cal). (1977 Lab IC NOC 140 (Cal), Reversed.)

(53) Advocate appointed by agreement as Government Advocate to conduct criminal cases in High Court but allowed private civil practice — Payment of monthly remuneration — Not a holder of civil post at any relevant time and Article 311 cannot possibly be attracted in such cases. A 1960 Raj 138 (139, 141) (DB) •• 1976 Raj LW 408 : 1977 Lab IC (NOC) 99.

(54) Claim to hold 'civil post' — Relationship of master and servant must exist before person can put such claim — Advocate appointed as Public Prosecutor — He does not hold 'Civil Post' within meaning of Article 311. 1969 Lab IC 1257 (1258) (Andh Pra) •• 1972 Lab IC 402 (405) (Madh Pra).

(55) Registrar of Board created under Pepsu Ayurvedic and Unani Practitioners Act, 2008 B. K. is not Civil Servant under Government and can be removed by Government at its pleasure — Article 311, has no application. A 1955 NUC (Pepsu) 1601 : ILR (1954) Patiala 300 (305).

(56) An Executive Officer appointed under the Punjab Municipal (Executive Officers) Act, 1931 does not hold a civil post within the meaning of Article 311 although the Government might have a hand in his appointment or dismissal under the provisions of the Act. (1966) 68 Punj LR 213 (215).

(57) Notary cannot be deemed to hold civil post to whom Art. 311 applies. A 1965 Punj 220 (222) •• A 1967 All 173 (176, 177) (DB).

(58) Council of Scientific and Industrial Research is not a public body nor is it a Government department — Its employees are not civil servants holding Civil Posts under Government and not entitled to benefit of Art. 311 (2) — Writ of mandamus cannot be issued against it. 1968 Lab IC 320 (325, 326) (Cal). (Reversed on another point in A 1969 Cal 525.)

(59) Publication Board constituted by the Education Ministry of Assam to encourage cultural activity — Not a Department of State of Assam — Employee of Board does not hold 'Civil Post'. 1972 Lab IC 1232 (1233) (Gauhati).

(60) Persons appointed to posts in connection with commercial, trading or industrial activities are Government servants — Such persons are entitled to protection under Art. 311. A 1971 Pat 273.

(61) Contingent servants can by no stretch of imagination be treated as holding a civil post within the meaning of Art. 311. A 1959 Tripura 21 (24).

(62) A Choudhary appointed under the Land Revenue Code of Bikaner for collection of land revenue is not a person in the civil employ of the Government. A 1956 Raj 110 (111) (DB).

(63) The post of Extra-departmental Post Master is a Civil Post and entitles the holder of the post to the protection of Article 311. 1978 Serv LJ 287 (288) (DB) (Andh Pra). (In view of the P. & T. Extra Departmental Agents (Conduct and Service) Rules, 1964 the decisions in A 1961 Mad 166, (1967) 1 Andhra WR 228 (231) and A 1957 Orissa 112 (116) (DB) are no longer good law..... Ed.) •• (1979) 2 Andh LT 42 •• 1976 Lab IC 892 (893) (Orissa). (A 1961 Mad 166 no longer good law in view of A 1967 SC 884; A 1957 Orissa 112, Overruled in A 1972 Orissa 8.) •• 1972 Lab IC 1459 (1460, 1461) (All) •• (1972) 1 Andh WR 152.

(64) An Extra Departmental Delivery Agent in Postal Department is a person holding a "civil post" within the meaning of the expression in Art. 311 (2). ILR (1967) 2 Ker 649 (656, 657) •• A 1977 SC 1677 (1680) : 1977 Lab IC 908. (1976 Lab IC 892 (Orissa),

Articles 310 & 311 — Note 15 (contd.)
Affirmed.) ** 1973 Lab IC 539 (540) (Ker).

(65) Malis employed in Raj Bhavan are not Government servants. A 1956 Pat 398 (401) (DB).

(66) A village Chowkidar in Manipur Territory does not hold a civil post within Art. 311. A 1971 Manipur 32 (34) : 1971 Lab IC 1530.

(67) Petitioner was in the Serf-e-khas army — Serf-e-khas merged in divani as a result of the Serf-e-khas Merger Regulation of 1358-F — Serf-e-khas army disbanded — Petitioner continued in private service of Nizam of Hyderabad — Held, petitioner not being in any State service, Art. 311 not attracted. ILR (1962) Andh Pra 278 (284) (DB).

(68) An extra typist working in the office of Collector from time to time according to exigencies and paid out of contingency funds, not even an approved apprentice is not a person holding 'civil post under a State' within the meaning of Art. 311 (1) — Termination of service does not require compliance with Article 311. 1966 All LJ 978 (979, 980) : 1968 Lab IC 49 (DB).

(69) A person appointed as a Mandal (Village surveyor) under the Garo Hills District Council is not a member of the Civil Service of the State of Assam inasmuch as the State Government had nothing to do either with his appointment or dismissal or had any control over his duties and activities. Therefore, Article 311 has no application and he cannot invoke the aid of Art. 311. A 1961 Assam 69 (70) (DB).

(70) Permanent Asstt. Clerk in Office of Secretary Board of High School and Intermediate Education — He holds a civil post in the State. A 1962 All 413 (419) (DB).

(71) Protection under, not available to an employee of college registered as Society — He is not a holder of a civil post. (1972) 74 Punj LR 524.

(72) Mauzadar in Assam valley is a holder of civil post under the State and is entitled to protection under Art. 311 (2). A 1967 SC 884 (887). (A 1964 Assam 54, Affirmed; A 1957 Orissa 112, Overruled.)

(73) A Radio Artist in All India Radio holds a civil post within the meaning of Article 311. 1975 Lab IC 423 (424) (All).

(74) Petitioner not a Government employee when in service or when departmental proceedings were started against him — Petitioner also prosecuted under Section 409, Penal Code — The fact of such prosecution will not make him a Government servant. A 1968 Manipur 68 (70) : 1968 Lab IC 1275.

(75) Non-compliance with S. 4 (1) of Employment Exchange (Compulsory Notification of Vacancies) Act (1959) does not invalidate the appointments made — Employees on temporary basis whose services are liable to be terminated without any notice cannot challenge their termination. (1967) 2 Lab LJ 606 (609) (DB) (Mys).

(76) Scope of S. 206-A, Gujarat Panchayats Act (1961) — Panchayat service is civil service under the State. 1976 Cri LJ 1256 (FB) (Guj).

(77) Lambardar holds a civil post under the State and his dismissal attracts the provisions of Article 311. 1978 Simla LC 369.

(78) Person serving under registered society is an employee of society under control of the Board of Governors — His service conditions are regulated by rules and regulations framed by Society — He must be deemed to hold post under the Society and not to hold any civil post either under the Union or State — Protection under Article 311 cannot be claimed. A 1970 Pat 163.

(79) Employee of Indian Standards Institution — Not a holder of civil post under the Union to attract Art. 311. (1973) 2 Serv LR 694 (Delhi).

(80) Vesting of the Management of an Assurance Company in the Central Government does not result in the employees of the Company becoming the employees of the Central Government. 1973 Lab IC 1682 (Madh Pra).

(81) Staff Artist in All India Radio — Contract of service with provision for termination of service on six months' notice — As per contract the Artist to submit to superior Government authorities, to devote whole time to service, to proceed to any part of India for service, to obey rules prescribed for him — Provision for suspension — Monthly salary in time scale paid — Artist is a Government servant holding a civil post — Termination of Artist's service retaining junior persons — Artist is entitled to protection of Art. 311 (2) of the Constitution. (1975) 1 Serv LR 457 (460) (All).

16. Members of Indian Civil Service — See also Article 314.— (1) Indian Independence Act (1947), Ss. 9 (1) (a) and 10 (2) — India (Provisional Constitution) Order (1947), Art. 7 (1) — Effect of Political change in India in 1947 on services of Indian Civil Servants — Announcement of Viceroy dated 30-4-1947 — Admissible in evidence — While initial option to continue or not in service was with servant concerned, final option to continue in service or not was with appropriate Government and special orders or arrangements contemplated were action taken in pursuance of that final option. A 1955 SC 817 (829) : (1955) 2 SCR 541. (A 1954 Mad 1155, Reversed.)

17. "Except as expressly provided by this Constitution" — See also Note 18.— (1) The opening words of the article "except as expressly provided by this Constitution" indicate that the provision in Art. 310 (1) is only subject to the exceptions provided by the Constitution itself and that it is not subject to any exceptions that may be sought to be made by statute law. A 1956 Bom 601 (603).

[But see A 1957 Pat 515 (527) : ILR 36 Pat 515 (527) : ILR 36 Pat 557 (DB).]

(2) The phrase "except as expressly provided by this Constitution" in Art. 310 cannot include Rules and Regulations which are continued in force under Art. 313 nor can they remain operative if they are inconsistent with the provisions of the Constitution. A 1958 Bom 283 (287) ** A 1960 Bom 431 (433).

(3) The English Common Law Rule regarding the holding of office by an officer only during the pleasure of the Crown has not been adopted by the Constitution in all its entirety and with all its rigorous implications. A 1958 SC 36 (41).

(4) Except in the cases mentioned in Article 311 there is no constitutional protection against any punishment imposed on a Government servant. ILR (1956) Punj 1213 (1223).

Articles 310 & 311 — Note 17 (contd.)

(5) Scope — Police Act and Police Regulations made under that Act, which were preserved under Section 243 of the Government of India Act, 1935, continue to be in force after the Constitution, so far as they are consistent with the provisions of the Constitution. **A 1961 SC 751 (755, 756) : 1961 (1) Cri LJ 773.**

18. "Holds office during the pleasure of" — Rule of pleasure in Art. 310 (1) — Its scope and limitations.— (1) Pleasure of Governor cannot be exercised so as to abridge fundamental right of employee. **A 1970 Assam 1 (7) : 1970 Lab IC 11 (FB).** (Reversed on another point in **A 1970 SC 1314.**)

(2) The pleasure of the President is clearly controlled by the provisions of Article 311, and so, the field that is covered by Article 311 on a fair and reasonable construction of the relevant words used in that article, would be excluded from the operation of the absolute doctrine of pleasure. The pleasure of the President would still be there, but it has to be exercised in accordance with the requirements of Article 311. Wherever it is shown that a permanent civil servant is removed from his service Article 311 (2) will apply and Article 310 (1) cannot be invoked independently with the object of justifying the contravention of the provisions of Article 311 (2). **A 1964 SC 600 (610) **** (1977) 1 Serv LR 10 (21) (DB) (Guj).

(3) The expression 'during the pleasure' indicates that it is the tenure of office which is held at the pleasure of the President or the Governor. The effect of the article is that the tenure of office can be terminated by the President or the Governor as the case may be at his pleasure. **A 1961 Mys 88 (91, 96) (FB).**

(4) "Doctrine of pleasure" is subject to rules or law made under Article 309 as well as conditions prescribed under Article 311. **A 1971 SC 40 (42) : 1971 Lab IC 8.**

(5) The rules of service framed under Article 309 do not control the 'pleasure of the President' in Article 310 (1) in such a manner so as to give to Defence personnel almost similar protection as is available to civil servants by Article 311. Article 311 is an express provision in the Constitution which curtails the pleasure of the President postulated by Article 310 (1). Therefore, where Article 311 is not attracted the pleasure of the President contemplated by Article 310 cannot be curtailed by rules under Article 309. Hence unless the termination is by way of punishment for a misconduct, termination of services under the pleasure of the President cannot be regarded per se as punishment. (1975) 1 Serv LR 424 (Delhi).

(6) The Parliament or State Legislature cannot make a law so as to impinge upon the overriding powers conferred upon the President or the Governor under Art. 310 as qualified by Art. 311. **A 1961 SC 751 (761) : 1961 (1) Cri LJ 773 **** ILR (1968) 2 Ker 664 (672) ****** 1968 Lab IC 1377 (1381, 1382) (Mad) ****** 1962 Mys LJ (Supp) 437 (439).

(7) The power of the head of the State himself to dismiss or remove is not affected by Art. 311, Cl. (1) or its counterpart, Section 240, Sub-section (2) of the Government of India Act, 1935. **A 1949 PC 112 (114) : 50 Cri LJ 383.**

(8) Article 311 is one of the express provisions in Constitution which curtails the pleasure of President or Governor that is vested in him under Article 310. Article 311 is to be regarded as proviso to Article 310. It controls Article 310. A 1966 Cal 252 (257) (DB) ****** A 1967 Pat 318 (319) (DB) ****** 1973 Lab IC 1572 (1575, 1576) (Raj) ****** 1980 Lab IC 489 (494) (P & H) (DB).

(9) Doctrine of pleasure — Appointments to Government service — Doctrine is subordinated to restrictions provided under Article 311. A 1966 Pat 364 (366) (DB) ****** A 1966 Pat 97 (105) (DB) ****** A 1961 Assam 74 (76) (DB) ****** (1960) 1 Andh WR 256 (258) (DB).

(10) The pleasure referred to in Art. 310 cannot afford to be unconstitutional and can only be exercised in strict accord with the express provisions of the Constitution. Article 311, being an express provision, acts as a rider of limitation on the pleasure under Article 310. **A 1961 Cal 1 (5, 6) (SB) **** A 1959 Bom 363 (365) (DB) ****** 1975 Lab IC 76 (80, 81) (Andh Pra).

(11) Although word "dismissed" casts a stigma and removal is by way of penalty, "pleasure" under Article 310 extends to dismissal. 1973 Serv LJ 173 (Delhi).

(12) As provided by Article 310 all Civil servants (including Railway servants) hold office during the pleasure of the President or the Governor as the case may be. This pleasure is subject only to the restrictions imposed by Article 311 (2). Subject only to the protection afforded by Article 311 (2), a Civil servant who has been removed from service can have no justifiable cause in a Court of law. Once the procedure under Article 311 (2) has been complied with the Courts are not entitled to determine whether the ground or charge upon which the authorities have proceeded against a civil servant is factually correct or sufficient to warrant the action taken against him. A 1962 Madh Pra 372 (373, 374) ****** **A 1961 SC 751 (761) : 1961 (1) Cri LJ 773.**

(13) Railway Servants (Discipline and Appeal) Rules (1968), Rule 14 (ii) — Removal of railway servant without inquiry — Provision consistent with "pleasure" doctrine — Opportunity to be heard to concerned railway servant need not be given — Rules of justice or fair play not to be imported. 1975 Lab IC 1288 (1294, 1295, 1297, 1298) (DB) (Cal). ((1975) 1 Serv LR 277 (Guj), **Dissented from.**)

(14) Article 311 does not affect the principle that a Government servant holds office during the pleasure of the head of the State. It only imposes certain constitutional obligations before he can be dismissed, removed or reduced in rank. A 1955 Hyd 54 (55) (DB) ****** A 1964 Madh B 54 (55) ****** A 1954 Madh B 49 (50) (DB) ****** A 1952 Madh B 105 (108).

(15) In view of the "rule of pleasure" enunciated in Art. 311 (1) Government has always power to terminate services of Government servant by compulsory retirement on proportionate pension even before

Articles 310 & 311 — Note 18 (contd.)
age of superannuation, irrespective of any specific service rule permitting such a course. A 1957 Assam 77 (81) (DB) ** A 1956 Madh B 40 (43) (DB) ** A 1954 Madh B 54 (56) (DB) ** A 1943 Bom 268 (271) (DB). ** 1973 Lab IC 1054 (All).

(16) The pleasure doctrine under Article 310 is in a way, unoffendingly resuscitated with appropriate vigour towards the tail-end of the career of a Government servant under Rule 16 (3) of the All India Services (Death-Cum-Retirement Benefit) Rules 1958. **A 1977 SC 2411 (2420) : 1977 Lab IC 1923.**

(17) Unless, the Court finds a specific provision in some part of the Constitution giving to a Government servant a tenure different from the tenure provided for in Article 310, every member of the civil service holds his office during the pleasure of the President. A 1960 Bom 14 (15) (DB).

(18) Pleasure of President in the matter of tenure of office of Public Servant — Rules and laws affecting or impairing such pleasure — Permissible limits stated. 1970 Lab IC 76 (79) (DB) (Delhi). **(Reversed** on another point in A 1971 SC 1547.)

(19) Where a person holds an office under the provisions of a statute which fixes certain modes and methods for appointment, dismissal and removal, they must be complied with in all these matters. A 1952 Mad 865 (870, 871) (DB).

[But see A 1956 Bom 601 (605) ** 1976 Lab IC 913 (All). (Power to retire a Government servant without assigning reasons.).]

(20) The general rule that service is during pleasure of Crown or State is protected only to the extent and within the limits prescribed by relevant statute and while Courts will take care to see that cardinal requirements prescribed by statute are fulfilled and principles of natural justice have not been violated and public servant has had a fair deal, equally the Court will have discretion to refuse in suitable cases declaration on well settled principles applicable to specific relief. (1957) 70 Mad LW 965 (971) ** 1979 MPLJ 625 (628) (DB).

(21) Right of Government in matter of appointment and promotion of officers, extent of, indicated. A 1970 Punj 112 (Prs 59, 64).

(22) State has power under Article 310 to dismiss or punish Government servant even for misconduct unconnected with his official duties — Article 311 does not restrict this power of State. A 1960 All 55 (59, 60, 61) : 1960 Cri LJ 26.

(23) Except in the cases of substantive appointments to permanent posts and of appointments to temporary posts for specified period, appointment gives no right to the appointee and his service may be terminated unless his service had ripened into quasi-permanent service. **A 1958 SC 36 (42, 43). (A 1956 Nag 113 and A 1957 Punj 42 and A 1957 Punj 191 and A 1957 Raj 81, Overruled.)**

(24) It is only when there is a breach of the provisions of Article 311 or other constitutional provision that the termination of services of a Government servant can be questioned in a Court of law. A 1955 Hyd 54 (56) (DB) ** A 1954 Madh B 49 (50) (DB) ** A 1954 Mad 587 (591).

(25) Rule 56 (3) like Rule 56 (i) is not intended for taking any penal action against the Government servants. That rule merely embodies one of the facets of the 'pleasure doctrine' embodied in Article 310 of the Constitution. The order of compulsory retirement could be challenged on very limited grounds. 1975 Lab IC 1173 (DB) (Madh Pra).

(26) W. B. Service Rules, Part I, R. 75 (aa) is a facet of the pleasure doctrine under Article 310 — Government servant need not be heard before compulsorily retiring him. 1978 Lab IC (NOC) 8 (DB) (Cal).

(27) 'Rule of Pleasure' laid down in Article 310 is embodied in Section 18, Army Act. 1968 Lab IC 60 (63) (Delhi) (DB) ** 1974 Serv LWR 396 (Delhi) ** 1973 Serv LJ 173 (Delhi).

(28) The paramount law as between Government and their servants is, as enunciated by Article 310 (1) that the latter hold their office during pleasure of former subject only to two conditions, relating to disciplinary action embodied in Article 311 thereof. A 1959 Ker 338 (339).

(29) Where the contractual services of a lecturer in National Defence Academy are terminated for insubordination resulting in his reversion under the relevant clause of contract following a departmental enquiry under Rule 14 of the Central Civil Services (Classification, Control and Appeal) Rules, such order of termination is made in the exercise of the pleasure of the President under Article 310 and the employee not being entitled to the protection conferred by Article 311, any breach of the 1965 Rules is not justiciable at his instance. A 1970 Bom 180 (188, 190, 192, 193, 197).

(30) Under J. and K. Constitution, if termination of service of a civil servant in substance amounts to dismissal or removal, no matter what phraseology is used for such termination it will attract the provisions of Section 126 (2). **A 1964 J and K 92 (95) (FB).**

(31) Article 311 has to be read as a proviso or an exception to Article 310. It is only the Judges of the Supreme Court and of the High Courts, the Comptroller and Auditor-General of India, etc., for whom special provisions have been made in the Constitution that can be said to hold office during good behaviour. The tenure of office of others is at the pleasure of the President subject, of course, to Article 311 when it is applicable. A 1960 J and K 97 (101).

(32) The fact that a post is "held" under the Governor means that the Governor has full power to remove the employee from that post or to demote him from the same. This pleasure of the Governor is fettered only by express provisions of the Constitution. Article 310 of the Constitution does not, however, empower the Governor to refuse at its pleasure to pay him even for the period of his service. A 1965 Assam 109 (110) (DB).

(33) Dismissal from service — Pleasure doctrine embodied in Articles 309, 310 — Limitations of — Rules under Article 309 designed purely for administrative guid-

Articles 310 & 311 — Note 18 (contd.)
ance — Madras Police Standing Order No. 90 (3) (b) though considered as one under Article 309 is directory — Non-compliance does not involve error of jurisdiction. **A 1966 Mad 203 (FB).**

(34) Natural justice requires that no person should be 'condemned unheard'. In a matter where the servant has to cease to hold office on account of the exercise of pleasure or policy pursued by an authority, the servant's mouth is shut as he has no right to be heard in opposition thereto. To punish a person at pleasure or on account of a policy regardless of any guilt of his, would be to condemn him unheard which is obnoxious to natural justice. Neither the pleasure nor the policy can, therefore, justify a punishment of a public servant by an order of dismissal. A 1956 Trav-Co 35 (40).

(35) The Parliament or the State Legislature can make a law regulating the conditions of service of a member of a public service, which includes proceedings by way of disciplinary action, without affecting the powers of the President or Governor under Article 310 read with Article 311. **A 1961 SC 751 (761) : 1961 (1) Cri LJ 773.**

(36) The pleasure of the President or Governor to dismiss a public servant cannot be fettered by any provisions in the contract of service. ILR (1968) 2 Ker 664 (672, 673).

(37) Article 309 gives power to the President or the Governor to make rules regulating the conditions of service of civil servants. The rules so framed put a fetter upon the powers of the President or the Governor to dispense with the services of an officer at pleasure. 1961 Raj LW 298 (307) (DB) ** 1975 Lab IC 213 (217) (Ker). (Reversed on another point in A 1976 SC 2433 : 1976 Lab IC 1551.) ** ILR (1969) 2 Cal 199

(38) Statutory Rules under Article 309 taking away constitutional protection given to civil servant under Article 311 (2) — Tenure of such civil servant is reduced to one of Presidential pleasure — But provision in such rules giving a right of hearing to concerned servant before his removal cannot be said to be inconsistent with Presidential pleasure. 1977 Lab IC 643 (651) (Delhi).

(39) Our Constitution has ensured security of tenure against mala fide punishment and it is well known that Government servants cannot be hired and fired arbitrarily or at the whim and caprice of anybody, however great the power entrusted to him. A 1966 Punj 66 (81) (DB).

(40) Where a resignation of a Government servant has been accepted by Government and intimation about its acceptance is sent to him, the Government servant cannot withdraw his resignation without the permission of the Government as the servant holds office only during the pleasure of the Government. A 1966 Punj 221 (224).

(41) The principle embodied in Art. 310 (1) that Government servants hold office during the pleasure of the President or the Governor, as the case may be, is qualified by the provisions of Article 311 which give protection to Government servants. (1960) 1 Andh WR 256 (DB).

(42) The tenure of office of an employee of the Union or the State is only during the pleasure of the President and/or Governor; and accordingly, except as provided in the Constitution, there can be no justiciable cause available to a dismissed Government employee for getting relief in a Court of law. A 1960 Bom 431 (433 to 436).

(43) Substantive appointments to permanent post — No special contract governing the matter — Employee's service cannot be terminated except by way of punishment — Employee has a right to hold the post until he attains superannuation, or is compulsorily retired or the post is abolished. **1958 All LJ 372 (386, 387, 388) (SC).**

(44) The provision in Article 310 (1) cannot confer a power on the State Government to compel an officer to continue in service of the State against his will apart from service rules. **A 1964 SC 72 (81).**

(45) Appointment to temporary post for a specified period — Tenure of person — Appointment cannot be put an end to before the end of the period except by way of punishment. **1958 All LJ 372 (386) (SC).**

(46) In respect of Government servants other than, Supreme Court Judges, High Court Judges, Comptroller and Auditor-General etc., the tenure of service is at the pleasure of the President or the Governor as the case may be subject to what is contained in Article 311. Article 311 is nothing but a Proviso to Article 310. A 1959 All 643 (654).

(47) The right of the President of India to terminate the services of public servants is subject to the restrictions imposed by Article 310 (2) and Article 311. (1967) 10 Law Rep 555 (573) (DB).

(48) The rule of an office being held during pleasure cannot be extended to offices under a University or such other authority. A 1951 Mad 870 (871, 872).

(49) Termination of service of Government servant serving in State — No complaint that there has been infringement of Articles 310 and 311 — Governor's pleasure in the matter is final. 1958 All LJ 218 (221).

(50) Provisions of Section 43 (6) and (8) of Andhra Pradesh Agricultural University Act (24 of 1963) offend the provision of pleasure tenure under the Article. ILR (1972) Andh Pra 66.

(51) Order that "President has been pleased to remove 'X' from service without pensionary benefits" — Pension being property within Article 19 (1) (f) and Article 31 (1), deprival of pensionary benefits without giving the person to be deprived an opportunity of being heard, is illegal — Order held valid so far "removal" from service was concerned but invalid so far as it related to deprival of pensionary benefits. 1973 Serv LJ 173 (Delhi).

19. English law.— (1) The English Common Law rule regarding the holding of office by public servants only during the pleasure of the Crown has not been adopt-

Articles 310 & 311 — Note 19 (contd.)
ed by Article 310 (1) of the Constitution in its entirety and with all its rigorous implication. Article 311 gives a two-fold protection to persons who come within that Article viz., (1) against dismissal or removal by an authority subordinate to that by which they were appointed; and (2) against the dismissal, removal or reduction in rank without giving them a reasonable opportunity to show cause against the action proposed to be taken in regard to them. A 1964 Andh Pra 206 (210) (DB).

(2) English Law — Civil servant holds office at pleasure of Crown — Crown is not bound by any special control, let there be any — Servants are liable to be dismissed without notice and there is no right of action for wrongful dismissal. (1956) 2 Lab LJ 347 (351, 352) (DB) (Mad).

(3) When the Constitution of India accepts and adopts a doctrine well known to the common law of England, the doctrine that a civil servant holds his office at the pleasure of the Crown, it is futile to suggest that the Constitution makers did not wish that doctrine to have full sway. A 1960 Bom 14 (17) (DB).

(4) The rule of English law pithily expressed in the Latin phrase 'durante bene placito' ("during pleasure") has not been fully adopted by Article 310 (1). The pleasure of the President is clearly controlled by the provisions of Article 311, and so, the field that is covered by Article 311 would be excluded from the operation of the absolute doctrine of pleasure. **A 1964 SC 600 (609, 610, 621).**

20. Age of superannuation — Alteration of rule as to.— (1) Once an employee attaining 55 years of age is found fit in efficiency and physical fitness tests memorandum dated 21st March 1963 issued by the Government of Assam under F. R. 56 gives right to such employee to continue in service up to 58 years. Therefore he cannot be compulsorily retired before 58 years on the ground that at the pleasure of the Government, the Government may pick and choose any man for hostile treatment. The exercise of the pleasure of the Government under Art. 310 is made subject to other express provisions in the Constitution. Therefore in exercise of its pleasure, the Government cannot deprive a person of his fundamental rights. A 1969 Assam 46 (50): 1969 Lab IC 534 (DB).

(2) So long as age of compulsory retirement and period of qualifying service for such retirement fixed by rule are reasonable, Art. 311 is not attracted. A 1969 Orissa 37 (43) (DB). ** **A 1975 SC 1646: 1975 Lab IC 1121.**

(3) There is no legal or constitutional bar to the alteration of the Service Rules as to the age of superannuation for retirement purposes to the disadvantage of persons already in service. A 1953 Trav-Co 140 (142) (DB) ** **A 1962 All 328 (332) (FB).**

(4) Rule 56 (j) of Fundamental Rules embodies a facet of "doctrine of pleasure." **A 1971 SC 40 (43): 1971 Lab IC 8.**

(5) Termination of service resulting from change in age of superannuation — Article 311 is not attracted. **A 1965 SC 1567 (1569, 1570) ** A 1971 SC 1997 (2000): 1971 Lab IC 1178.**

(6) Karnataka Civil Services (Twenty Second Amendment) Rules, Rr. 2, 3 — Amendment reducing age of superannuation from 58 to 55 years — Does not contravene Article 311 (2). 1975 Lab IC 799 (Kant).

(7) No ministerial servant can claim as a matter of right to be in service till the age of 60 and if the employee concerned is made to retire at the age of 55, he cannot complain of any breach of statutory obligation. A 1958 Andh Pra 697 (702).

(8) Government raising age of superannuation from 55 to 58 — Govt. reserving to itself a right to ask any Government servant to retire at age of 55 — Does not imply that such officer lacks integrity so as to attract operation of Art. 311 (2). **A 1971 SC 1516 (1519): 1971 Lab IC 948** ** (1969) 35 Cut LT 1089.**

(9) Punjab District Manual Para 2.10 — Age of superannuation — Application to get birth date in service record amended — Application must be made within two years of entry into service — Application to Government rejected on grounds of delay and other grounds — The matter cannot be reopened in writ application. ILR (1972) 1 Punj 275.

(10) The age of compulsory retirement having been extended unequivocally by the Government from 55 to 58 years, an employee holding permanent post has a right to continue in service till that age, unless he has completed 30 years of service earlier and he cannot be asked to leave service without giving any reason therefor at any time before attaining that age, hence in absence of compliance with the procedure prescribed in Art. 311 (2), such action, if taken, would be illegal. A 1969 Orissa 45 (49): 1969 Lab IC 288 (DB).

(11) U. P. State Law Officers Rules (1942), Rules 7, 14 — Petitioner appointed Additional Government Advocate for three years — No superannuation age fixed at time of original appointment — Post described as tenure post and classed as "special post" — New rule fixing 60 years as superannuation age — Services of petitioner terminated before completing three years, under new Rule — Order is "removed" — Petitioner is entitled to protection of Article 311 (2). A 1959 All 169 (171, 174, 176, 179) (DB).

(12) Where the age of Superannuation of teachers who entered in service prior to 1-4-1958 was sixty years according to Statute 4 (9) of the Kerala University Act (1974), the service prior to 1-4-1958 need not be continuous service nor under the same management but there should not be complete severance of teacher's service relationship with the management. (1979) 2 Serv LR 518 (521) (DB) (Ker).

(13) Superannuation — Bihar Government Notification No. F1/5021/ 62-452F, D/- 11-1-1963 extending age of superannuation from 55 to 58 years — Benefit available to officers retiring after 14-1-1963 — Date of retirement of incumbent 1-1-1963 — Not

Articles 310 & 311 — Note 20 (contd.)
entitled to the benefit. **A 1977 SC 746 (747): 1977 Lab IC 271.**

21. Scales of pay, alteration of.— (1) The President cannot, in the exercise of the pleasure, fix the scales of pay of Government servants. A 1958 All 345 (347).

(2) Civil servant reinstated after termination of disciplinary proceedings — Government transferring him to some other department on administrative grounds — Old scale of pay continued though under the new post a higher scale of pay existed — **Held**, Government could effect such changes so long as provisions under Art. 311 are not violated. A 1968 Manipur 16 (18, 19): 1968 Lab IC 150.

(3) Pay scale fixed and employee confirmed —Reduction of scale without hearing him is illegal — On confirmation employee becomes entitled to rights to the post and to the scale of pay fixed. **A 1974 SC 1889 (1889, 1890): 1974 Lab IC 1275** ** (1975) 30 Fac LR 194 (All).

(4) Conditions of service including pay scales — Alteration of — Government can take decision unilaterally — Employees not entitled to be heard — However, condition of service determined by an executive order cannot be subsequently altered retrospectively to the prejudice of a civil servant. 1979 Lab IC 781 (783, 784) (DB) (Punj).

(5) Conditions of service of public servants may be statutory or contractual. **(1967) 10** Law Rep 555 (573) (DB).

(6) Substitution of increased pay scale and subsequent restoration of earlier pay scale — Question of contravention of Art. 311 does not arise, there being no question of petitioner's dismissal, removal or reduction in rank. 1976 Lab IC 1226 (1232) (DB) (Him Pra).

(7) Railway servant held entitled by competent authority to a particular grade and benefits thereof — Successor authority long thereafter holding otherwise, suo motu withdrawing those benefits and ordering recovery of wages alleged to be overpaid — Order was not legal. (1971) 1 Serv LR 629 (DB) (Punj).

22. Pleasure, whether can be delegated.— (1) The power to dismiss a public servant at pleasure is outside the scope of Arts. 53 and 154 of the Constitution and cannot be delegated by the President or the Governor to a subordinate officer and can be exercised by him only in the manner prescribed by the Constitution. This, however, does not mean that a law cannot be made under Art. 309 or a rule cannot be framed under the proviso to the said Article prescribing the procedure by which and the authority by whom the said pleasure can be exercised. **A 1971 SC 1547 (1549).** (1970 Lab IC 76 (Delhi) **Reversed; ILR (1966) 2 Punj 305 (FB) Impliedly no good law.)** ** **A 1964 SC 648** ** A 1956 Trav Co 35 (40) ** 1973 Lab IC 1572 (1575, 1576) (Raj).

(2) Court is debarred from examining pleasure of President — However, it can examine whether in fact the pleasure has been exercised by the President or by one duly authorised by Constitution to act in his behalf — Pleasure cannot be delegated and expressed by an officer — Pleasure of executive officer of Government does not enjoy the immunity granted to President — What is required under Art. 310 is pleasure of President and not of Union of India — Both are not identical — Hence dismissal by officer is wrongful. (1966) 70 Cal WN 925 (931, 939) (DB).

(3) The pleasure of the President or the Governor mentioned in Art. 310 must be exercised in accordance with the rules or the statute made in that behalf. **ILR (1966) 2 Punj 305 (310) (FB).**

(4) The function in Clause (c) of the proviso to Art. 311 (2) cannot be delegated by the President to anyone else in the case of a civil servant of the Union. In other words he has to be satisfied personally that in the interest of the security of the State, it is not expedient to hold the inquiry prescribed by Clause (2). **A 1971 SC 1547 (1551)** (1970 Lab IC 78. **Reversed.)** ** 1973 Serv LJ 173 (Delhi).

(5) Power conferred by Art. 310 can be delegated — Pleasure referred to in Article 310 is not strictly executive action to which Art. 77 applies. A 1966 Cal 252 (258): (1967) 1 Lab LJ 318 (DB).

(6) The President can delegate the powers under Art. 310, but Art. 309 cannot impair or affect the pleasure of the President therein specified. **ILR (1966) 2 Punj 305 (310) (FB).**

(7) Removal of military personnel from service — It cannot be said that the President alone may in his exclusive personal discretion exercise the power under Article 310. If the power to determine employment under Art. 310 is exercised in the name of the President in accordance with the Rules framed under Art. 77, no objection can be raised to the validity thereof. **1967 Serv LR 471 (477) (SC) (A 1963 Assam** 94 (FB) Impliedly **no longer good law.)**

(8) Protection under Art. 311 is not available to defence personnel. To terminate the services of an Army Officer is the executive action of the President and the power to do so is the executive power of the Union within the meaning of Art. 53. The provision in Section 18 of the Army Act that persons covered by the Army Act hold office during the pleasure of the President justifies the view that the exercise of power under Art. 310 or Section 18 fall within the ambit of Art. 53 read with Art. 77, 1974 Serv LWR 396 (403) (DB) (Punj).

(9) The pleasure of the President is not a justiciable matter. (1965) 67 Pun LR 580 (583).

(10) Military officer released from service — Order passed by Under-Secretary in the name of the President but the President had no occasion to deal with the matter at any stage — Order held justiciable by High Court — Held further that order is invalid and not covered by Art. 77. 1973 Serv LJ 866 (Delhi).

(11) Under Rule 146 of Railway Establishment Code issued by the President, the power of the President in respect of transfer of non-gazetted railway servants, may be exercised by an agent or by a lower authority to whom the Agent may re-delegate his power. A 1967 Punj 76 (78).

Articles 310 & 311 (contd.)

23. Right to hold office, whether Fundamental Right. See also Article 309.— (1) Government servants have fundamental right to form associations under Art. 19 (1) (c), but they have no fundamental right to be continued in employment and when their services are terminated by the State they cannot complain of infringement of any of their constitutional rights when no question of violation of Article 311 arises. **A 1958 SC 232 (238)** ** A 1965 Ker 19 (23).

(2) Every Government servant has a right of appeal in accordance with rules governing his service, against an appointment made by promotion which is likely to infringe his rights. When such an appeal is filed person affected is entitled to notice and to a reasonable opportunity of being heard. 1969 Lab IC 712 (715): (1968) 1 Andh WR 86 (DB).

(3) Where a post is being held by the Government employee only temporarily and not substantively, then on the facts of the case there can be no question of his having any right to hold that post or rank. A 1966 Orissa 173 (178, 179) (DB).

(4) A civil servant can hold office only during the pleasure of the Rajpramukh and there is no such thing as a vested right in him which is inviolable and inherent in him notwithstanding the Constitution, and his removal would be governed by Art. 311. A 1960 Andh Pra 479 (483) (DB).

(5) A dismissal for established delinquency entails a bar to reinstatement of the dismissed servant. It is a taint on his reputation and would affect his position in society. A 1956 Trav-Co 35 (40).

(6) Compulsory retirement — Fundamental Rules, Chapter IV, Rule 56 (b) (i) — Right of servant to be retained in service after age of 55 years — Rule does not confer any such right — Authority can retire servant even if he continues to be efficient — Enquiry into reasons for exercise of discretion by authority is not the concern of High Court. A 1966 Cal 483 (485) (DB).

24. "Dismissed" or "removed" — General.— (1) The words "dismissed" "removed" and "reduced in rank" are all used in a special technical sense. They must be understood in the sense in which they are used in the Civil Service (Classification, Control and Appeal) Rules, where they denote the three major categories of punishments which can be imposed on civil servants. **A 1953 SC 250 (251, 252).** (Expressions are taken from Rule 49 of C. S. (C. C. & A.) Rules.) ** **A 1958 SC 300 (304)** ** **A 1958 SC 36 (47)** ** A 1954 Madh B 177 (180) (DB) ** A 1954 Madh B 49 (51) (DB).

(2) Word "dismissal" in Government of India Act as also in Constitution means termination of person's service by way of punishment. **A 1971 SC 2242 (2245): 1971 Lab IC 1381.**

(3) The words "dismiss, remove or reduce in rank" have a stigma, namely, the meaning which they bear as three major punishments in Service Rules. The difference between dismissal and removal is that dismissal ordinarily disqualifies any future employment and removal ordinarily does not. If one is reverted by way of punishment for misconduct Art. 311 (2) is attracted. Losing some places in the seniority list in the same cadre does not amount to reduction in rank under Art. 311 (2). Reduction in rank may be brought about in the garb of a reversion. **A 1976 SC 1899 (1903).** (ILR (1974) Cut 731, **Reversed.**)

(4) Dismissed or removed — Includes every kind of termination of service. **A 1964 SC 600 (621, 632).**

(5) Dismissal includes removal. The only difference between dismissal proper and dismissal in shape of removal from service is that the former ordinarily disqualifies the servant from future employment but the latter does not do so. A 1961 Madh Pra 261 (266) (DB) ** A 1954 Mad 1155 (1160) (DB). (**Reversed** on another point in **A 1955 SC 817.**) ** ILR (1966) 1 Mad 206.

(6) The word 'removal' in Article 311 has a narrow and technical meaning involving the concepts of arraignment, guilt, stigma and punishment and future debarring of employment under Government service whereas termination does not. (1957) 70 Mad LW 965 (972).

(7) In deciding whether a dismissal is justified, the test to be applied must vary with the nature of the business and the position held by the employee. (1964) 1 Lab LJ 500 (510) (Mad).

(8) Dismissal or removal — Does not include termination of service on expiry of fixed period of employment of temporary employee. ILR (1955) Hyd 711 (713) (DB).

(9) Dismissal involves some serious consequences to the person affected and is also a slur on his character. Therefore he should be afforded an opportunity. The same thing cannot be said of "dispensing with services" of a servant by his master, unless he was bound by some agreement not to do it (1959) 1 Lab LJ 554 (555) (DB) (Andh Pra).

(10) Dismissal from Government service for disqualifying a person for being elected as a Pancha must be for misconduct and a declaration by competent authority that the person is ineligible for further employment in public service — Removal of Gumastha-Patwari from service for misconduct by competent authority debarring him from holding any public post — Though term 'removal' is used, removal amounted to dismissal. ILR (1964) Andh Pra 1237 (1240, 1241) (DB).

(11) It is not the motive for either terminating the services of a Government servant or reducing him that is material in determining whether or not it amounts to an order of dismissal or removal or reduction in rank, but it is the ground on which a person has either been dismissed or removed or reduced in rank. ILR (1967) 2 All 240 (DB).

(12) The mere passing of an order of dismissal is not effective unless it is published and communicated to officer concerned. **A 1966 SC 1313 (1316).** ** (1979) 1 Serv LR 749 (754, 755) (DB) (Pat). (Removal from service, the order becomes effective from the date it is communicated to the Government servant concerned.) ** 1975 Lab IC 932 (933) (Orissa). ** 1971 BLJR 719.

(13) Mere transfer is not punishment unless the step taken amounts to punishment

Articles 310 & 311 — Note 24 (contd.)
of the servant concerned. ILR (1964) 2 Mad 813 (814) ** A 1968 Andh Pra 129 (132, 133). (Transfer from one department to another.) ** 1967 Ker LT 354 (358).

(14) Government servant convicted for offence under Sec. 380, Penal Code, 1860, given benefit of Section 4 and released — Conviction cannot form basis for removal from service in view of Section 12 of Probation of Offenders Act (1958). (1967) 69 Punj LR 331 (333).

(15) The words 'your work and conduct has not been found satisfactory' contained in the order of termination of service attach a stigma to the servant and cast an aspersion against his capacity as also against his conduct. Provisions of Art. 311 (2) must be complied with. 1968 Serv LR 734 (737) (DB) (Punj).

(16) Article 311 of the Constitution speaks of removal from the service of the State Government or the Government of India and not from any post held by the Government servant in any department. The reversion of a Government servant holding an officiating post in one department to his substantive post in another department does not, therefore, amount to his removal from service within the meaning of Art. 311 of the Constitution. A 1970 Punj 315 (318): 1970 Lab IC 1009.

(17) "Dismissed or removed or reduced in rank" — Non-selection to post in selection grade is not removal or reduction in rank — Losing job on abolition of post is also not removal from service. A 1970 Delhi 1: 1970 Lab IC 31.

(18) Dismissal order — Non-communication of reasons for the same — Order not rendered automatically invalid thereby. (1972) 2 AP LJ 98.

25. Article 311 (2) applies only when there is punishment.— (1) An order which would not otherwise be an order of removal does not become such merely because it follows an enquiry against the Government servant. A 1964 All 278 (280) (DB). (A 1963 All 390. **Overruled.**) ** 1972 Serv LR 567 (Punj) ** 1969 Serv LR 160 (Punj).

(2) The opportunity to show cause provided for in Clause (2) of Art. 311 is required to be given only when the termination of service is resorted to as a punishment and not otherwise. **A 1958 SC 36 (47) ** A 1956 Bom 455 (458): ILR (1956) Bom 767 (DB) ** A 1962 SC 1711 (1715, 1716).** (A 1957 Punj 191, **Reversed** on another point.)

(3) Article 311 is concerned only with dismissal or removal or reduction in rank 'as and by way of punishment' and has nothing to do if they are brought about on other considerations or conditions. A 1960 Mys 255 (257).

(4) Mere terminatin of service will not necessarily amount to "dismissal" or "removal" unless it is by way of penalty. **A 1954 SC 369 (374) ** A 1958 SC 232 (238) ** A 1958 SC 36 (47) ** A 1957 SC 892 (895) ** A 1953 SC 250 (251, 252) ** A 1966 SC 1529 (1531)** ** A 1969 Tripura 10 (11): 1969 Lab IC 110 ** A 1958 Tripura 28 (33) ** (1956) 2 Lab LJ 347 (352) (DB) (Mad) ** A 1956 Orissa 113 (114) (DB).** (Action is taken by Government only on the grounds of irregularities of promotion. Article 311 does not apply.) ** 1965 Mad WN 271 (275). ** 1976 Lab IC 385 (Raj). (Rajasthan Service Rules (1951), Rule 23-A (1) — Termination of service of temporary employee under R. 23-A — It is termination simpliciter — No stigma attached — Art. 311 not attracted.) ** 1974 WLN 596 (Raj) (Order not visiting the petitioner with any stigma — Article 311 not attracted.) ** A 1969 Tripura 10 (11): 1969 Lab IC 110.

(5) Dismissal or removal from service — Order casts stigma only when it contains some adverse remarks as to character, ability to work or integrity. A 1971 All 271 (273): 1971 Lab IC 731.

(6) When order is punitive in nature it is not necessary to find if it resulted in penal consequences. A 1966 Pat 364 (368) (DB).

(7) Constable officiating temporarily as Assistant Sub-Inspector — Examination for Assisant Sub-Inspectors not passed by him — Reversion to Constable's post not as punishment — Protection under Article 311 not available to such Constable. 1969 Lab IC 496 (498) (Pat).

(8) When, according to the Service Rules or according to the contract of service, a Government servant is entitled to continue in service up to a particular time, the premature determination of his service before that time would, by itself, amount to a punishment (even though it may not purport to be such) and would, therefore, constitute 'dismissal' or 'removal' from service within the meaning of **Art. 311, Clause (2). A 1958 SC 36 (48, 49).**

(9) An order passed under Rule 244 (2) of Rajasthan Service Rules (1950) does not attract the provisions of Art. 311 (2) nor is the rule repugnant to the Art. 311 (2). 1961 Raj LW 298 (305) (DB).

(10) Order reverting A only to make room for B who belonged to Scheduled caste — Order not being punitive — Art. 311 not attracted. A 1965 Raj 109 (111) (DB).

(11) Retirement of civil servant after age of superannuation — Not a dismissal or removal. A 1958 Andh Pra 697 (704) (DB).

(12) Lambardar stopped from collecting land revenue by Revenue Minister — Order is not by way of punishment but only an administrative order. A 1965 J and K 102 (105).

(13) Panchayat Executive Officer transferred on a complaint by members of Panchayat without going into the merits of the complaint — Transfer is ultra vires and illegal as the transfer amounts to punishment. 1976 Lab IC 273 (275, 276) (Ker).

(14) Employee of Food Corporation of India — Transfer — Challenged — Transfer order tainted with mala fides and passed to by-pass disciplinary machinery and in order to avoid a fair opportunity being given to employee to explain alleged misconduct — Court can interfere. (1980) 1 Lab LJ 1 (5, 6) (DB) (Mad).

(15) Appointment of Branch Postmaster under Posts and Telegraphs Extra Departmental Agents (Conduct and Service) Rules, 1959 — Not a public servant entitled to protection under Art. 311. The fact that the Superintendent of Post Offices assigned a reason which is invalid does no render the order of removal in any way illegal or in-

Articles 310 & 311 — Note 25 (contd.)

valid. It is well settled that where services of a Government servant is liable to be terminated by a specified notice without assigning any reasons the existence of a reason for termination of the service does not convert the termination into an order of dismissal or removal. It follows that the order terminating the services of the petitioner is warranted by Rule 6, and cannot be questioned (1967) 1 An WR 228 (231).

(16) Temporary employment of applicant — Transfer order — Applicant refusing to abide by it and preferring to be discharged — One month's discharge notice — **Held** not by way of punishment. **A 1963 Pat 125** (126, 127) (DB).

(17) For termination of service of temporary railway servant under Rule 148 of Railway Establishment Code, not being by way of punishment does not amount to removal. A 1962 Raj 244 (246).

(18) Termination purporting to be under Rule 148 of Railway Establishment Code, in substance by way of punishment — Procedure prescribed by Art. 311 (2) not followeed —Order is void and of no legal effect. 1965 Mad WN 271.

(19) Temporary Government servant appointed to a post though not possessing requisite qualification — Servant then required to acquire certain qualification by a certain date — Removal from service as he could not acquire that qualification — This does not amount to casting any stigma — Nor does the impugned order visit petitioner with any penal consequences so as to attract operation of Art. 311 — He had no right to post and appointing authority could dispense with his services without assigning any reason. 1970 Lab IC 948 (948, 949) (Orissa).

(20) District Judge altering date of birth of a clerk working under him — High Court setting it aside — Does not amount to punishment — Prior notice to concerned person not necessary. 1978 Lab IC 853 (857) (DB) (All).

(21) Order terminating services — Motive behind order being employee's furnishing incorrect particulars as regards date of birth — Art. 311 applies. 1978 Lab IC (NOC) 18 (Andh Pra).

26. Termination of service, when amounts to punishment — Tests and illustrations.— (1) If the order is based on the authority of a service rule, it must ordinarily be taken that the termination of service was in exercise of the powers conferred by that service rule. If, on the other hand, the order states that the temporary servant was guilty of misconduct or insubordination or was incompetent, etc., and if his service was terminated on the strength of any such ground, it would be a matter of punishment which would bring the case within the ambit of Art. 311 (2). A 1960 J and K 97 (100).

(2) Services of temporary employee terminated without giving him chance of showing cause — Real motive behind termination that employee was not qualified — Employee is not entitled to any relief. A 1961 All 292 (293, 294).

(3) The question whether the particular order terminating services was by way of punishment or only in the exercise of right under the contract will have to be determined on the facts and the circumstances of each case. Where the petitioner who held an officiating post was discharged from service on the ground that his past services were reported to be not good and honest: **Held**, that the termination was by way of punishment and not in terms of contract of service and therefore the servant was entitled to the protection of Art. 311 (2). A 1958 Assam 181 (182) (DB) •• 1965 Mad WN 271 (273) •• ILR (1965) 2 Mad 24 (35) (DB) •• 1968 BLJR 815 (821) (DB).

(4) One test for determining whether the termination of service of a Government servant is by way of punishment is to ascertain whether the servant but for such termination has the right to hold the post. The other test may be whether he has been visited with the evil consequence such as the forfeiture of his pay or allowances and the loss of his seniority in his substantive rank or the stoppage or postponement of his future chances of promotion. If a person is compulsorily retired or his services are terminated under some rules, the termination does not bring about any evil consequence. If, however, a person has right to remain in the post and that right is curtailed by the exercise of the power under the contract, or under the conditions of service rules in one sense it does affect his right to remain in the post. But as such an action is taken in the exercise of the contractual right or in the exercise of the powers given under the conditions of service rules, it is not taken by way of punishment and thus it is not covered by Article 311. In such a case even though no enquiry is made, there is no violation of Article 311 as the termination does not come within Article 311 at all. **A 1963 Assam 94 (98, 100) (FB).** (Reversed on another point in A 1964 SC 600.) •• A 1962 SC 1711 (1715) •• A 1958 SC 36 (50) •• A 1958 SC 905 (908) •• A 1958 SC 232 (238) •• 1962 Ker LT 362 (365) (DB) •• (1967) 1 Lab LJ 718 (721) (SC) •• A 1958 Madh Pra 135 (144) (DB) •• 1977 Lab IC 1326 (1327) (J & K).

(5) Two tests for determining whether termination of service was by way of penalty or not are: (1) Whether there was a charge or imputation against the officer and (2) Whether there is loss of benefit already accrued. **A 1962 All** 328 (332) (FB) •• 1970 Lab IC 139 (147) (Bom). (Factors to be considered stated.) •• ILR (1957) 2 All 486 (494, 495).

(6) For applicability of Article 311 it is not necessary that there should be express words of stigma attributable to the conduct of Government servant in the impugned order of termination. There is no rigid principle that one has only to look to the order. The form of order is not conclusive of its true nature. The entirety of circumstances preceding or attendant on the impugned order must be examined and the overriding test will always be whether the misconduct is a mere motive or is the very foundation of the order. **A 1971 SC 1011 (1014, 1015) : 1971 Lab IC 724.** (A 1966 Pat 364, Affirmed.)

(7) The form of the order of termination of service is not conclusive on the question whether the order was in the nature of punishment. The surrounding circumstances in which the order was passed are to be considered for determining the real foundation of the order. (1973)

Articles 310 & 311 — Note 26 (contd.)
2 Serv LR 410 (All) ** A 1980 SC 1459 : 1980 Lab IC 747 (749) : (1980) 2 Serv LR 108 ** (1979) 1 Serv LR 465 (468) (Delhi) ** 1977 Lab IC 567 (All) ** 1976 Lab IC 1292 (All) ** 1976 Ker LT 268 (271, 272) ** 1975 Lab IC 1358 (1359) (All) ** 1974 All LJ 840 ** 1974 Raj LW 565 ** (1973) 2 Serv LR 90 (All).

(8) The consideration of the motive which impels the Government is of no consequence. The true test in each case is to find out what the basis of the order of the Government is. A 1964 Guj 145 (149, 150) (DB).

(9) Where a servant has a right to a post or to a rank either under terms of contract of employment, express or implied, or under rules governing conditions of service, termination of service of such a servant or his reduction to a lower post is by itself and prima facie a punishment, for it operates as a forfeiture of his right to hold that post or that rank and to get emoluments and other benefits attached thereto. A 1967 All 197 (202).

(10) Termination of service not amounting to removal — Motive is immaterial. A 1959 All 643 (648) ** 1968 All WR (HC) 834. (Termination of temporary service — Reasons not assigned — Motive irrelevant.) ** 1975 Lab IC 1358 (1359) (All).

(11) Where by an order the services of a temporary Government servant were terminated without assigning any cause, it is not dismissal by way of punishment but simple termination under the terms of the contract. Merely because at one time it was thought desirable to hold departmental enquiry against him, it cannot be said that the services were terminated by way of punishment. (1961) 2 Guj LR 268 (269) ** A 1961 All 284 (286). (Motive immaterial.)

(12) Holding departmental enquiry by itself does not prove that termination of service was accompanied by penal consequences. A 1960 Punj 126 (130) (DB) ** A 1964 All 278. (A 1963 All 390, Overruled.) ** (1960) 2 Lab LJ 884 (386) (DB) (Andh Pra).

(13) Even though a Government servant may have no right to continue in service, the termination of his service may amount to punishment so as to attract the application of Art. 311 if it involves the loss of benefit already accrued. A 1958 SC 36 (49).

(14) The termination of service will amount to punishment where it entails the loss of benefits already accrued. A 1958 SC 905 (908) ** A 1958 SC 232 (238) ** A 1958 SC 36 (49) ** 1963 All LJ 934 (942) (DB).

(15) Removal from service for overstaying leave — Prior opportunity of being heard must be given — Rule 14 (c) of Revised Service Rules (1933) cannot prevail over Article 311. 1970 Lab IC 248 (250) (Manipur).

(16) Termination of Government servant for overstaying leave — Order amounts to punishment for being absent without leave — Petitioner entitled to protection under Article 311 (2) before being punished — Order of termination passed by authority without complying with Art. 311 (2) is illegal. ILR (1974) Him Pra 926 ** 1970 Lab IC 601 (605) (J & K).

(17) Discharge of even a temporary Government servant for overstaying his leave is illegal even though provided by a service regulation. Discharge from service as punishment is removal and the protection of Art. 311 cannot be taken away from him by contending that under the Regulations the incumbent himself gives up the employment and the Government only does not allow the person to be reinstated. Termination of service under note to R. 6-A (b) without giving him an opportunity whatsoever to show cause is violative of Art. 311. 1976 Lab IC 352 (Andh Pra).

(18) Petitioner seeking extension of leave → Discharge from service for over-staying leave — Leave Rules not providing for such termination, but Service Regulations having such a provision — Held, petitioner employee was still entitled to be afforded opportunity to show cause against his discharge from service, which amounted to removal under Article 311, especially when he was sending leave applications on medical grounds. 1976 Lab IC 534 (537, 538) (Him Pra).

(19) Where the intention of an order of termination of service was to deprive the petitioner of his full salary during period of suspension and the benefits that accrued to him, termination was in effect by way of punishment — Procedure prescribed by Art. 311 (2) not followed — Order is illegal. A 1963 Mad 35 (36, 37).

(20) Temporary servant — Suspension on 26-1-1948 — Services automatically terminating on 31-3-1948 — Prosecution for bribery on 30-4-1948 — Conviction on 30-6-1949 — Order of dismissal passed on 23-7-1949 dismissing him with effect from date of suspension i. e., 26-1-48 — Effect of order held was that servant was deprived of his pay from 26-1-1948 to 31-3-1948. A 1953 All 470 (470) : 1953 Cri LJ 1052 (DB).

(21) Government servant appointed on purely temporary basis — His post was made permanent but he was not made permanent — Termination of service by notice after 5 years service had been put in — Termination held to be not by way of punishment — It was removal of temporary servant under contract of service. A 1970 SC 537 (539) : 1970 Lab IC 419. (A 1969 Assam 3 : 1969 Lab IC 6, Reversed.)

(22) Respondent, a railway servant put under suspension for 8 years — Thereafter respondent was informed that he could join duty — Immediately thereafter respondent served with order of termination of service — Emoluments during period of suspension not restored — Order held was of penal character and attracted Art. 311 (2). A 1964 Mad 243 (244, 245, 246) (DB).

(23) Servant having right to post — Termination of service is prima facie punishment — If it is under terms of contract or under rules of service, unless it is by way of penalty, Art. 126 (2) of J. and K. Constitution will not be attracted. A 1959 J & K 136 (137, 138) (DB).

(24) Termination of service resulting from change in age of superannuation → It is not removal within meaning of Art. 311. A 1965 SC 1567 (1569, 1570).

(25) Termination of temporary servant will not prima facie and per se amount to a punishment so as to attract provisions of Art. 311 (2). A 1960 J & K 97 (99) ** A 1960 Madh Pra 294 (296, 299) (DB) ** 1978 Serv LWR 274 (277) (Punj).

Articles 310 & 311 — Note 26 (contd.)

(26) Service for fixed period — Servant allowed to continue in service after such period — During such continuance servant accepting service in another State without permission — Services of servant terminated by order — Order held did not amount to removal and Art. 311 (2) did not apply. 1963 Raj LW 329 (332, 333).

(27) Punjab Educational Service (Provincialized Cadre) Class III, Rules (1961), Rule 6 — Services of a teacher, taken over by State and he continued to hold post beyond maximum period of probation prescribed under Rules — He must be taken to have continued in substantive capacity — Services terminated after giving one month's notice and stating that it was in accordance with terms of his employment — Held, order was illegal as it amounted to punishment and removal from service which was not permissible without proper enquiry — After period of probation he must be taken to have been confirmed. A 1966 Punj 468 (471) (DB).

(28) Although the mere dropping of the charges immediately followed with the termination of services of an employee would leave a stigma on the employee for which he was given no opportunity to show that it was not justified, the proceedings cannot on that account be regarded as punitive. 1965 Mad WN 271 (274).

(29) Where the authority choosing to exercise its power of dismissal holds a formal departmental enquiry and terminates the services of temporary servant as a result of the finding in that enquiry, prima facie the termination would amount to a dismissal of the temporary servant. **A 1964 SC 449 (453).**

(30) Servant of former Gwalior Government — Dismissal — Reinstatement by Madhya Bharat Government treating his past services as tacked on with all benefits and privileges accrued to him — Subsequent departmental enquiry against him for certain irregularities — Pending enquiry order rescinding his reinstatement passed and his services were treated as temporary — Held, that the order rescinding his reinstatement had the effect of removal from permanent service without any opportunity contemplated by Art. 311 (2) and therefore was invalid. A 1958 Madh Pra 135 (139) (DB).

(31) If the order of enquiring officer entailed penal consequences in addition to termination of service, it was obviously a case of dismissal. The same conclusion must be arrived at where order of discharge added a stigma e. g. that the employee had been found to be undesirable to be retained in Government service. A 1969 Cal 164 (166) : 1969 Lab IC 406.

(32) Refusal to pay subsistence allowance during period of suspension held did not indicate that termination of service was by way of punishment. **A 1962 SC 630 (632).**

(33) Petitioner appointed Honorary Magistrate under Sec. 14 (1), Cr. P. C. for two years — Magisterial powers withdrawn before time on grounds of petitioner's political activity — Petitioner is entitled to reasonable opportunity to show cause — Since withdrawal of Magisterial powers caused slur or imputation on petitioner's character — Order quashed though the period of two years tenure had expired during pendency of writ petition. (1961) 1 Cri LJ 657 (658) (Ker).

(34) Suspension of Government servant — Subsequent termination of his services after framing certain charges — No enquiry into charges made, nor servant given opportunity to show cause against termination — Held, order of termination was bad. 1966 All WR (HC) 624 (625).

(35) The burden is on petitioner to prove that his services had been terminated by way of penalty. A 1959 All 643 (648) °° **A 1964 SC 449 (452).**

(36) The line demarcating "removal" and "dismissal" on the one side and termination on the other is somewhat a thin line. 1962 Mys LJ (Supp) 487 (490).

(37) Termination of services of a permanent servant otherwise than on the ground of superannuation or compulsory retirement must per se amount to his removal within meaning of Article 311. On a fair construction, Rr. 148 (3) and 149 (3) of Railway Establishment Code (Vol. I) authorise Railway Administration to terminate services of all permanent servants to whom rules apply merely on giving notice for specified period or on payment of salary in lieu thereof and that clearly amounts to removal of servant within Article 311 and so Article 311 (2) must come into play. The Rules which do not require compliance with procedure prescribed by Art. 311 (2) must be struck down as invalid. **A 1964 SC 600 (610, 612, 617, 620, 626).** (A 1956 Pat 221 and A 1950 Raj 250 and A 1959 All 439 and A 1960 Cal 264 and A 1962 Mad 349, **Overruled;** Special Appeal No. 502 of 1958, D/- 15-12-1959 (All) and LPA No. 81 of 1961, D/- 6-4-1961 (Punj) and ILR (1960) 12 Assam 441 and A 1963 Assam 94 (FB), **Reversed.**)

(38) Railway servant declared ceasing to be in Government employ because of absence from service — Article applies. A 1967 Orissa 171 (172) (DB).

(39) Civil Service Regulations, Chap. XVII, Art. 422 — Break in service — Condonation of under Article 422 — Condonation is only for purposes of pension and not for all purposes. A 1968 Manipur 58 (60) : 1968 Lab IC 1065.

(40) Petitioner, a clerk in Sales Tax Department of the State of Mysore transferred to the Income-tax department of the Central Government without his concurrence and contrary to the conclusions reached by the conference of Chief Secretaries of various States consequent on the reorganisation of States — Petitioner made an application to the State Government for repatriation — His services terminated on the ground of indiscipline — Held that as his transfer of service was without his concurrence it was not effective and he had not become the servant of Central Government and hence his termination of service was ineffective. (1967) 10 Law Rep 169 (175).

(41) If on the face of the order no stigma on the employee is cast, the order is a piece of evidence to show that it has not been made by way of punishment. But then the order by itself is not conclusive. It is open to the employee to show by attending circumstances that really he has been punished by the impugned order without following the legal procedure. 1973 Lab IC 48 (50, 53, 54) (Pat).

(42) An order terminating the services of a Government servant in which the unsatisfactory nature of the work or misconduct of the Government servant enters merely as a motive for

Articles 310 & 311 — Note 26 (contd.)
the termination of his services is not by way of punishment in the eye of law and it is only where the order is wholly founded on the particular misconduct of the Government servant the order is to be deemed as an order by way of punishment which would attract the provisions of Article 311. 1974 Raj LW 565.

(43) Where the authority could terminate the services for any reason and no reason is mentioned in the order, it cannot be predicated that the order had an inherent stigma and the order cannot be said to be one for dismissal or removal in the nature of penalty or punishment. (1972) 2 Sim LJ 329 (Him Pra).

(44) Termination of employee's service on discontinuance or abolition of post — Employee can have no grievance, more so when the post he was holding was not a civil post. 1977 Lab IC (NOC) 130 (Punj).

(45) Termination of services of a clerk in office of D. F. O. under R. 5 (1) C. C. S. (Temp. Serv.) Rules during pendency of enquiry against him for failing to appear before Inquiry Officer — Amounted to an order of punishment — Article 311 (2) attracted. ILR (1978) Him Pra 206 : 1978 Lab IC (NOC) 142.

(46) Held, that in view of the fact that termination order was passed within a few hours of finding that the accused cashier was guilty of misappropriation, the termination was the result of that finding. Then no emoluments were paid to him for the period between suspension and the orders of termination. Principal left a stigma on the cashier. Hence, the order of termination amounted to punishment. A 1970 Mad 424 (424) : 1970 Lab IC 1330.

(47) If the innocuously worded order of termination or retirement simpliciter is passed because of bad record and general unsuitability of the employee, then the mere fact that some disciplinary enquiry on some specific charge also happened to be pending at the time cannot have the effect of invalidating the order. (1980) 1 Serv LR 329 (332) : (1980) 6 All LR 41.

(48) If a simple order of termination appears to be founded on misconduct then it would amount to punishment. 1977 Lab IC 99 (All).

(49) Termination of service — No stigma cast on servant — Termination not bad notwithstanding that misconduct, negligence or inefficiency is the motive or inducing factor in terminating the service — Article not applicable. 1971 Lab IC 1344 (1346) (All).

(50) Where the order of compulsory retirement was passed after obtaining report from the vigilance department against the Government servant which contained reports of misconduct involving moral turpitude against him, the order must be held to be an order of punishment. (1980) 1 Serv LR 601 (Punj).

(51) Mere rejection of employee's representations against termination order does not amount to stigma especially when Court is not acquainted with the contents of the representations. A 1971 Pat 283 (284) : 1971 Lab IC 1215.

(52) Criminal proceeding against officer — Termination of services because of pendency of criminal case casts a stigma and therefore violates Art. 311 (2). (1975) 77 Pun LR (D) 150.

(53) Order terminating services of a teacher stating that her services were not beneficial to the school — Held does not cast any adverse reflection, it is an order of termination simpliciter. 1977 SLWR 284 (Punj).

(54) Government servant — Removal on basis of adverse remarks, general bad reputation and inefficiency — Action, held was punishment — Mandatory provisions of Article 311 (2) should have been followed by giving him a charge-sheet and affording him opportunity of explaining the charges and holding an enquiry into the charges. 1969 Cur LJ 17 (Punj).

(55-56) Termination of service — Appeal — Rules not providing for personal hearing — Appellate authority is not bound to give the delinquent a personal hearing — There is no principle of natural justice which requires that a personal hearing should be given in such a matter — Full-fledged enquiry — Findings supported by reason — No need for punishing authority to reiterate findings and reasons given by Enquiry Officer when agreeing with them. A 1976 Punj 381 (386) (FB). (1975 Lab IC 986 (Punj), Overruled.)

(57) Termination of service — Teacher on expiry of vacation not allowed to join his service — Order stating "You are not allowed to join in any capacity ....." — Order is not one of termination of service. (1970) 74 Cal WN 325.

(58) Termination of service on ground of physical unfitness is not a penalty — It cannot therefore be impugned on ground that petitioner was not given opportunity of being heard against it. (1970) 74 Cal WN 966.

(59) Abolition of permanent post in flagrant violation of Service Rules resulting in discharge of permanent employee — Order of abolition of post amounting to termination of service of permanent employee — Article 311 attracted — Termination is illegal. 1970 Lab IC 1207 (1210) (DB) (J & K).

(60) Police Act (1861), S. 7 (d) — U. P. Police Regulations, Regns. 478, 478-A, 490 — Removal from office of special emoluments without affording any opportunity is void. 1975 Lab IC 31 (All).

(61) The termination of employment by a notice of discharge on account of unsatisfactory work has to be distinguished from a termination based on misconduct. To the latter the protection of Art. 311 (2) is attracted but to the former Art. 311 (2) is not applicable. 1979 All WC 289 (292, 293) : (1979) 2 Lab LN 1.

(62) Where a railway servant who was holding a post carrying higher pay-scale, was found medically unfit for such post, and was absorbed in another employment carrying lower pay-scale for which he was declared fit, he was neither punished nor any stigma was cast on his character so as to attract Article 311. A 1973 SC 1306 (1307) : 1973 Lab IC 877.

(63) Government Servants (Village Level Workers and Gram Sevikas) made permanent and holding permanent posts — A. P. Government abolishing the said posts without prior notice by G. O. Ms. No. 366, D/- 27-3-1965 and No. 411, D/- 1-4-1965 — Option given either to join non-Government Service or to get removed from service — Termination by the G. Os. amounted to removal from service, attracting Art. 311 (2). ILR (1972) Andh Pra 901 (DB).

Articles 310 & 311 — Note 26 (contd.)

(64) Postal packer convicted under S. 420, I. P. C. but released on probation — Postal authorities, without considering the conduct of concerned party and the circumstances of the case dismissing him from service because of mere conviction — Order of dismissal held illegal. 1974 SLWR 607 (DB) (Punj).

(65) If the termination of service is in the course of administrative routine, it would be a simple termination. On the other hand, if some incident arising otherwise than in the course of administrative routine was the cause of the termination, then such an incident should have formed a charge against the employee who should have had the opportunity of rebutting the same. If, without giving such opportunity, the Government terminates the service, then the charge would be a foundation of the termination which would then amount to punishment. ILR (1975) 1 Delhi 284 (FB).

(66) Unauthorised absence from duty treated as leave with loss of pay is not punishment. 1976 Lab IC 1047 (1049) (DB) (Orissa).

(67) On facts termination of petitioner's service held to be on the ground that he obtained appointment on forged letter — Termination held to be "punishment". 1974 All Serv Rep 240 (Punj).

(68) Order terminating services passed as a result of finding of guilt of theft by Government servant amounts to an order of dismissal. (1973) 1 Serv LR 766 (All).

(69) Simple termination of the services of a Government servant holding a permanent post (of Munsif) though temporarily, for the last seventeen years, without any enquiry against him is violative of Art. 311 (2) and as such is illegal. A 1973 SC 1133 (1134).

(70) Removal of lecturer of Government aided private college in contravention of Ss. 3 and 4 of Punjab Affiliated Colleges (Security of Service of Employees) Act (1974) — Absence of penal clause for such contravention in the Act — Penalty cannot be imposed in the garb of acting for removal of difficulty in applying provisions of the Act, by invoking Sec. 10 of the Act. 1979 Lab IC 461 (467) : (1979) 1 Serv LR 166 (Punj).

(71) Civil Service — Termination of Post → Decision of Government if taken in good faith cannot be altered by High Court — Abolition of post on economical grounds, held was valid. A 1976 SC 1199 ; 1976 Lab IC 849. (1975 SLWR 95 (Punj), Reversed.)

(72) District Judge altering date of birth of a clerk working under him → High Court setting it aside — Does not amount to punishment. 1978 All LJ 896 : 1978 Lab IC 853 : (1978) 4 All LR 544.

(73) Removal of member of Electricity Board under Section 10 of Electricity (Supply) Act (1948) → Such removal should be construed in the same sense as in Art. 311 viz. termination of service by way of penalty. 1977 Lab IC 196 (198) (DB) (Madh Pra).

(74) Where a railway employee was removed without inquiry for accepting illegal gratification and giving free lift to passengers in train, the removal was not justified. No doubt the corruption should be rooted out quickly and cases should be finalised quickly. But these are certainly no considerations to do away with the protection provided in Disciplinary Rules in terms of Constitutional Protection in Art. 311 (2). 1977 Lab IC 1158 (1161) (DB) (Orissa).

(75) Temporary employee → Service terminated with immediate effect → Termination not a punishment. (1977) 3 All LR 606 : 1978 Lab IC (NOC) 2 •• (1977) 2 Serv LR 194 : 1977 Lab IC (NOC) 89 (Him Pra).

(76) Simple termination of services of temporary Government servant mainly on ground of unsuitability, held not imposing punishment of dismissal. 1974 Lab IC 1129 (1133) (All) •• 1975 Lab IC 1090 (1093) (All).

(77) Person temporarily taken in a newly constituted service → Termination on ground that he was not found suitable for absorption in new service casts no stigma. 1972 All LJ 607.

(78) Termination of service of temporary servants — Complaints against employee's work and conduct → Termination held did not amount to punishment. 1977 Lab IC 567 (All).

(79) Order of termination of temporary employee preceded by complaint — Complaint furnishing only motive and not forming basis of impugned order — Order passed on overall assessment of work and conduct of delinquent → Held order was not by way of punishment. 1977 Lab IC 1292 (All).

(80) Where an inquiry has culminated in an order of termination of a temporary employee and punishment is the foundation of the order, the order would be void in the absence of an opportunity of hearing to the employee. Not only the order but all circumstances are to be considered by the Court. 1977 Lab IC 1222 (Andh Pra).

(81) Even though the real intent of the authorities concerned might have been to get rid of a temporary Government servant on account of his conduct yet if the order terminating his services was made in exercise of the right flowing from a contract or the service rules, Article 311 will not be attracted. 1975 Lab IC 718 (720, 722) (All).

(82) The termination of services after a full scale departmental enquiry is by way of punishment. It cannot, however, be said that unless and until there is a full scale departmental enquiry envisaged by Article 311 no termination of services could be by way of punishment. 1977 Lab IC 116 (Andh Pra).

(83) Termination of temporary service → Earlier disciplinary action does not make subsequent termination a punishment, without anything more. 1975 Lab IC 1041 (1043) (Andh Pra).

(84) If an order of dismissal of a temporary employee contains a ground which attaches stigma or where from circumstances it appears that the dismissal was by way of punishment Article 311 (2) is attracted, and he cannot be dismissed without an enquiry. 1974 Lab IC 1071 (1072, 1073) (J & K).

(85) Where the termination order does not ex-facie show any words indicating or casting stigma on the temporary employee or any words

Articles 310 & 311 — Note 26 (contd.)
by which his future career would be visited with penal consequences, it does not cast any stigma. Hence the order is not by way of punishment. (1977) 2 Serv LR 725 (731, 732) (Guj).

(86) Temporary employee — Termination of services with one month's salary in lieu of notice — Order neither casting any aspersion on employee not actuated by ulterior motives — Order is valid. (1970) 1 Mys LJ 528.

(87) Termination of a temporary servant with stigma attaching to it amounts to punishment. Such a termination of service must accord with Article 311, if it is a case of Government servant and in other cases it must accord with the rules of natural justice by drawing regular charges. 1976 Lab IC 1324 (1328) (DB) (Pat).

(88) Where the circumstances at the time of passing termination order reveal that the dominant factor for termination was the failure of the temporary government servant to join duties on transfer, the termination was by way of punishment. Hence compliance with Article 311 (2) was necessary. (1971) 2 Andh WR 183.

(89) Termination of temporary services without assigning any reason though within powers of State Government, it cannot do it in an arbitrary manner so as to cast stigma on character or conduct of the temporary employee. 1975 BLJR 426.

(90) Employees though overage temporarily appointed through mistake — Mistake later rectified by terminating their services — Termination neither casting stigma nor in the nature of punishment — Held, Article 311 (2) did not apply and termination orders were valid. (1974) 2 Serv LR 668 (Delhi).

(91) Social Welfare Officer calling for explanations from temporary clerk for serious allegations — Officer making recommendation to Director for terminating clerk's services and lodging complaint of theft against clerk with police — During criminal investigation Director terminating services of clerk — Order held was one of punishment. 1975 Lab IC 1358 (1358 to 1360) (All).

(92) The fact that an enquiry is made into a complaint does not mean that, if the services of a temporary Government servant are terminated after a report is received, any punishment is inflicted entitling the Government servant to reasonable opportunity to show cause against the termination within Article 311 (2). (1969) 2 SCA 124 : A 1969 NSC 100.

(93) Temporary teacher — Order of termination of service on the ground that he was not a suitable person to be continued in service — Though misconduct of the teacher was a motive for termination, order as passed was not by way of punishment within Article 311. ILR (1973) Him Pra 371.

(94) Regulations framed by Punjab and Haryana State Electricity Board have got a statutory force. Under Regulation 9 of Punjab State Electricity Board Employees (Punishment and Appeal) Regulations, when an employee's services are terminated on the ground of his not being found fit for Government service it amounts to stigma and the employee cannot be dismissed from service without giving an opportunity to the delinquent to explain his case. (1980) 1 Serv LR 301 (302) (Punj).

(95) Services of temporary Government servants can be terminated in two ways : (i) on subjective assessment of his work and (ii) dismissal or removal by way of penalty. Only the latter action attracts Article 311 (2).

It is in absolute discretion of Government to adopt one of the above two ways. Government servant has no right to ask for departmental enquiry. Therefore, even preliminary enquiry into bad confidential reports when it is without any stigma will not attract Article 311 (2). A 1971 Delhi 186 (189) : 1971 Lab IC 842.

(96) Where the petitioner's services were terminated by notice for the prescribed period and there was no evidence to show that the services were terminated on account of any misconduct or any inefficiency, the order could not be held to have been passed by way of punishment or intended to cast any stigma on the petitioner and Article 311 was not attracted to the case. ILR (1974) Andh Pra 818.

(97) H. P. Panchayat Department Class III Service (Recruitment and Promotion and Conditions of Service) Rules (1962) — Person appointed on temporary basis prior to promulgation of certain State Rules and acquiring right to the post under the Rules on working on the permanent post for more than 3 years — Removal from service in contravention of Art. 311 (2) is void. 1974 Serv LJ 187 (Him Pra).

(98) Termination of service of temporary Andhra Pradesh Government servant as per service Regulation for absence when non-entitled to leave — Opportunity as required under Article 311 not given — Termination amounts to punishment — Even temporary servant is entitled to protection of the Article. 1976 Lab IC 352 (Andh Pra).

(99) Central Service (Temporary Service) Rules (1965), Rule 5 (1), Proviso — Gives additional right to Government to terminate service forthwith on immediate payment of all dues for one month in lieu of notice — Non-payment or non-tender of dues — Effect — Order of termination of service is bad and servant is deemed to continue in service. ILR (1974) Him Pra 1051.

(100) Where there was an open declaration by the Railways' Minister and notices by the Administration that they have decided to terminate the services of casual labourers resorting to R. 149 of the Railway Establishment Code if they failed to report to duty by specified date and on their (Labourers') absence the impugned orders terminating their services were made and in the counter the Railway Administration conteded that the labourers were persons not desirable to continue in service in the interests of the life of the community, held that these facts attendant on the orders clearly established that the termination of services was penal even though on the face of the order there was no mention whatever of their conduct. Provisions of Article 311 were therefore attracted and non-compliance thereof rendered the orders invalid. 1976 Lab IC 115 (Andh Pra).

(101) Probationer — Petitioner, Professor of Agricultural Botany in University — Termination of service during probation by resolution of Executive Council based on report of Vice-Chancellor containing serious allegations of misconduct amounting to misappropriation of public funds and property — No inquiry into such allegations held before order was passed — Tennination is not a termination simpliciter but

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by way of punishment — Order of termination being violative of Article 311 (2) quashed. 1976 Lab IC 176 (All).

(102) Merely because prior to simple termination of the services of a temporary Government servant, he was served with a notice pointing out that he was not discharging his duties properly and that he must improve his work, it could not be said that the simple order of termination of service was converted into one of dismissal so as to attract Art. 311. 1975 Lab IC 687 (690) (All).

(103) Termination of temporary employee — Order describing him as at present under 'suspension' carries stigma. A 1970 Assam 98 : 1970 Lab IC 1103.

(104) Temporary Government servant suspended pending criminal trial — After acquittal suspension allowed to be continued and finally services terminated under Rule 5, Civil and Defence Services (Temporary Service) Rules, 1949 — Order must be held to be a mere cloak — Article 311 (2) was attracted as termination amounted to punishment. 1971 Lab IC 1445 (1446, 1447) (All).

(105) Government Employee — Appointment temporary — No selection by Public Service Commission — Other so selected persons available for appointment — Temporary employees not having a right to the post — Their termination with a view to appoint selected persons not illegal. 1975 Lab IC 1000 (1000, 1001) (All).

(106) Temporary Government employee charged of embezzlement — Departmental enquiry — Before conclusion of enquiry employee reinstated and his services terminated — Termination held was by way of punishment — As no opportunity under Article 311 (2) was given termination order was void. 1975 Lab IC 1094 (1094, 1095) (All).

(107) Termination of services of temporary employee — Steady progress of employee in his service career showing that authorities were satisfied with his qualification — Termination held to be by way of punishment for misbehaviour. A 1977 Andh Pra 4 (7) (DB).

(108) Simple termination of probationer or temporary servant — Servant can show by reference to official records that termination is by way of punishment. A 1980 SC 42 : 1979 Lab IC 1389 : (1979) 2 Serv LR 527.

(109) Temporary Government servant — Termination of service for failing to pass departmental test — No intimation given to the servant regarding departmental test — Termination is by way of punishment — Requirements of Article 311 (2) must be complied with. 1976 Lab IC 97 (DB) (Orissa).

(110) Temporary Govt. servant charged with misconduct and explanation called on 2-3-1970 — Services terminated on 3-3-1970 — No opportunity to explain position given — Termination order held was by way of punishment for misconduct and must be quashed. 1976 Lab IC 1292 (All).

27. Termination of service of temporary servants.— (1) Both permanent and temporary members are within the protection of Cl. (2) of Article 311. In the case of a temporary servant a mere termination of service per se does not amount to punishment. When a temporary service is terminated in pursuance of the terms of the contract or the rules governing it the termination is not a punishment. On the other hand, if the termination is founded upon misconduct, negligence, inefficiency or other disqualification attributed to the servant, it is a punishment attracting the protection afforded by Art. 311. A 1960 Madh Pra 294 (296 to 299) (DB) ** A 1975 SC 1096 (1097) : 1975 Lab IC 666 ** 1978 Lab IC (NOC) 3 (All) ** 1976 Lab IC 1292 (All) ** 1975 Lab IC 116 (118, 120) (Gauhati) ** ILR (1969) 2 Cal 199. (He is not entitled to protection.)

(2) Even a temporary employee has a right to hold the post and his temporary employment can only be brought to an end in accordance with law and not otherwise. (1978) 2 Serv LR 598 (600, 601) (Raj).

(3) A temporary servant has no lien over the post so long as it exists. It is also immaterial that certain civil servants junior to him are still in service; their retention in service will not by itself make termination of his services 'removal' within the meaning of Article 311. A 1964 All 278 (280, 284) (DB). (A 1963 All 890, Overruled.)

(3-A) If the services of a temporary Government servant are terminated arbitrarily, and not on the ground of his unsuitability, unsatisfactory conduct or the like which would put him in a class apart from his juniors in the same service, a question of unfair discrimination may arise, notwithstanding the fact that in terminating his service, the appointing authority was purporting to act in accordance with the terms of the employment. A 1979 SC 429 (433, 434).

(3-B) A temporary employee does not have any right to hold the post and therefore his services can be terminated without following the provisions of Art. 311 (2) if the order does not attach any stigma on the character of the Government servant. 1975 Lab IC 208 (212) (Gauhati) ** A 1973 Him Pra 14 (18) : 1973 Lab IC 447 ** 1971 Lab IC 1351 (All). (Services of temporary Government servant terminated as no longer required, under terms of service conditions — Services of others junior to him retained — Order being a simple one of termination does not attract either Art. 311 or 16.) ** A 1971 All 355 (356) : 1971 Lab IC 974 ** A 1970 Mys 302 : 1970 Lab IC 1625. (Temporary Government servant — Notice of termination of service under Rule 5 (1) (a), Central Services (Temporary Services) Rules (1965) without any adverse remark — Servants junior to him retained in service — Notice challenged on grounds that it is only a cloak for actual punishment of dismissal without giving opportunity — Held such a notice could not be regarded as amounting to any type of punishment or even a stigma. A 1967 Mys 223, Disting.)

(4) The power of removal of even a temporary employee is not available for accommodating another, especially when the other has no lien on the post. (1972) 39 Cut LT 1.

(5) Central Civil Services (Temporary Service) Rules (1965), Rule 5 (1) — Temporary civil servant — Termination of services under R. 5 (1) — Order not indicating any reason for termination would not for that reason, be bad. A 1979 Ker 31 (34) : 1979 Lab IC 265 (FB). (O. P. No. 5434 of 1974 (Ker), Reversed.)

(6) Though temporary Government servants appointed on contractual basis may be discharged from service in accordance with the terms of the contract, nevertheless, if such an order of discharge is passed by way of punish-

Articles 310 & 311 — Note 27 (contd.)

ment the provisions of Article 311 should be complied with.

An order discharging a temporary government servant for "unreliability, wilful absence from duty and disobedience of orders" after framing charges alleging specific instances of misconduct and asking him to show cause is without doubt a punishment and not merely an exercise of contractual right by the Government. (1959) 1 Orissa JD 87 (DB) °° (1959) 1 Lab LJ 245 (248) (Andh Pra) °° 1973 Lab IC 1577 (1581) (Raj) °° 1972 Cur LJ 7 (9) (DB) (Punj) °° A 1971 All 346 (348) : 1971 Lab IC 964 °° 1975 Lab IC 856 (857, 858).

(6-A) Where the termination of service of a temporary Government servant is founded on the disqualification that he could not pass the departmental test though in fact he was not called upon by the competent authority to appear in such examination, the termination on the basis of such imaginary disqualification amounts to a punishment. In such a case the requirements of Art. 311 (2) must be complied with. 1976 Lab IC 597 (598) (Orissa) °° 1970 Lab IC 469 (470) (Orissa). (Held, order of termination of service of petitioner (temporary Government servant working in Balasore-Mayurbhanj Settlement) directing that he is not to be re-employed in any other settlement amounted to punishment as it affected his future chance of employment.)

(7) When a temporary clerk with about 13 years of service did not pass the departmental examination though he was given opportunity therefor and on being found negligent in duties despite warning is removed from service, the removal is not punitive, being an act of a prudent master in normal discharge of duty. The employee cannot be deemed to have obtained permanency in service just because he was allowed to appear for departmental examination and allowed increment during his 13 years of service. 1976 Lab IC 1029 (1030, 1031) (DB) (Orissa).

(7-A) Termination of services of temporary servant — Paid out of Civil defence estimates — Though R. 5 of C. S. Rules was quoted in the order of termination, it was merely a colourable exercise of power — In substance order was by way of punishment — Whether the order be under Art. 311 or other provision like R. 14 of the Civil Services (C. C. & A.) Rules, employee must be given an opportunity to meet the charges levelled against him. 1977 Lab IC 116 (119) (Andh Pra).

(8) Termination of temporary public servant by way of punishment — Article 14 or 16 are not attracted. 1980 Lab IC (NOC) 67 (Delhi).

(9) Termination of service on ground that his services were no longer required and not on ground of unsuitability — Mandatory injunction directing re-instatement cannot be ordered — Only remedy is to claim damages for the termination of services contrary to terms of contract. (1972) 85 Mad LW 271.

(10) Appropriate authority possesses two powers to terminate the services of a temporary public servant. It can either discharge him purporting to exercise its power under the terms of contract or the relevant rule, and in that case the provisions of Article 311 will not be applicable. The authority can also act under its power to dismiss a temporary servant and make an order of dismissal in which case the provisions of Article 311 will apply. (1967) 1 Lab LJ 718 (721) (SC) °° A 1962 SC 630 (632) °° A 1962 Manipur 52 (54, 55) °° A 1958 Tripura 38 (40) °° 1976 Lab IC 385 (Raj) °° 1975 Lab IC 1021 (1022) (All) °° 1973 Serv LJ 273 (Delhi).

(11) Where the adverse remarks passed against an employee do not show that any punishment was being inflicted on him but at the most show that the appointing authority might have been prompted to discharge him from service because of his unsatisfactory work, it cannot be said that the order of discharge is issued by way of punishment. (1973) 1 Serv LR 285 (Punj).

(12) Where a temporary appointment is made for a definite period the termination of service before that period will prima facie amount to punishment so as to attract the application of Art. 311, Cl. (2). A 1958 SC 36 (48) °° A 1970 Delhi 132 (142) : 1970 Lab IC 814.

(13) Order conveying to temporary servant that his service would not be extended beyond certain date — Order held casts no stigma and Court cannot look into background to find out some kind of stigma. 1977 SLJ 677 (680) : (1977) 1 Cal LJ 554.

(14) Termination of service — Appointment order disclosing that appointments were purely temporary and are liable to termination at any time without notice and that in no case appointees would be retained in service beyond three months — Retention in service after 3 months — Held, that retention did not change character of appointments so as to have notice before termination of service — Petitioners acquired no right under appointments except that of emoluments and question of natural justice did not arise. 1970 Ker LR 173.

(15) In the case of temporary Government servants, their services can generally be terminated at any time by notice by the Government and it will not be necessary for the Government to bring any charges against the Government servant or have an enquiry held into them. A 1958 SC 36 (48) °° A 1956 Bom 455 (458) (DB) °° A 1958 Tripura 38 (39) °° 1974 Lab IC 819 (821) (All).

[See also 1977 Lab IC 371 (Cal). (When Government dispenses with the services of a temporary servant, it is not for the Government to justify the order by referring to any specific rule but it is for the discharged employee to point out that there has been violation and contravention of the provisions of an Act, rule or regulation. In the absence of any specific rule provided for the purpose of terminating a temporary primary teacher of a District School Board the Government under the common law can terminate the services of the teacher, but it must give at least one month's notice or pay one month's salary in lieu of notice. Apart from that, there is no restriction on the right of the employer to dispense with the service of a temporary employee.)]

(16) Resignation tendered by a temporary Government servant by giving reasonable notice has the effect of terminating his employment with the Government. Therefore Government cannot institute departmental proceedings against him or dismiss him from service after his resignation. (1971) 1 Lab LJ 173 (Guj).

(17) Termination of provisional appointment or reverting him to his substantive office in lower rank from an office of higher rank in which he was officiating, does not per se amount to punishment or penalty. In the case of pro-

Articles 310 & 311 — Note 27 (contd.)
visional or officiating appointments, something more than mere termination of service is necessary to bring the case within Article 311. The office of the plaintiff being provisional, the termination of service on the ground of unsuitability cannot be considered to be a punishment. A 1958 Cal 551 (558, 559).

(18) Appointment of a substitute in the vacancy caused on account of removal of delinquent Government servant as a result of conviction by Criminal Court is only provisional pending his appeal against order of conviction. The appointee could not derive any absolute right to the post, his appointment being a contingent one is liable to be forfeited in the event of the conviction of the Government servant being set aside in appeal or revision. (1978) 1 Serv LR 706 (709) (Ker).

(19) Persons in temporary service — Word "ad hoc employee" — Meaning — Termination of services of ad hoc employee — Article 311, not attracted. **A 1979 Punj 149 : 1979 Lab IC 575 (579) (FB). (C. W. P. No. 2268 of 1977, D/- 9-12-1977 (Punj), Overruled.)**

(20) U. P. Government Notification No. 230/IIB-1953 — Rule regulating the termination of services of temporary Government servants — Rule, held, not ultra vires Article 311 (2). 1970 Lab IC 131 (136) (All) (DB).

(21) Punjab Civil Services Rules, Vol. II, R. 5.9 — Temporary employee — Termination of his service by giving one month's notice does not contravene Art. 311 (2) of the Constitution. (1973) 1 Serv LR 285 (Punj).

(22) Temporary Government servant absenting himself from duty by overstaying — Authorities terminating his services as he was deemed to have resigned under Rule 13 (4) of Orissa Leave Rules (1966) — Removal is not per se punishment — Nor it is invalid for absence of inquiry under Article 311 (2) of the Constitution — Rule 13 (4) held not discriminatory. 1974 Serv LJ 637 (Orissa).

(23) Service whether permanent or temporary — Question of fact. A 1961 All 284 (285).

(24) Intention of Government in terminating service will decide character of order. A 1965 Raj 147 (148) (DB).

(25) An order which is ex facie one of termination of employment of a temporary employee cannot be assumed to have been intended as one of dismissal. The onus to prove that such was the intention lies on the employee concerned. A 1963 SC 601 (604).

(26) Even in the case of a temporary Government servant, if the order terminating his service puts an indelible stigma affecting his future career, or casts slur on his capacity or character, he will be entitled to the protection of Article 311 (2). If, however, his services are simply terminated and no penal consequences are involved, he cannot claim such protection. ILR (1959) Andh Pra 185 •• 1977 Lab IC 1836 (1839) (DB) (Raj) •• (1970) 36 Cut LT 559 •• 1970 BLJR 415.

[See also (1979) 47 Cut LT 401 : 1979 Lab IC (NOC) 57 (DB). (Termination of temporary service — Order casting stigma — Disciplinary proceeding necessary.) •• 1977 Lab IC 400 (Kant). (Temporary Service in Home Guard Department — District Commander not satisfied with conduct of employee and recommending his transfer — Commandant-General deciding to terminate his services under Rule 5 of Karnataka State Civil Services (Temporary Services) Rules (1967) — Article 311 (2) held not attracted as termination was not by way of punishment.) •• A 1970 Assam 131 (136) : 1970 Lab IC 1573. (Temporary servant — Railway servant having no lien on post — Termination of service in exercise of power under Rule 149, Railway Establishment Code — Nothing to show that any slur or stigma was cast on petitioner — Order is valid and not open to any objection.)]

(27) Where the services of a temporary teacher in the Himachal Pradesh Administration, were terminated by giving one month's notice, following the complaint made by the Gram Panchayat, about his misconduct and the order of termination was passed on a Sunday, it is clear that the order is definitely based on the complaint and is mala fide although the order of termination was couched in a plain language containing no stigma. The services were not terminated in the ordinary administrative manner. The order of termination amounted to removal from service within the meaning of Article 311 (2) of the Constitution and in the absence of any inquiry or notice being given to the petitioner, the order is not sustainable. 1972 Lab IC 1554 (1558, 1559) (Him Pra).

(28) Temporary Civil Servant — Termination of service simpliciter — Service record for 11 years was unblemished — Order based on a report and finding about his character (viz. being an active worker of R. S. S.) — **Held** order was by way of punishment attracting Article 311 (2) — Even when the order of termination does not attach any stigma to the Civil servant concerned the Court has power to look into the entirety of circumstances and if there is evidence that the order of termination was in the nature of punishment, Art. 311 will be attracted. 1974 Lab IC 280 (281, 283) (Madh Pra) •• (1974) 2 Serv LR 602 (Delhi).

[See however (1973) 1 Mad LJ 9. (If the order challenged does not on the face of it cast a stigma or imputation on the servant concerned the Court cannot look into the antecedents or the background of the order so as to find out whether the order was motivated by mala fides or was intended as a punishment for misconduct or disobedience.)]

(29) Whatever may be the motive behind the termination of services of a temporary Government servant, if the Government proceeds to terminate the services without casting any aspersions on his honesty and competence, then Article 311 is not attracted. Conversely, if, while terminating the services, the Government casts aspersions on the honesty or competence or integrity of the servant concerned, then that does cast a stigma on his competence, affecting his future carreer and, therefore, would amount to punishment and would make Article 311 applicable. A 1964 Punj 354 (355) •• 1970 Lab IC 361 (364) (Goa).

(30) Temporary appointment — Termination of service on one month's notice was valid. There is no stigma attached to the petitioner nor does it visit him with any civil consequences. Order does not amount to a punishment. So as to attract Article 311. (1959) 25 Cut LT 167 (169) (DB).

[See also A 1970 Tripura 66 (68, 69) : 1970 Lab IC 1326. (Order terminating services of temporary servant in terms of contract of em-

Articles 310 & 311 — Note 27 (contd.)
ployment after giving one month's notice — Order is not dismissal or removal even though at the time case under Section 420 Penal Code was in contemplation against employee — Article 311 is not attracted.)]

(31) Services of temporary Government servants can be terminated on giving one month's notice, in the exigencies of service or on their being found unsuitable for the post. Unsuitability depends upon the past record and not how the old employees stand with reference to new candidates for the similar post. 1975 Lab IC 1099 (1100, 1101) (All).

(32) Temporary servant — Termination of service on one month's notice according to contract or rules — Does not attract Article 311 merely because inquiry into misconduct was instituted, particularly when the alleged misconduct was not the basis of termination — Held that it was an order of discharge simpliciter. 1974 Lab IC 1345 (1350) (Raj).

(33) Order terminating the services of temporary employee on payment of one month's salary — No stigma to him or visit him with penal consequences. Article 311 is not attracted — High Court will not go behind the order to find out its background. A 1971 All 354 (355) : 1971 Lab IC 966.

(33-A) Temporary servant — Service could be terminated either after giving one month's notice or one month's salary in lieu of notice — It does not mean that one month's salary must be paid along with the order of termination. (1980) 1 Serv LR 779 (783) (DB) (Punj).

(34) Where the services of a temporary servant are terminated under the rules of employment by an innocuous order which does not cast any stigma on the face of it and the order is challenged as being violative of Article 311, the entirety of circumstances preceding or attendant on the impugned order must be examined and the overriding test for the applicability of Article 311 will always be whether the alleged misconduct is a mere motive or is the very foundation of the order. 1975 Raj LW 179.

(35) Suspension of temporary employee on account of his arrest in a criminal case which was later on dropped — Notice of termination of services by paying one month's full salary and allowances in lieu of notice held could not be construed, in circumstances of case, as one by way of punishment — It was implicit in the notice that the order of suspension must be deemed to have been revoked before issue of notice. A 1970 Delhi 185 (187) : 1970 Lab IC 1264.

(36) Termination of temporary service by one month's notice — No provision of such termination in the terms of contract or the relevant rule of service — Employee suffering loss of pay and allowances and indelible stigma affecting his future career as a result of termination — Termination is penal order of termination without compliance with Article 311 is liable to be quashed. 1968 Lab IC 687 (690) (All).

[See however 1978 Lab IC (NOC) 2 (All). (Temporary employee — Service terminated with immediate effect — One month's salary not paid — Termination of service not illegal. 1975 ALR 429 held overruled in Spl. Appeal No. 269 of 1975. D/- 15-10-1975 (All).) °° 1975 Lab IC 1000 (1000) (All). (Government Employee — Appointment temporary — One month's notice or offer of one month's pay before termination not a condition of service — Termination order without one month's notice or offer of one month's pay — Not invalid.) °° 1974 Raj LW 565. (Government servant temporary — Services liable to be terminated without notice — Services terminated with immediate effect as no longer required — Order is wholly innocuous — Article 311 is not attracted even if order was passed on account of misconduct.)]

(37) Petitioner had been appointed, temporarily to a permanent vacancy. According to the letter of appointment, her services could be terminated by giving her one month's notice. When no such notice was issued and she was told that she would be paid one month's salary in lieu thereof, but the same was not paid along with the letter of termination of service, held that the termination of petitioner's service was not in accordance with the terms of her appointment and, therefore, cannot be sustained. 1973 Cur LJ 859 (Punj).

(38) Termination of service of a re-employed temporary Civil Servant with immediate effect — Petitioner under term of employment entitled to one month's notice or one month's pay in lieu thereof — Termination is illegal. 1974 Cur LJ 632 (Punj).

(39) Termination of service — Service purely temporary liable to termination without notice — Temporary servants are not "surplus" when terminated — Notification requiring absorption of surplus staff terminated, in future vacancies not applicable to servants recruited on temporary basis. 1977 SLJ 710 (711) (Raj).

(40) Termination of service of temporary employee on expiry of period of engagement — Opportunity to show cause or giving of reasons not necessary — There is no violation of principles of natural justice in the case. ILR (1955) Hyd 711 (714) (DB) °° 1966 MPLJ 351 (353) (DB).

(41) Temporary or officiating appointment — Such appointment is liable to be terminated without notice — Order of termination or reversion is not punishment — Order is not assailable as offending Article 311 (2). A 1969 Madh Pra 60 (61) (DB).

(42) Incumbent petitioner holding temporary post continuously for five years. Termination without any cause being shown against petitioner — On facts, held, that as the petitioner ought to be treated as quasi-permanent employee termination amounted to removal of service attracting Article 311. A 1969 Assam 3 (6, 7) : 1969 Lab IC 6 (DB).

(43) Temporary Government servant — Appointment on a temporary basis — Post made permanent — Incumbent however not made permanent — Held, that notwithstanding the fact that incumbent had put in five years' service the termination by a notice is not by way of punishment and Art. 311 is not attracted. A 1970 SC 537 (539) : 1970 Lab IC 419. (A 1969 Assam 3, Reversed.)

(44) Where a government employee against whom an order of simple termination is passed was holding one of the many temporary posts and the creation and sanction of the post and his appointment thereto were not conterminous, it could not be claimed that he has been employed on yearly basis. (1973) 1 Serv LR 285 (Punj).

(45) A clause in the termination order of a temporary employee barring his future employ-

Articles 310 & 311 — Note 27 (contd.)
ment is a penal clause and as such the termination amounts to dismissal within the meaning of Art. 311. A 1967 Punj 415 (415) (DB) ** (1973) 1 Serv LR 1204 (All).

(46) Termination of service of temporary employee in terms of Rule 5 of Central Civil Services (Temporary Service) Rules (1949) — Petitioner challenging the order merely on the ground that he was entitled to be deemed as 'quasi-permanent' and hence the Rule did not apply — No allegation in the petition that the order though purporting to be one for termination of service under the Rules was in effect, founded upon inefficiency — Though motive for the action was petitioner's inefficiency, the order not showing that the action was founded on the ground of inefficiency or misconduct — **Held,** that the petitioner had failed to discharge the burden of proving that the order though in the language was one terminating the service was in effect, an order founded on inefficiency and hence he was not entitled to succeed on the ground of non-compliance with Article 311. **A 1964 Assam 68 (69, 70) (SB).**

(47) Valid order of termination of services of a temporary servant with one month's notice — Subsequent order of dismissal not giving one month's notice — Subsequent order held surplusage — Termination is valid. A 1967 Cal 326 (331) (DB).

(48) If the servant is appointed to officiate in a permanent post, or to hold a temporary post other than one for a fixed term, whether substantively or on probation or on officiating basis under the general law the implied term of his employment is that his service may be terminated on reasonable notice and the termination of services of such a servant will not per se amount to dismissal or removal from service. A 1958 SC 36 (48) ** A 1956 Bom 455 (458) (DB).

(49) Under Rule 3 of the Central Civil Services (Temporary Service) Rules, 1949, two conditions are required to achieve quasi-permanency by a Government servant. The first condition is that he must have been in continuous Government service for more than 3 years. The further essential condition is that the appointing authority being satisfied as to the Government servant's suitability in respect of age, qualifications, work and character for employment in a quasi-permanent capacity has issued a declaration to that effect. A 1963 Tripura 38 (40, 41).

(50) Where service was neither permanent nor quasi-permanent, and not even for any term fixed, though temporary, termination of service could not per se be deemed as a case of punishment. The order of termination of service could not be struck out or held illegal on the ground that it lacked the compliance of what is provided in Article 311 (2). A 1963 Pat 190 (192, 193).

(51) Where the petitioner was employed in place of a discharged constable in the Police force, who was entertained and discharged as a temporary constable, the petitioner's appointment made him a temporary servant and he can be dealt with as a temporary servant. A 1960 Tripura 31 (32). (Reversed on another point in A 1963 SC 601.)

(52) Training course for teachers — Government cannot compel even temporary teachers to undergo training course if they are not inclined to do so for whatever reasons. This does not mean that no step can be taken against those refusing to undergo training, because they are temporary. 1969 Lab IC 1165 (1166) (DB) (Pat).

(53) In case of temporary post Section 126 of J. & K. Constitution is not attracted unless termination is by way of punishment or penalty — In case of permanent servant, the very removal per se would be punishment provided termination is not by way of retirement or by operation of rule of superannuation. A 1965 J & K 15 (21) (FB).

(54) Even in a case where a formal departmental enquiry is instituted against temporary Government servant, it is open to the authority to drop further proceedings in departmental enquiry and to make an order of discharge simpliciter against the temporary Government servant. (1967) 1 Lab LJ 718 (721) (SC).

(55) Where the employment of temporary servant, even though liable to be terminated by notice of one month without assigning any reason, is not so terminated but instead the superior officer chooses to hold an enquiry into his alleged misconduct, termination of service is by way of punishment, because it puts a stigma on his competence and thus affects his future career. In such a case, he is entitled to the protection of Art. 311 (2). A 1963 SC 531 (532, 533) : (1963) 2 SCJ 185 ** 1963 All LJ 934 (943) (DB). (ILR (1962) 1 Punj 239, Reversed.) ** A 1959 Bom 134 (136) (DB). (Reversed in A 1962 SC 630 on another point.)

(56) Termination of service of temporary Government servant on the ground that his continuance in service is considered highly detrimental to public interest — Neither any charge-sheet nor any show cause notice given nor any enquiry held against him — Termination order amounted to dismissal and was hit by inhibition contained in Article 311. 1966 Cur LJ 103 (105) (Punj).

(57) Termination of services of temporary Government servant — Employee served with charge-sheet — Without giving employee a hearing or making any enquiry, order terminating his services forthwith made under service rules — Order neither referring to charge-sheet nor imposing any penalty on employee nor casting any stigma on him — Article 311 not attracted. 1969 WLN 607 (Raj).

(58) Where a person is governed by temporary service rules, the same become conditions of service, so far as he is concerned and provided requisite notice has been given or compensation has been provided for, provisions of Art. 311 do not operate. Termination of service of such a person is not a case of punishment at all but dismissal or discharge as the case may be in accordance with terms of service. A 1966 Cal 353 (355) (DB).

(59) Termination of service whether it amounts to removal, suspension or dismissal — Court must come to a conclusion on the wording of the text of the document terminating service, facts and circumstances in connection therewith and see whether it was by way of punishment — Inference cannot be drawn that it is a final step merely because the authority contemplated taking punitive action — Motive or terminating authority cannot also be taken into account — Termination of service of temporary employee which is in form and substance no more than his discharge effected under terms of contract, of relevant rule, cannot in law be regarded as

Articles 310 & 311 — Note 27 (contd.)
his dismissal because the authority was actuated by motive that the said servant did not deserve to be continued for same alleged misconduct. A 1966 Cal 545 (549, 551, 552) (DB).

(60) The employer is entitled to look into the service records or the conduct of a temporary employee with a view to determine as to whether he should be continued in service. This is a necessary incidence of a public employment. The past unsatisfactory service of the employee may provide the motive for the order, but on that ground an innocuous order of termination is not open to challenge. 1974 Lab IC 1189 (1190) (Orissa) ** 1980 Lab IC 260 (263) : 1979 Mah LJ 828 (DB) (Bom).

(60-A) Termination simpliciter in accordance with Rules applicable to temporary servants — Conduct of servant constituted merely a motive and not foundation for removal from service. **A 1979 SC 684 : 1979 Lab IC 473 (475) : 1979 All LJ 499.** (Civil Appeal No. 254 of 1965, D/- 19-8-1966 (All), Reversed.) ** 1974 Lab IC 646 (650, 651) (Ker). (Termination of temporary service — Does not amount to punishment where employee's misconduct is a mere motive and not the very foundation of that action.) ** 1980 Lab IC 552 (555) : 1980 Serv LJ 316 (DB) (Delhi). (Civil Writ No. 962 of 1978, D/- 23-5-1979 (Delhi), Reversed.) ** 1973 Serv LC 82 (DB) (Delhi) ** 1970 All LJ 438.

(60-B) Temporary Govt. servant — Termination of services after holding preliminary enquiry — Article 311 held not attracted — Motive operating in the mind of the authority concerned is immaterial. 1976 Lab IC 1569 (1574, 1577).

(60-C) Existence of some charges which may have impelled Authority to terminate services of temporary employee do not make simple order of termination, one of dismissal. A 1971 All 122 (126) : 1971 Lab IC 298 ** 1971 UJ (SC) 462. (Temporary employee — Services terminated by an order of termination simpliciter, without any reflection on his conduct or work — Mere fact that Government, subsequently gave information on enquiry as to background reason for termination of his services as being unsuitability cannot convert the order into an order of dismissal so as to attract Article 311 (2).)

(61) Termination of temporary servant — Order ex parte innocuous — Court cannot go into motive behind the order. 1979 Lab IC (NOC) 106 (DB) (Madh Pra).

(62) Administrative instructions to officers requiring ad hoc appointments not to exceed three months' term — Yet ad hoc employees allowed to continue beyond such term — Under newly framed Rules, employees reverted or discharged. — Those employees have no right to posts officiated. It will not amount to dismissal, removal or reduction in rank. Assessment of their fitness cannot be said to be a stigma on the career and character — It is not made by way of punishment — Article 311 (2) not applicable. A 1969 Delhi 246 (250, 255) : 1969 Lab IC 974 (DB).

(63) Temporary servant — Termination — Plea that U. P. Government Instructions dated 12-2-1963 not complied — Instructions, held, administrative and not statutory. 1978 Lab IC (NOC) 3 (All).

(64) Temporary Civil Judge — State Government, having regard to resolution passed by High Court, terminating his services — Order not casting stigma on his character or integrity nor visiting him with any evil consequences — Order not passed by way of punishment — Provisions of Article 311, held not attracted. **A 1970 SC 158 (160).**

(65) Extra departmental Branch Post Office — Person in charge not a member of civil service and not entitled to protection of Art. 311. Relationship between Government and him was not that of an employer and an employee — It was only contractual — Article 311 cannot apply to termination of contracts. In the case of an alleged breach of contract there is no scope for invoking principles of natural justice. A 1961 Mad 166 (169, 170) (DB).

(66) Termination of service of a probationer appointed in a temporary post — Petitioner selected for promotion to the post of a senior Draftsman in a temporary post, subsequently appointed as probationer in a clear vacancy on a probationary period of one year — Petitioner continuing to work for 5 years — Termination of service on the ground that the post was temporary attracts Article 311 (2) — In the absence of a rule petitioner on completion of probation is deemed to have been confirmed — Termination is illegal. A 1970 Assam 16 (19 to 25) (DB).

28. Termination on basis of misconduct, negligence, etc.— (1) Misconduct denotes something more than negligence. The test in each case will be whether the servant is conducting himself in a way inconsistent with the faithful discharge of his obligations undertaken by him either expressly or impliedly in accepting the service. The inconsistency may arise on account of any act of the servant either in the course of his employment or outside it which injures or has the tendency to injure his master's business or interest or reputation. 1977 All Serv LJ 415 (422) (Goa) ** 1977 Lab IC 1988 (1992) (Delhi) ** 1975 Lab IC 538 (541) (Cal). (Termination of service — Misconduct as foundation of termination — Termination without proper enquiry violates Art. 311 (2).)

(2) Dereliction of duty — Officer charged of misconduct in discharge of his official duty punished for dereliction of duty — Misconduct in discharge of duty was wide enough to include dereliction of duty and it could not be said that there was no charge to sustain the finding. 1971 Lab IC 1478 (1480) (DB) (Orissa).

(3) All India Services (Death-cum-Retirement Benefits) Rules (1958), Rule 16 (2) — 'Suspension on a charge of misconduct' — Lack of efficiency, failure to attain highest standards of administrative ability etc. do not constitute misconduct. **A 1979 SC 1022: 1979 Lab IC 792.**

(4) Dismissal on ground of misconduct — Satisfaction of disciplinary authority for avoiding an inquiry and yet imposing a punishment must be objective. (1975) 2 Cut WR 1034 (DB).

(5) Termination of temporary services for misconduct without any inquiry is in contravention of Art. 311 and is unsustainable. (1973) 2 Mys LJ 536 ** 1975 Lab IC 858 (859, 860) (All). ** 1972 Lab IC 937 (938) (Orissa). (If second show cause notice is not issued

Articles 310 & 311 — Note 28 (contd.)
before punishment is imposed, order of punishment has to be quashed.)

(6) Where the termination of service of a temporary Government servant is by way of punishment, as it will be when the termination is based on the misconduct, negligence, inefficiency or other disqualification of the Government servant and amounts to "dismissal" or "removal" within the meaning of Art. 311, Clause (2) then a proper notice as required by that clause must be given. **A 1958 SC 36 (49)** ** A 1959 Bom 134 (136) (DB) ** 1958 Jab LJ 187 (198) (DB) ** A 1958 Mys 23 (25) (DB). ** A 1957 Bom 175 (176, 177, 178) (DB) ** A 1957 J & K 11 (12) ** A 1957 Mys 8 (8) (DB) **** A 1958 SC 232 (236)** ** A 1957 Cal 4 (8) (DB). (It will amount to punishment notwithstanding that the servant had no right to the post of which he is deprived.) **** A 1964 SC 1854 (1860 to 1864)** ** 1962 Mys LJ (Supp) 487 (490) ** (1959) 1 Lab LJ 245 (248) (DB) (Andh Pra). ** 1972 Lab IC 476 (477, 478) (All). (Circumstances preceding or attending upon the order of termination of services ought to be examined.)

(7) No question of discrimination arises in case where services are terminated on account of unsatisfactory record. If, however, allegation as to unsatisfactoriness is demonstrated to be a pretence or baseless, the act becomes arbitrary and open to the attack of discrimination. 1980 Lab IC 260: 1979 Mah LJ 828 (835) (DB) (Bom).

(8) Even in the case of a temporary post, where termination of service or transfer to a lower post is actually resorted to as a measure of punishment, for some misconduct, negligence, inefficiency etc., action of Government would amount to a dismissal or removal from service in one case and to reduction in rank in the other. **A 1958 SC 36 (49) ** A 1957 SC 886 (887) ** A 1958 All 741 (746) (FB).**

(9) The termination of the services of a provisional Government employee on the ground that his character and antecedents are such as to make him unsuitable for employment under the State does not attract Art. 311. Where there is no defect in the process of verification of the antecedents and character adopted by the State, there is no force in the contention that Art. 16 is violated. **A 1965 Ker 63 (63, 64)** (DB).

(10) If the lapse or misconduct is one which is known to the authority before the person is promoted and not one which comes to light subsequent to the promotion, and if the authority concerned knowing of this lapse or misconduct promotes the civil servant without any reservations, then it must be taken that the lapse or misconduct has been condoned, and thereafter the servant cannot be punished for his lapse or misconduct. A 1967 Madh Pra 284 (285, 286) (DB).

(11) Dismissal for misconduct not in course of employment not sustainable. 1975 Lab IC 1732: 1975 Ker LT 503.

(12) Dismissal — Charge of misconduct — Obtaining appointment by deceitful means cannot be a misconduct during the course of employment. 1973 Lab IC 1267 (1270) (All).

(13) Issue of show cause notice calling for reply to a charge of misconduct — Order terminating services passed before expiry of time allowed for submission of reply — Procedure prescribed under Art. 311 not followed — **Held**, order was liable to be quashed — Misconduct was the foundation of the order which was an order of punishment. 1971 UPTC 401 (All).

(14) Where an order of discharge is attacked on the ground of mala fides and the authority in justifying the order refers to certain facts relating to the misconduct, negligence or inefficiency of the temporary servant it cannot be said that the order of discharge was made on a consideration of those facts set out in the plea made long after the passing of that order. **A 1964 SC 449 (453).**

(15) Termination of service of Government servant appointed on provisional basis — Order not indicating reason — Government alleging termination due to character and antecedents having been found unsatisfactory — Record relating to verification not placed before Court — Order quashed. 1963 Ker LJ 1168 (1170).

(16) Person appointed on provisional basis — Service terminated not by way of punishment but because character and antecedents of person not found satisfactory for permanent appointment — **Held**, provisions of Arts. 16 and 311 are not violated. A 1965 Ker 19 (23, 24).

(17) Where the Government decides to punish the civil servant by dismissal or removal or reduction in rank on the ground of misconduct, inefficiency or other disqualification, and bases its action on such ground, Art. 311, Clause (2) will apply even though the Government could have simply terminated his service in the exercise of its right under the contract of employment or under the Service Rules independently of any question of punishment. **A 1958 SC 36 (49).**

(18) Termination of service as punishment for misconduct — Agreement between parties giving discretion to authorities to terminate services without assigning cause — Action proposed, however, was the result of enquiry conducted for misconduct — Mandatory provision in Art. 311 (2) is obligatory notwithstanding the agreement. A 1961 All 338 (342) (DB).

(19) Government of India Act (1935), Section 240 (3) — Temporary railway servant — Suspension from service on account of bad conduct and absenting from duty — Subsequent termination of service held by way of punishment — No opportunity to show cause given according to railway rules — Termination is illegal and void. 1962 Pun LR 807 (817, 818) (DB).

(20) Temporary servant — Order of discharge of temporary servant stating that he was not suitable for employment and passed without following prescribed procedure including framing of charge etc. — **Held**, order was order of dismissal and was liable

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to be quashed. (1966) 2 Andh WR 78 (80) ** A 1964 SC 449 (456, 457). (Order of discharge stating that he was found undesirable to be retained in Government service.)

(21) The constitutional requirement of Article 311 should not be allowed to be avoided in a case where a person is sought to be discharged or reverted on the ground that he is undesirable but, failing the charge of misconduct, reliance is placed upon the fact that his service is temporary. This would be a colourable use of the power of discharge of temporary servants and fraud on Article 311. A 1959 Tripura 2 (6).

(22) Removal of public servant whether probationer or temporary for misconduct of taking hush-money — Amounts to punishment — Removal without inquiry contravenes Article 311 (2) and is illegal. 1975 Lab IC 91 (93) (Cal).

(23) Dismissal from service on proof of misconduct — Complaint of denial of opportunity to defend not justified — Petitioner also guilty of serious laches — Petition challenging order dismissed. A 1979 (NOC) 173 (Kant).

(24) Railway Servants' (Discipline and Appeal) Rules (1968), Rule 14 (ii) — Railway clerk participating in illegal railway strike and threatening willing workers and their family members with physical violence — Disciplinary authority dispensing with enquiry under Rule 14 (ii) and removing clerk from service — Reasons for dispensing with enquiry under Rule 14 (ii) held had substance and nexus with object sought in order of removal. 1975 Lab IC 1530 (1531, 1536, 1537) (Gauhati). ** (1977) 2 Serv LR 681 (688, 689) (Guj).

(25) Railway Servants (Discipline and Appeal) Rules (1968), Rule 14 (ii) — Dispensing with inquiry into charge of misconduct — Duty of disciplinary authority to record reasons in writing and to give delinquent servant opportunity of hearing — Non-compliance of — Order of removal liable to be quashed. 1978 Lab IC 193 (194) (DB) (All).

(26) Termination of service for misconduct — Regular disciplinary action taken — Enquiry officer not exonerating delinquent but recommending punishment of warning for negligence — Innocuous order of termination relying on service conditions — Article 311 (2) attracted — Alleged misconduct operates as foundation and not motive for termination. 1974 All Serv LJ 667.

(27) Participation by a Railway employee in peaceful strike before it is banned by an order Under Essential Services Maintenance Ordinance (1960) does not infringe Rule 3 of Railway Services (Conduct) Rules (1956). His dismissal on a charge of gross misconduct is illegal. A 1967 All 457 (459).

(28) Conviction for an offence outside the course of employment does not ipso facto constitute 'misconduct' entailing a summary termination of employment. Failure to give opportunity to show cause against order proposed violates natural justice. (1960) 70 Cal WN 786 (806).

(29) Where the misconduct is of a substantial and serious nature as to undermine the confidence that could be placed in him the employer would be justified in summarily dismissing such employee. Even a single instance of misconduct is sufficient to sustain such dismissal. (1964) 1 Lab LJ 500 (515) (Mad).

(30) The solitary or the isolated act of non-verification of the police statement of an unimportant witness, which may be treated as a mere omission of such a duty as to be imposed upon the superior police officer by the relevant paragraph of the Bombay Police Manual, 1959, Vol. III, cannot prima facie amount to an act of 'substantial misdemeanour' or 'grave delinquency'. Order of removal on ground of "dereliction of duty", **Held**, cannot be supported on any finding as to 'substantial misdemeanour' for which the punishment can lawfully be imposed. 1972 Lab IC 880 (886) (DB) (Guj).

(31) An order of discharge of a probationer after an enquiry into charges of misconduct, negligence or inefficiency can generally be regarded as one by way of punishment. But where the enquiry was conducted simply to ascertain whether the probationer was fit to be confirmed or not it cannot be regarded as an enquiry into any charge of misconduct. ILR (1965) 2 Mad 24 (35) (DB).

(32) It is not permissible under law, to dismiss or remove from service for misconduct under a pretended order of termination of service. (1965) 11 Fac LR 191 (195) (Cal).

(33) Bihar Board of Revenue Miscellaneous Rules, Rule 145 — Departmental proceedings against 'Kanungo' — Kanungo forwarding report of abatement of rent and settlement of lands with new tenants — His duty is not only ministerial — Though settlement is to be made by gazetted officers, it is duty of Kanungo to place correct facts before them to enable them to make proper settlement. 1956 BLJR 825 (831) (DB).

(34) Charges framed against civil servant when he was in civil service can be continued against him after retirement and if they are proved, Government is entitled to reduce his pension after considering the representations made by him as a punishment under Article 470 (b) of Civil Service Regulations. A 1957 Mad 612 (612, 613).

29. Termination in terms of Service Rule or contract of service.— (1) Termination of service by notice or otherwise in accordance with the terms of the contract of service is not "dismissal" or "removal" within the meaning of Article 311 and the condition as to affording of reasonable opportunity to show cause against the action proposed to be taken does not apply in such cases. A 1953 SC 250 (251) ** A 1958 SC 36 (49) ** A 1954 SC 632 (634) ** A 1957 All 439 (443) (DB) ** A 1957 Pat 541 (541) (DB) ** A 1956 All 527 (528) (DB) ** A 1956 Cal 662 (667) ** 1969 Lab IC 710 (711, 712) (All) ** A 1963 SC 601 (603, 604, 605) : 1963 (1) Cri LJ 491. (A 1960 Tripura 31, Reversed.) ** (1979) 2 Serv LR 104 : 1979 Lab IC (NOC) 97 (All) ** 1979 Lab IC (NOC) 161 (DB) (All) ** 1968 All LJ 735 (737) (DB) ** 1964 Raj LW 353 (356) (DB) ** A 1963 Pat

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190 (192) ** A 1962 Mad 376 (377, 378) (DB) ** 1962 Mys LJ (Supp) 487 (489) ** A 1962 Tripura 34 (49) ** A 1959 Andh Pra 251 (254) (DB) ** A 1959 J & K 136 (137) (DB) ** A 1958 Pat 653 (654) (DB) ** A 1966 All 92 (94) (DB) ** 1958 All LJ 503 (504) (DB) ** A 1964 SC 1854 (1862).

(2) Termination of temporary service — State having right in terms of contract and service rules — Order not casting stigma — Court cannot go behind order to find out motive in passing order. A 1976 SC 2547 (2556, 2557). (S. A. No. 2261 of 1966, dated 3-1-1975 (All), Reversed.)

(3) A substantive appointment to a permanent post in public service confers normally on the public servant so appointed a substantive right to the post and the Government cannot terminate his service unless it is entitled to do so (i) by virtue of a special term of the contract of employment, for example, by giving the requisite notice provided by the contract, or (ii) by the rules governing the conditions of his service, for example, on attaining the age of superannuation prescribed by the rules, or on the fulfilment of the conditions for compulsory retirement, or (iii) subject to certain safeguards, on the abolition of the post, or (iv) on being found guilty, after a proper enquiry on notice to him, of misconduct, negligence, inefficiency or any other disqualification. A 1958 SC 36 (42).

(4) Railway Establishment Code (1951), Vol. 1 Rule 148 (3) — Railway Establishment Code (1959) Vol. 1, Rule 149 (3) — Permanent Railway Servant — Termination of his services on notice — Amounts to removal within Article 311 (2) — No provision of enquiry and notice — Rules contravene Article 311 (2) and are invalid. A 1964 SC 600 (610, 612, 617, 620, 626). (A 1956 Pat 221 and A 1958 Raj 250 and A 1959 All 439 and A 1960 Cal 264 and A 1962 Mad 379, Overruled: Spe. App. No. 502 of 1958 D/- 15-12-1959 (All) and LPA No. 81 of 1961, D/- 6-4-1961 (Punj) and ILR (1960) 12 Assam 441 and A 1963 Assam 94 (FB), Reversed.)

(5) If it is sought to dismiss any servant of the Union or the State, the procedure prescribed in Article 311 (2) must be followed. The guarantee conferred by the Constitution, is merely a guarantee that, if the servant is sought to be dismissed or removed from service, then the provisions of Article 311 shall come into play. Dismissal or removal from service is to be judged by the consequences that the order brings about and by the tests laid down in Shyam Lal's Case. A 1954 SC 369.

(6) It is open to the Union or the State to enter into a contract of service and to provide for termination of the service by any notice that may be agreed upon as a term of the contract; and if there is termination of service under the terms of the contract, which does not cast a slur on the employee or deprive him of any benefit already earned by him, such termination cannot attract the provisions of Article 311 notwithstanding the fact that there was a suggestion of some misconduct against the servant and a preliminary enquiry was held, but no charge was framed against him. (1957) 59 Bom LR 1210 (1215, 1216) ** A 1963 Mys 193 (198, 199, 200, 201, 202) (DB).

(7) Where the Government does not choose to terminate the service of the Government servant in exercise of its power under the terms of the contract of employment, express or implied, or under the rules regulating the conditions of service of the Government servant, but decides to proceed against the Government servant on the basis of his misconduct, negligence, inefficiency or the like and to inflict on him the punishment of dismissal or removal from service, the Government would be bound to comply with the requirements of Article 311 of the Constitution of India. (1963) 4 Guj LR 16.

(8) The right to terminate the service of a servant without any notice on account of misconduct is a right which is inherent in the master under the ordinary law of master and servant and is by its very nature a right which is exercisable by the master against the servant by way of punishment. This exercise of right which is necessarily and always by way of punishment, does not cease to have that character when it is embodied in the contract of service between the master and the servant. The exercise of such a right whether it be a part of the general law of master and servant or whether it be a part of the contract of service must always be in the nature of infliction of punishment and the termination of service of the servant in exercise of such right must necessarily amount to dismissal. (1963) 4 Guj LR 16 (24, 25).

(9) In order to determine whether or not a Government servant was entitled to the protection of Article 311 (2), the proper legal test is not only imputation of misconduct but also whether evil consequences, such as forfeiture of pay allowance etc., flowed as a result of the order. A 1962 Pat 40 (44, 45, 46) (DB).

(10) Order terminating petitioner's services under service rules for reason which has nothing to do with the charges levelled earlier against him for stopping his annual increment — Order of termination attaching no stigma or entailing no penal consequences — Order of termination cannot be regarded as one of dismissal. A 1965 All 252 (252, 253) (DB). (A 1964 SC 423, Disting.)

(11) There is no difference in principle between a case where the services of a Government servant are terminated in accordance with the terms of employment contained in the Service Rules and one in which the service is terminated in accordance with the terms of the contract of service. A 1958 SC 36 (48) ** A 1957 SC 886 (887) ** 1962 Mys LJ (Supp) 457 (DB).

(12) The services of a person can be terminated under the Rules only in the circumstances and in the manner in which the employment of a Government servant in permanent service can be terminated or when the appointing authority certifies that a reduction has occurred in the number of posts available for Government ser-

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vants not in permanent service. A 1957 Pat 555 (556) (DB).

(13) The terms and conditions of service embodied in a contract of service cannot be altered by the Government unilaterally. A 1955 Assam 17 (20, 21) (DB).

(14) Appointment of petitioner on provisional basis terminable on one month's notice on either side — Neither a month's notice nor a month's salary in lieu of notice given or offered to petitioner before termination of service — Order of termination held invalid and inoperative. 1963 Ker LT 1168 (1169).

(15) Where the service of a Government employee is terminated on one month's notice according to the terms of the contract of service, an irregularity in the notice will not entitle him to an order of reinstatement although he may be entitled to damages. A 1956 Pat 23 (28).

(16) Though in the case of removal from service by way of penalty the employer is not bound to give any notice or to pay any salary in lieu of notice, he may choose to be more generous to the employee and pay him something to which he is not entitled. The action of the employer in such a case cannot be construed as not enforcing the penalty which he actually enforced or intended to enforce. A 1957 All 439 (445) (DB).

(17) Where, according to the terms of service, it can be terminated on one month's notice and it is so terminated, the mere fact that the Government servant was first charged with some misconduct, which charge was not pursued, does not show that the termination of service was by way of punishment and amounts to dismissal or removal. A 1957 All 408 (411) (DB) ** A 1957 Cal 4 (8) (DB) ** A 1956 Cal 662 (667) ** A 1956 Pat 23 (26, 27) (DB) ** A 1964 Mad 335 (347) ** A 1961 All 64 (71, 72) (DB) ** A 1957 All 439 (445) (DB) ** A 1956 Cal 532 (536).

(18) A provision in a contract of service under the Government that the employee can be "dismissed" or "removed" from service without being given an opportunity to be heard in his defence, is inconsistent with Article 311 (2) and hence ultra vires. A 1957 Cal 720 (726) (DB) ** A 1954 Cal 566 (568).

(19) Where the Government instead of terminating the services of a person according to the terms of the contract elects to dismiss him, as a punishment for some fault or misconduct, Article 311, Cl. (2) will apply and he will be entitled to a sufficient opportunity to show cause against the dismissal. A 1958 SC 36 (49) ** A 1958 Mys 23 (25) (DB) ** A 1957 All 408 (410) (DB) ** A 1956 Cal 662 (667) ** A 1954 Cal 495 (497).

(20) Where under the Service Rules or under the contract of service the Government has the right to terminate the service of an employee on giving notice and terminates such service in the exercise of the rights, the motive operating on the mind of the Government is immaterial and the fact that the inducing factor is the misconduct, etc., of the servant will not make the step taken a punishment so as to attract the provisions of Article 311 (2). A 1958 SC 36 (49) ** A 1956 Bom 455 (458) (DB).

(21) A person in a quasi-permanent service means one who has been in continuous Government service for more than three years and in whose favour the appointing authority has issued a declaration that he is a quasi-permanent servant. The services of a quasi-permanent servant can be terminated in the same circumstances as those of a permanent servant. A 1958 SC 36 (48) ** A 1955 Punj 229 (230) (DB) ** A 1962 Bom 45 (47) (DB) ** A 1961 Cal 454 (455).

(22) When the termination of service is due to something which the Government servant has done, which enables the authorities, under the Service Rules to terminate the services without anything further, as for example, absenting himself without leave for more than seven days, the termination of service does not amount to dismissal or removal and Article 311, Cl. (2) does not apply. A 1955 Hyd 260 (261) (DB) ** 1966 Cur LJ 968 (980) (Punj) (DB). (Reversed on another point in A 1977 SC 1233) ** A 1958 Cal 407 (409).

(23) Service under contract — Clause in contract providing for removal without notice for inefficiency, negligence etc. — Removal for misappropriation and tampering of record — Impugned order was one of dismissal in substance — Article 311 (2) comes into operation as clause does not cover the case. A 1969 Cal 164 (166) : 1969 Lab IC 406.

(24) Government servant making aspersions on minister — Minister being in position of master, principles relating to master and servants apply — Dismissal of servant held proper. A 1962 Guj 197 (202, 203) (DB).

(25) It is now well settled that even in the case of Government servants, if there be a contract or a rule by which there is a right to terminate the employment of an employee without going through the procedure prescribed for imposing punishment, the authority concerned will be justified in acting in terms of such a contract or rule. 1965 Mad WN 271 (272).

(26) Proceedings taken against the petitioner, a railway employee, under the Railway Services (Safeguarding of National Security) Rules, 1949, for his subversive activities were withdrawn by the authorities and the suspension order was revoked directing the petitioner to resume his duties. The day on which he resumed his duties he was served with an order under Rule 148 of the Indian Railway Establishment Code, Vol. I, terminating his services.

Held, that there was nothing to indicate in the order that it was founded on any ground of misconduct on which Rule 148 of the Establishment Code permitted the action taken by the Authorities. The allegation of subversive activities might have been then the impelling factor but the actual order had been made on the authority of the Service Rules, and not as a measure of punishment against the petitioner. A 1959 Assam 120 (121, 122, 123) (DB).

(27) Under Rule 5 (a) of Central Civil Service (Temporary Service) Rules, 1949, notice of termination need be given by the appointing authority to a Government ser-

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vant in temporary service — Notice by authority who was appointing authority at time of appointment but not at time of notice, is valid. (1965) 11 Fac LR 191 (193) (Cal).

(28) Contractual right intended to be enforced against employee — Chance of explaining conduct should be given. A 1960 Cal 264 (268) (DB). **(Overruled** on another point in A 1964 SC 600.)

(29) There is no fixed rule of law defining the degree of misconduct justifying dismissal from service it is a question of fact in each case whether misconduct in question is inconsistent with the fulfilment of the implied or express conditions of service. (1964) 1 Lab LJ 500 (Mad).

(30) Fundamental Rules, Rule 49 — Bombay Civil Services Conduct, Discipline and Appeal Rules, Rule 33 — Order appointing employee to post communicated by Deputy Secretary by and in name of Governor — Order published in Government Gazette and communicated to employee — Order amounts to contract of employment — Order is not invalid because sanction of Public Service Commission was not obtained and if his services are terminated before the date up to which he was appointed without giving any reasons the termination is contrary to Article 311. A 1963 Bom 13 (16).

(31) Punjab University Act (7 of 1947), Section 31 (2) (c) — University and its employees — Relation between is contractual — Removal of employee — Writ petition for reinstatement — Not maintainable. A 1969 Punj 391 (394, 395) : 1969 Lab IC 1406. (A 1968 Cal 206 **held no longer good law** in view of A 1969 SC (Notes) 208.)

(32) The appointment to a permanent post in Government service either on probation or on an officiating basis, is, of a transitory character and in the absence of any special contract or specific rule, the implied term under the ordinary law of master and servant, is that it is terminable at any time. (1959) 1 Lab LJ 245 (247) (DB) (Andh Pra).

(33) Termination of service according to terms of contract — Government servant on probation — Explanation asked and warning served for misconduct — Charge not framed and misconduct not mentioned as ground in termination order — Termination from service in accordance with service-contract though motivated by preliminary enquiry is not punishment — Article 311 (2) cannot apply. A 1965 Punj 94 (96, 97).

(34) Defence Accounts Department (Temporary Service) Rules, 1949, Rule 5 — Termination of service in terms of R. 5 — Order terminating services not suggesting misconduct or any other stigma — But service certificate granted on demand by employee and issued in accordance with Rules showing ability of employee as below average and conduct unsatisfactory — Termination was valid and certificate could not convert plain and simple order of discharge into one of dismissal. A 1965 Punj 303 (305).

(35) Since the fact that the petitioner a motor driver was convicted of an offence involving moral turpitude was established under the standing orders regulating the employment of the petitioner, the operation of which was continued even after the Mysore State Road Transport Corporation was established, it was perfectly within the competence of the disciplinary authority whoever he was, to impose the punishment of dismissal from service — The General Manager of the corporation was therefore competent to take disciplinary action though the employee was convicted before he became a servant of the corporation. 1962 Mys LJ (Supp) 498 (502) (DB).

(36) Order stating that Government servant was removed from service under Rule 5 of Central Civil Services (Temporary Service) Rules, 1949 — **Held** mere fact that words 'removed from service' had been used would not convert 'termination of service' into 'removal from service' thereby bringing into operation provisions of Article 311. A 1968 Punj 106 (107) : 1968 Lab IC 519.

(37) Where the appointment is for a specified period of years, the services of a Government servant cannot be terminated merely at the pleasure of the Government before the expiry of the period and if the Government wishes to terminate his services, he must be given sufficient opportunity to show cause against such termination. The same principle will also apply to the transfer of the Government servant to a lower post. **A 1958 SC 36 (49).**

(38) A Government servant engaged under contract is free to prove that the order of termination is in effect an order of dismissal or removal within the meaning of Article 311 and have it set aside if the safeguards provided by that Article have been ignored. 1962 Ker LT 362 (364) (DB).

(39) Appointment made on provisional basis terminable by month's notice on either side — Service terminated without such notice — Order of termination not for misconduct — Order also not indicating any other reason — Petitioner challenging order as capricious, arbitrary and mala fide on the ground that his juniors were retained in service and a new recruit was appointed in his own place — Governmen stating in its counter affidavit that the termination was due to the petitioner having been found unsuitable on the ground of character and antecedents — Record regarding verification of character and antecedents not placed before Court — **Held,** that the order should be quashed for the reasons that it violated the terms of appointment and it was arbitrary and mala fide. 1964 (8) Fac LR 72 (73, 74) (All).

(40) The termination of service in accordance with the conditions of such service is not "dismissal" or "removal" within the meaning of Article 311 (2) and hence, in such cases, the temporary servant is not entitled to the opportunity of showing against his discharge contemplated by Clause (2). **A 1958 SC 36 (42) ** A 1957 SC 886 (887) **** A 1957 Hyd 12 (13) (DB) ** A 1957 J & K 11 (12) ** A 1957 Orissa 27 (28) (DB) ** A 1955 Pat 353 (355) (DB) ** A 1968 All 14 (17) ** (1963) 1 Lab LJ 334 (337) (All) ** **A 1960 All 647 (649).**

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(41) Termination of services of temporary Civil Judge, by State Government upon recommendation of High Court, valid. **A 1970 SC 158 (161).**

(42) The Government is free to make special contracts of service with temporary employees and impose special terms in each case provided that they are not inconsistent with the Constitution. **A 1953 SC 250 (252)** ** A 1955 All 496 (498) : ILR (1956) 2 All 627 ** A 1963 Cal 421 (423) : (1963) 2 Lab LJ 569 ** 1962 Mys LJ (Sup) 487.

(43) Government's power to terminate temporary service of civil servant at will is not restricted by any rule that it must terminate services of juniormost temporary civil servants first. The fact that enquiries were held were wholly immaterial — Termination of his services with one month's pay in lieu of notice was not mala fide and he could not invoke provisions of Art. 311 (2). A 1964 All 278 (280, 284) (DB). (A 1963 All 330, **Overruled.**)

(44) If the termination of service is founded on the right flowing from contract or the service rules then prima facie, the termination is not a punishment and carries with it no evil consequences and so Article 311 is not attracted. ILR (1961) Mys 1129 (1152) (DB) ** A 1967 Pat 404 (405) (DB) ** 1964 Raj LW 353 (356) (DB) ** A 1963 Tripura 38 (43) ** A 1960 J and K 97 (100, 101).

(45) Temporary post — Appointment to, in substantive capacity — Post made permanent — Appointment to such post in officiating capacity — Termination of service on 30 days' notice held valid. A 1961 All 421 (426, 428).

(46) Where the service of a temporary Government servant is terminated after one month's notice in accordance with the terms of contract of service, such termination does not amount to "dismissal" or "removal" within the meaning of Art. 311. cl. (2). **A 1958 SC 36 (49)** ** A 1959 Bom 134 (136) (DB) ** 1957 Ker LJ 729 (730) ** 1957 BLJR 155 (157) (DB) ** A 1955 All 496 (498) ** A 1954 Madh B 49 (52, 53) (DB) ** (1966) 1 Lab LJ 224 (225) (Punj) ** 1971 Lab IC 1037 (1041) (HP) ** (1963) 76 Mad LW 164 (165) ** A 1960 Tripura 31 (33, 34). (Reversed on facts in A 1963 SC 601.) ** 1978 Lab IC (NOC) 101 (AP) ** 1977 Lab IC 977 (All) ** A 1977 Orissa 165 : 1977 Lab IC (NOC) 100 ** ILR (1973) Him Pra 20.

(47) State Government having power under Rules framed under Article 309 and the Manual of Government orders to remove temporary servants after a month's notice — Government exercising the power under the rules and not on the ground that the servant did not deserve further retention, or with an idea to punish him. The termination did not amount to "dismissal" or "removal" within Article 311. A 1964 All 278 (284) (DB). (A 1963 All 390, **Overruled.**)

(48) An order of discharge of a civil servant engaged in accordance with the terms of his contract is not treated by Service Rules as an order imposing the penalty of dismissal or removal from service and in fact is not so treated by Rule 7 of the Bengal Subordinate Service (Discipline and Appeal) Rules, 1936. Where the order terminating the employment of a temporary servant stated that the notice was served as he was not considered to be suitable for employment in Government Service, the order of termination does not inflict any penalty and does not amount to an order of dismissal or removal and there is no contravention of Article 311 (2). The order is an administrative order and, no question of contravention of the principle of natural justice can arise. A 1960 Cal 306 (307, 309) ** A 1965 Punj 162 (162, 163).

(49) Even though a temporary clerk is first charge-sheeted, the termination of his service will be only according to the terms of his employment and not as a punishment if subsequently the charge is dropped and his services are terminated without entering a finding against him. A 1957 Madh Pra 133 (134) ** A 1956 Him Pra 8 (8).

(50) If a temporary Government servant is removed without any black mark or comment on the ability of the employee, then Article 311 does not apply. A 1960 Madh Pra 230 (231) ** 1967 All LJ 806 : 1967 All WR (HC) 607 (609).

(51) Servant of Corporation under contract of service — Termination of service by payment of one month's notice pay in terms of contract for unsatisfactory work — Acceptance — Servant cannot subsequently challenge order of termination — Termination held legal and proper. A 1961 Cal 108 (111).

(52) Where the petitioner, holding a temporary post, continues in service after the probationary period and his services are terminated with a month's notice; the service rules providing for such notice for temporary hands, the termination is legal. (1969) 71 Punj LR 343 (345).

(53) A probationer can be discharged in the manner provided by Rule 55-B of the Civil Services (Classification, Control and Appeal) Rules. **A 1961 SC 177 (180, 181). (ILR 1958 Cut 77, Reversed.)**

(54) Services of a railway servant appointed temporarily and not either permanently or for a definite period could be terminated in accordance with the terms of his appointment and when so terminated the servant cannot claim that he has a right to continue in service and that his removal from service is illegal. A 1954 All 122 (122, 123) (DB).

(55) Probationer — Termination of service in accordance with rules governing conditions of service — Not a dismissal or removal — Civil servant not entitled to protection under Article 311 (2). **A 1963 SC 1552 (1553, 1554).**

(56) The mere fact that the temporary servant has been given a memorandum informing him of certain charges and asking him for his explanation on the charges as well as to why disciplinary action should not be taken against him cannot prevent the Government from taking action under the service rules, without holding a departmental enquiry if it is otherwise satisfied that his conduct and work are unsatisfactory. **A 1964 SC 1854 (1863)** ** 1968 Lab IC 767 (771, 772) (Punj) (DB) ** A 1967 Punj

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238 (240) : 68 Punj LR 806 (DB) ** (1967) 69 Punj LR 50 (55) (DB) ** A 1965 Punj 94 (96).

(57) Probationer — Termination under Rule 9 of Civil Services (Punishment and Appeal) Rules (1952) — Show cause notice as to why her services should not be terminated — Charge that her work and conduct had not been satisfactory — Service terminated after consideration of the explanation — Termination did not amount to dismissal within Article 311 (2) as it was not made by way of punishment. A 1967 Punj 213 (215, 216) (DB).

(58) Termination of service of Temporary servant — Termination because of some misbehaviour on his part — Provisions of Article 311 apply and an enquiry contemplated by that provision has got to be made. 1967 All LJ 806 : 1967 All WR (HC) 607 (609).

(59) M. P. Civil Services, (General Conditions of Service) Rules (1961), Rule 8 — Applicant appointed as temporary Sub-Inspector of Police — Service liable to be terminated on one month's notice — Notice of termination signed but not served — Meanwhile order of confirmation passed and gazetted — Notice served and services declared to have been terminated — Notification corrected by issuing corrigendum — Held that order of confirmation was valid and could not be cancelled — Order subsequent to confirmation held ultra vires and quashed. A 1965 Madh Pra 208 (210, 211) (DB).

(60) Government servant holding lien on post under State Government of Punjab — Temporary appointment in Himachal Pradesh on service contract — Termination of service will be governed not by rules but by terms of contract — No legal bar to terminate his services with one month's notice under contract even if he was a direct appointee and not a deputationist. A 1965 Him Pra 55 (56, 57.)

(61) Temporary Government servant — Order of discharge on ground of insubordination without giving opportunity to show cause held amounted to dismissal and passed in violation of provisions of Section 126, J. and K. Constitution — Protection of Section 126 is available to temporary post when services are terminated by way of punishment. A 1959 J and K 13 (14, 15, 16).

(62) If the retrenchment is carried out in pursuance of a specific Service Rule, then, the termination of service would be one in terms of a specific Service Rule, and hence, would not be a punishment so as to constitute a dismissal or removal within Article 311. A 1954 Madh B 54 (57) (DB) ** A 1958 SC 36 (42, 48).

(63) When the appointment of a person as State Press Liaison Officer (a cadre post) in Public Relations Department of Punjab was conterminous with the continuance of the said post the State had no power to terminate the services of that Officer when the post itself was continuing. If any action by way of disciplinary proceedings was being taken, then the State must comply with Article 311 (2) of the Constitution. A 1972 SC 1004 (1027, 1028): 1972 Lab IC 543.

(64) Termination of service — Petitioner holding temporary post — Petitioner continuing in service after probationary period — His services terminated with one month's notice — Service rules providing for such notice for temporary hands — Termination legal. (1969) 71 Punj LR 343.

(65) Person in temporary service under Government — Termination of service by one month's notice under Rule 5 (1), Jammu and Kashmir Civil Service (Temporary Service) Rules, 1961 — Order neither mala fide nor offending Art. 14 on the ground of discrimination — Order of termination carries no stigma against the person and hence will not be set aside on the ground of non-fulfilment of procedure prescribed by Art. 311 read with Sec. 126, Jammu and Kashmir Constitution. A 1970 J and K 156 (156, 157): 1970 Lab IC 1272.

(66) Civil servant officiating in post for fixed period — Reversion to substantive post before expiry of term — Has no right to maintain writ petition against Government unless his fundamental right or right under Art. 311 is affected — Claim based on contract — High Court does not enforce contractual rights — Remedy by way of suit against Government is open. A 1970 Punj 315 : 1970 Lab IC 1009.

(67) Appointment of a person with condition as to liability of termination of services without notice — On being terminated on ground of remaining absent, not entitled to notice or pay in lieu thereof — No stigma cast on him — Art. 311 not attracted. 1970 Pat LJR 167.

(68) Permanent District Board Employee — Termination of service on one month's notice in terms of letter of appointment — Validity.

Held :— The conditions stated in the letter of appointment of the Secretary continued to bind the parties even after his confirmation and his services could be terminated by an order of discharge simpliciter in accordance with the condition of the letter of appointment as this condition was almost in the same terms as Rule 1 in Part V-A of the District Board Rules (1926) Rule 1 in Part V-A of the District Board Rules (1926), has the same force as if enacted in the District Boards Act. The power to discharge an employee is inherent in the appointing authority because of the power to appoint vesting in him or it. It thus follows that S. 27 of the District Boards Act giving power to the District Board to appoint its officers and servants also gives it the power to discharge them from service and the provision for the mode of discharge has been made in Rule 1 (1) in Part V-A of the Rules. **1974 Lab IC 1313 (1316 to 1319 and 1323 to 1326) (FB) (Punj).**

(69) Contractual appointment for a fixed term — Where a person's services are terminated on the expiry of the term for which he was engaged, there is no question of application of Art. 311 (2). 1972 Lab IC 402 (405) (Madh Pra).

(70) Services terminable on a month's notice on proof of unsuitability for efficient performance of duties — Termination on

Articles 310 & 311 — Note 29 (contd.)

ground that services are no longer required invalid. (1972) 2 Mad LJ 64.

(71) Termination in accordance with terms of employment of a temporary heavy vehicle's driver aged 59 years on ground of unsatisfactory service cannot be questioned. 1973 Lab IC 270 (270) (Orissa).

(72) Where the order of termination was not pursuant to disciplinary action but under a totally different provision namely, Rule 5 of Central Service (Temporary Service) Rules (1949). Art. 311 could not be invoked in absence of adequate data suggesting penal nature of the order. 1973 Serv LC 92 (Delhi).

(73) The motive operating in the mind of the Government is wholly irrelevant if the Government has the right under the contract or the rules to terminate the services of the temporary employee in which event the order cannot be regarded as an order of 'dismissal' within Art. 311 of the Constitution. 1973 Serv LJ 273 (Delhi).

(74) Termination of temporary Services for misconduct, in terms of employee's services — Order of termination not visiting the employee with penal consequences or attaching any stigma — Protection under Art. 311 (2) cannot be invoked. 1973 All Serv Rep 947 (Punj).

(75) A termination of service brought by the exercise of contractual right is not per se dismissal or removal within Art. 311 of the Constitution. 1974 Cal LJ 126.

(76) The mere fact that the authority while making the order took into consideration the complaints against the servant do not conclusively justify the finding that the order was made by way of punishment. Consequently, the provisions of Art. 311 will not be attracted in such a case. 1974 Lab IC 927 (928) (Him Pra).

(77) Appointment of physical instructors on temporary basis — Termination of service contrary to terms of service — Grounds of termination wholly extraneous to the assurances given in the letter of appointment for continuation in service after period of six months — Their services could have been terminated only if they failed to fulfill the conditions in the appointment letter — Order dispensing with the services was not legal. 1974 All Serv Rep 125 (131) (Punj).

(78) Termination of service of temporary employee according to condition of appointment — Payment of salary and allowances in lieu of notice period of one month not paid simultaneously with order of termination of service — Termination illegal. (1974) 2 Serv LR 814 : 1974 Serv LJ 365 (Punj).

(79) Where the services are terminated in accordance with the terms of contract service rules of natural justice are not required to be observed. ILR (1974) 1 Delhi 660 (671) (DB).

(80) **Held**, the authority to terminate the artist's service on six months' notice emanated from the contract; but nonetheless it had the effect of violating Art. 311 (1) of the Constitution. The enforcement of the notice clause could not amount to merely termination of service, but amounted to removal from service within meaning of Article 311 (1) of the Constitution. Since the provisions of Art. 311 (2) of the Constitution were not complied with in this case, the notice of termination was void. 1975 Lab IC 423 (425) (All).

(81) Contract of service for one year with no option to resign before that period, or to apply elsewhere for appointment — Termination of service before that period for extraneous reasons — Invalid. Further the Government is estopped from cutting short the period of service of the petitioner. 1975 Lab IC 1275 (1276 to 1278) (Him Pra).

(82) When a first appointment or promotion is made on probation for a specified period and the employee is allowed to continue in the post after the expiry of the period without any order of confirmation, he shall be deemed to continue in his post as a probationer only in the absence of any indication to the contrary in the original order of appointment or promotion or the service rule. In such a case, an express order of confirmation is necessary to give the employee a substantive right to the post.

However, if the service rules fix a certain period of probation, beyond which the probationary period cannot be extended, if the employee is allowed to continue in the post, on completion of the maximum period of probation, he must be deemed to have been confirmed in the post by implication. 1975 Serv LWR 58 (Punj).

(83) Strike by Employees of Electricity Board — Termination of service by offering one month's pay as permitted by conditions of service — Termination, though without enquiry, being not penal, not violative of Art. 311. 1976 Lab IC 348 (350, 351) (DB) (Punj).

(84) Order of termination of services — Order stating that services were terminated as per conditions of appointment order — Though delinquency of employee is a motive but not foundation of order, he is not entitled to protection of Art. 311. A 1977 Orissa 165 (167): 1977 Lab IC (NOC) 100.

(85) Termination in terms of contract of service — Service terminable at any time by order — Due notice of such order given — Provisions of Art. 311 would not be attracted. 1977 Lab IC 1179 (1186) (DB) (Gauhati).

(86) Broadly speaking, administrative order confers no right but this principle is subject to exceptions. In this case, Government order regulated the conditions of service of the members of work-charged establishment and it, therefore, conferred a right on such employees. It also imposed a duty on the competent authority to assign full reasons for terminating the services of a member and to obtain approval of the next higher authority to proposed action where the order terminating the service of the employee did not comply with the requirement of the Government order, order passed was illegal and void. 1977 Lab IC (NOC) 73 (All).

(87) A temporary appointment can be made against a permanent post — One of the terms of appointment being that appointment could be terminated at any time without prior intimation — Order terminating service legal. (1977) 1 Serv LR 506 : 1977 Lab IC (NOC) 69 (Pat).

Articles 310 & 311 — Note 29 (contd).

(88) Dismissal without notice but by giving one month's salary in lieu of notice — Absence of express term in contract or usage to that effect — Order of dismissal liable to be set aside. 1978 Lab IC 1062 (1064) (Mad).

(89) X engaged as staff artist in All India Radio on a short term contract for 3 years — Notice by authority to X intimating that the contract will not be renewed for any further term — Challenge under Art. 311 — Mala fides — Proof of — Where the order on the face of it is innocuous and casts no stigma, the court will not delve into secretariat files to make out mala fides. 1978 Lab IC 1242 (1245) (DB) (Ker).

[O. P. No. 905 of 1975, D/- 22-12-1977 (Ker), **Reversed.**]

(90) Public employment — Tests for determination — Approved chemist shop under E. S. I. (Medical Benefit) Scheme, W. B. — Appointment made on the basis of terms and conditions of service of approved Chemist Shops under the said Scheme — Agreement which governed the terms and conditions of employment of approved shops admittedly one under E. S. I. Medical Benefit Scheme, which was itself framed under Section 97 of E. S. I. Act — Notice ordering the shops holder to cease functioning in purported use of power under Clause 21 of the agreement — Order, though made in exercise of the power under the contract, was not an order of termination simipliciter but cast a stigma viz. the continuation of the shop would be prejudicial to the M. B. scheme — Principles of natural justice attracted — Order was quashed as it was made without offering an opportunity of being heard to the owner of the shop. (1978) 82 Cal WN 217: 1978 Lab IC (NOC) 20.

(91) Termination of services of ad hoc employee — Cannot be deemed in the eye of law as identically equivalent to an aspirant for the post which he is likely to vacate — Termination in accordance with letter of appointment — No question of Art. 311 being attracted. **A 1979 Punj & Har 149 (152, 153): 1979 Lab IC 575 (FB).**

(92) Wrongful termination of service of employee — Submission to order of termination and acceptance of dues in terms of service contract — Held did not amount to waiver of his other distinct right to recover damages for wrongful termination. 1979 Lab IC 506 (512) (Cal).

(93) Master and Servant — Termination of service — Service for indefinite period, terminable by reasonable notice on either side — Termination by one month's notice held wrongful and illegal. 1979 Lab IC 506 (510, 511) (Cal).

(94) Article 311 is not attracted if a probationer or a temporary servant is removed from his post, or even when permanent Government servant is compulsorily retired, in accordance with service rules, or is reduced in rank from officiating post without inquiry, provided no stigma is cast against him, the underlying reason being that the incumbent does not possess any right to the post. Art. 311 is not attracted to such cases where unsatisfactory work or conduct merely furnishes the motive and not the basis for the order. Art. 311 would not be attracted unless it can be shown that the order though unexceptional in form is made following a report based on misconduct. 1980 Lab IC 260: 1979 Mah LJ 828 (832, 833) (DB).

(95) Appointment as Sub-Inspector — Police Rules are not applicable — Order of appointment making Central Civil Services (Temporary Service) Rules, 1965, applicable — Appointee cannot challenge his termination in terms of those rules because temporary service rules apply to him not by statutory force but by agreement. 1980 Lab IC (NOC) 67 (Delhi).

(96) There is nothing in the Constitution which affects the right of the Government to terminate temporary employment in accordance with the terms of the engagement. (1974) 1 Malayan LJ 3.

30. Phraseology of order does not determine its nature.— (1) The form of the order or the language employed therein, e.g., the use of word 'dismissal' was not conclusive on the question whether it constituted 'removal' or 'dismissal' so as to attract Article 311 (2). In order to decide this question, Court was entitled to look into facts antecedent to order as well as its contents and 'substance.' A 1969 Cal 164 (166): 1969 Lab IC 406 **** A 1964 SC 1680 (1685, 1686): (1964) 2 SCJ 300.** (If the order though in the form merely of determination of employment is in reality a cloak for an order of dismissal as a matter of punishment, the Court would not be debarred in giving effect to the rights conferred by statutory rules upon the employee.) **** A 1964 SC 449 (456) **** 1977 Lab IC 1206 (Cal).

(2) The test for attracting Art. 311 (2) of the Constitution is whether the misconduct or negligence is a mere motive for the order of reversion or termination of service or whether it is the very foundation of the order of termination of service of the temporary employee. The form of the order, however, is not conclusive of its true nature. The entirety of circumstances preceding or attendant on the impugned order must be examined by the Court and the overriding test will always be whether the misconduct is a mere motive or is the very foundation of the order. ILR (1974) Him Pra 1197 ** 1971 Lab IC 999 (All).

(3) Order not giving reasons for reversion cannot be held to be innocuous as the real import of the order had to be considered. (1968) Lab IC 1590 (1593) (Punj).

(4) Notwithstanding the use of such innocuous expressions in the order like 'terminate" or "discharge" the Court in order to ascertain whether the public servant has been punished must apply two tests viz. (1) whether the servant had the right to the post or the rank, and (2) whether he has been visited with evil consequences and hold that he has been punished if either of the tests is satisfied. **A 1964 SC 1854 (1861)** ** 1968 Serv LR 232 (234) (Punj) ** A 1966 Orissa 173 (178, 179) (DB). (Not form but its

Articles 310 & 311 — Note 30 (contd.)
substance is to be considered.) ** A 1958 SC 36 (49, 50) ** A 1957 All 241 (243) ** A 1956 Bom 455 (458) (DB).

(5) Where after an informal enquiry an employer finds that the conduct of an employee is such that he is not suitable for retention in service, Art. 311 does not apply as the termination is merely motivated by the misconduct. But where the employer goes further and starts a formal enquiry, appoints an enquiry officer, asks the delinquent to give a formal defence and explanation of his conduct and then comes to a conclusion that he has committed misconduct and bases the termination on that misconduct, it would be a case where the misconduct is the foundation of the order. 1972 Lab IC 1593 (1594, 1595) (Madh Pra).

(6) Order reverting Government servant from the post to which he was promoted provisionally — Order also demanding refund of difference in salary drawn — Employee not aware of the condition as to refund — Order is one effecting reduction in rank — Order cannot become valid by striking out that portion imposing the condition as to refund — Order to be examined as such in the light of Art. 311. 1966 Cur LJ 813 (817): 70 Pun LR 621 (DB).

(7) Even if an order of reversion is wholly innocuous and is not passed by way of punishment but either as a necessary consequence of the order of reversion or in pursuance of it some penal consequences ensue the provisions of Article 311 (2) would be attracted. ILR (1966) 1 Punj 84 (122, 123) (DB).

(8) Mere use of the word "discharge" in the order will not make it any the less a punishment when by such discharge the servant has lost his lien on a substantive post and the order has thus entailed penal consequences for him. A 1960 Manipur 45 (48, 49).

(9) Question whether services were properly terminated — Substance of the notice and not the label given to it should be looked into. 1962 Mys LJ (Supp) 457 (458) (DB). ** (1976) 1 Serv LR 760 (763) (Cal) ** ILR (1975) 2 Ker 678 (DB) ** 1976 Lab IC 806 (Delhi).

(10) Service of a temporary servant terminated without formal enquiry under conditions of service — The word punishment used in the notes on the file were held to be loosely used — The termination of service was held legal. (1966) 68 Punj LR 452 (463, 464, 465) (DB).

(11) It is not the phraseology used by the Government that matters but the actual effect of the order made. Thus, where the Government servant is compulsorily retired a few years after his entertainment in service on the ground of his taking part in subversive activities, it is prima facie an order of "removal" within the meaning of Article 311. A 1958 Andh Pra 288 (292) (DB).

(12) Where the order of compulsory retirement clearly held the Government servant responsible for the allegations made against him, and it directed the recovery of a certain sum from him and stated that his continuation in service was not considered proper in public interest. **Held**, that the order of compulsory retirement although it was stated to be made under Rule 244 (2) of the Rules really amounted, in its essence, to a penal order. A 1962 Raj 258 (264) (DB).

(13) In determining whether termination of service amounts to dismissal, the antecedent enquiry made by the employer is not material, but what is material is the actual action taken by him in pursuance of the opinion formed by him. Where the actual order passed was that the service had been terminated and that one month's salary was to be given in lieu of notice and it also stated that the employee concerned was entitled to know the reasons for the termination of his service and that he could obtain a copy of the finding regarding this if he wanted: **Held**, that his fact would not warrant the conclusion that the action taken by the petitioner was merely a camouflage. The action taken was not punitive so as to amount to dismissal. (1958) 60 Bom LR 72 (74) (DB).

(13A) Discharge simpliciter of temporary Government servant — Communication of adverse remarks to him does not turn the simple order of discharge from service into punishment. 1972 Serv LR 567 (Punj).

(14) First orders by Vice-Chancellor, disapproving appointment of petitioner as lecturer but allowing him to continue for some time passed without notice to petitioner — Subsequent order disapproving appointment passed after issuing show-cause notice — **Held**, second order must govern petitioner's case as first order though illegal and void was superseded by second order. A 1966 Pat 11 (13) (DB).

(15) Where the show cause notices issued to temporary Government servants were couched in language which was innocuous but termination of their services was described as "removal" under the heading "disciplinary action" in an officially publicised document issued on behalf of the Government, it was held that the action taken against them was really punitive because it had the result of stigmatising them and hence the notices were liable to be quashed. 1969 All LJ 135. ** 1980 Lab IC (NOC) 67 (Delhi). ** 1977 Lab IC (1179) (1185) (DB) (Gauhati) ** 1975 Lab IC 1094 (1095) (All).

(16) Order of simple termination — Affidavit filed by Government in support of termination indicating its reasons for passing the order — Court in such circumstances can go beyond the order and see whether any stigma is attached to the servant. (1972) 2 Cut WR 1619.

(17) Termination order not containing words attaching stigma to employee — Court can still look at all circumstances to see whether order is by way of punishment. (1972) 2 Serv LR 672 (Delhi).

(18) No evil consequences can be thought of affecting the future career of a Civil servant when his service is terminated and he is described as under suspension when in fact he was under such suspension not in connection with any departmental proceeding but because of some criminal prosecution against him. 1977 Lab IC 1179 (1187) (DB) (Gauhati).

31. Automatic termination of service under Service Rules.— (1) Dy. Commissioner

Articles 310 & 311 — Note 31 (contd.)
refusing leave to clerk in March 1960 and intimating that if he did not report for duty within seven days he would be deemed to have resigned from Government service — Clerk not reporting for duty thereafter, and instead offering himself as candidate for election to Town Municipal Council in 1964 — **Held,** failure to report for duty resulted in cessation of employment and acceptance of resignation was superfluous — Clerk was not holder of office of profit, when he offered himself as candidate. (1966) 2 Mys LJ 479 (480) (DB).

(2) Service Regulations providing that there is automatic termination of service on overstay — Still removal from service for overstaying leave without giving opportunity to show cause is illegal. **A 1966 SC 492 (494, 495) **** 1976 Lab IC 534 (Him Pra) ** 1972 Lab IC 394 (J and K) ** A 1971 All 346 (347): 1971 Lab IC 964. ** 1969 Lab IC 117 (118) (Mys).

(3) It is by now well settled that from the constitutional standpoint, "removal" and "dismissal," stand on the same footing except as to future employment. In the context of Sec. 240 (3), 'removal' and 'dismissal' from service, are synonymous terms, the former being only a species of the latter. Moreover, according to the principle of interpretation laid down in Section 277 of the 1935 Act, the reference to dismissal in Section 240 would include a reference to removal. **A 1975 SC 2045 (2048): 1975 Lab IC 1493.**

(4) Temporary appointment — Upon expiry of the period the incumbent ceases to be in employment and Art. 311 does not apply. A 1962 Cal 420 (423. 424).

(5) Termination — Temporary clerk with about 13 years of service removed for negligence in duties despite warning — It cannot be said that removal ordered after the maximum age for entry into government service amounts to dismissal. Every such order cannot be said to be dismissal. 1976 Lab IC 1029 (DB) (Orissa).

(6) When a Government servant is convicted on a criminal charge, his dismissal cannot be automatic, unless there is a specific rule for such automatic termination of service on conviction of criminal charge. (1977) 2 Cal LJ 98 (106).

(7) Service Rule providing for automatic termination of service in certain contingency (continuous absence from duty without leave) is invalid as offending Art. 311 — Hyderabad Civil Service Rules, Rule 29 (2) is not such a rule and hence not invalid. 1975 Lab IC 76 (80, 81) (Andh Pra).

(8) Rule 76, Bihar Service Code (1952) prescribes antomatic termination of service for continuous absence for 5 years — Order of automatic termination of service without giving opportunity to Government servant offends Art. 311. **A 1971 SC 1409: 1971 Lab IC 881.**

(9) No show cause notice served on Government servant — No order of dismissal or discharge passed — Absence from duty by Government servant claimed to have resulted in automatic discharge from service — Services of Government servant cannot be dispensed with arbitrarily — Such claim of automatic discharge wholly untenable — Article 311 (2) must be fully and strictly complied with. 1970 Lab IC 506 (508) (J and K).

32. Distinction between 'removal' and 'dismissal.'— See also Note 24 — (1) Although both "dismissal" and "removal" connote a penalty, removal does not disqualify a person from future employment under the Government, while "dismissal" does so. **A 1957 SC 892 (895) **** A 1957 Andh Pra 794 (803) (DB) ** A 1957 Assam 77 (80) (DB) ** A 1955 Cal 556 (558) ** A 1959 Tripura 51 (56) **** A 1975 SC 1064 (1066): 1975 Lab IC 661 ** 1975 Lab IC 283 (Him Pra).**

(2) Regulation 20 (a) framed under Section 28 (6), Madras Port Trust Act, 1905, empowers Board to withhold contribution to provident fund account in a case of resignation or dismissal of a subscriber for misconduct. Where lesser penalty of removal from service for misconduct is imposed the subsequent order withholding contribution to provident fund, amounts to further punishment not warranted by Regn. 20 (a). This Regulation recognises the well established distinction between dismissal and removal. (1970) 2 Mad LJ 478 (DB).

33. Removal of honorary servant.— (1) The removal or dismissal of a special constable is covered by Clause (2) of Art. 311 even though he does not get any remuneration, as the removal may have the effect of casting a slur on his character. **A 1954 SC 369 (374) ** A 1953 SC 250 (251) **** A 1955 Orissa 33 (Pr. 4) (DB).

(2) Honorary Magistrate (Special 1st Class) appointed under Sec. 14 (1) Cr. P. C. holds "civil post" within meaning of Article 311, even though he is not a salaried officer. 1961 (1) Cri LJ 657 (658) (Ker).

(3) Services of Honorary Medical Officer terminated by Government under its right to do so at any time without any notice and without any reason — Motive of Government behind order of termination is not material — Termination not by way of punishment — Officer not entitled to protection under Art. 311 (2). 1961 Ker LT 662 (686, 689).

34. Discharge.— (1) The word "discharge" has the same meaning as "removal". A 1955 Cal 556 (558) ** A 1953 Cal 188 (192).

(2) Discharge from service on the grounds of notoriety for corruption and unsatisfactory service is clearly a punishment. **A 1960 SC 689 (692).**

[**See also** A 1965 Punj 28 (28, 29, 30). (Order of discharge passed while charge of corruption was pending in criminal court — Court acquitting delinquent officer on merits — Circumstances held revealed that discharge was result of punishment and order amounted to dismissal — Non-compliance with Art. 311 (2) — Order cannot be sustained.)]

[**But see** ** 1971 Lab IC 1230 (1231) (Orissa). (Where a temporary servant was discharged from service because he was arrested in some criminal case, his conduct would constitute only a motive for taking action and not a foundation for order of discharge. It would, therefore, be a dis-

Articles 310 & 311 — Note 34 (contd.)
charge simpliciter and not one by way of punishment.)]

(3) Discharge of Government servant — Requirements — There must be full-fledged enquiry — Charges must be established through evidence and delinquent must be given reasonable opportunity to defend himself — Order of discharge stating simply that chages have been established and explanation has no substance is improper. (1969) 11 Orissa JD 143.

(4) Discharge of temporary public servant — Art. 311 does not apply. **A 1964 SC 449 (453).**

[**But see** 1971 Lab IC 1230 (Orissa). (Discharge from service by way of punishment — Requirements of Article 311 have to be followed even in case of temporary servant.)]

(5) Article 311 would also apply to the case of a temporary servant if his services are terminated by way of punishment. So long as the authorities do not make an order of discharge for misconduct but merely exercise their right to terminate the services, it is nct open to an employee to complain. In judging of the question whether or not an order of discharge is accompanied by punishment, one must look to the language of the order of discharge. A 1960 Bom 9 (10, 11, 12) (DB).

(6) The Government has a right to terminate the services of its temporary servants when the terms of the contract of employment or the specific service rules provide for it, when it will be a mere discharge simpliciter from service. The motive is immaterial and the factor inducing the Government to take action under the contract of employment such as misconduct, negligence, inefficiency or other disqualification will not make the action a punishment to attract the provision of Art. 311 (2) of the Constitution. Any enquiry conducted prior to such action by the Government will not affect the position. A 1967 Punj 129 (130) ** 1962 Mys LJ (Supp) 487 (490). (Discharge in terms of service rules of temporary servant is neither 'removal' nor dismissal) ** A 1959 Pat 192 (196) (DB). (Discharge according to terms of contract — Absence of opportunity to show cause does not affect validity of discharge.) **** 1969 SCD 539.**

(7) An employee coming under the category of "Industrial employee" which is of a temporary character can be discharged from service by the authorities under Rule 75 (a) of the Army Instructions issued under the Army Act. Such discharge is not a penalty as contemplated by sub-rule (1) of Rule 212 of Army Instructions. A charge therefore need not be framed against him before such discharge. 1962 Mys LJ (Supp) 254 (257).

(8) The discharge of a temporary Government servant who has not attained the status of quasi-permanency even if it is done for misconduct will not amount to dismissal or removal within the meaning of Article 311. A 1959 Manipur 33 (37).

(9) Under 'Sastry award' an order of discharge of an employee of State Bank made under paragraph 521 (10) (c) does not amount to punishment by way of disciplinary action and there is no necessity for giving a hearing to the employee.

An order discharging an employee for inefficiency must be taken to be one passed under para. 521 (10) (c) of the award. The mere fact that certain disciplinary proceedings had preceded the order would not render the order one by way of punishment when it was not made in consequence of such proceedings. A 1962 Cal 72 (74, 75). ** 1979 Lab IC 990 (DB) (Pat).

(10) An order of discharge with retrospective effect is bad in law. (1957) 61 Cal WN 880 (885).

(11) Authority stating reasons for not giving notice of discharge to employee — Non-compliance of Proviso (b) to S. 126, J. & K. Constitution regarding notice — Sub-clause (3) of Section 126 has no application — Reasons are justiciable. A 1965 J and K 53 (56) (DB).

(12) Word "discharge" does not occur either in Article 311 or in the Civil Service Rules (Punjab) in regard to penalties — But definition of the word given in the Punjab Rules shows that it applies where a person's service is terminated for reasons given in (a), (b) and (c) of the explanation under Rule 14.10 of the Punjab Rules. A 1953 Punj 88 (93, 94) (DB).

(13) Petitioner allowed to appear for competitive examination, as being duly qualified — Petitioner successful at examination — His appointment as probationer for two years — Discharge of petitioner after expiry of probationary period on ground that he was not qualified to appear for competitive examination — Negligence of Government — Petitioner becoming over-age at time of discharge — Principle of estoppel held operated against authorities in circumstances of case — Discharge held illegal. A 1966 Andh Pra 59 (62).

(14) Order of discharge innocuous in nature — Nevertheless court has a right to find if it was punitive. ILR (1969) 2 Cal 199.

(15) Abolition of post — Abolition of National Savings State Advisory Board — Term of Vice-Chairman also stood terminated — Reconstitution of Board — Vice-Chairman holds no office on new Board. ILR (1977) Him Pra 398 : 1977 Lab IC (NOC) 144.

(16) Cantonment Board, a body corporate — Employees, not servants of State or Central Government. ILR (1971) 1 Punj 282.

(17) Order of discharge in terms of Service Rules — Order casting no aspersion — Confidential report from President to appointing authority containing some remarks — Report meant for the authority and not to others — Order of discharge would not attract Article 311 — Discharged employee not entitled to make use of contents of the report. ILR (1971) 1 Punj 282.

(18) Calcutta Subordinate Police Rules (1962), Rule 19 (3) and Constitution of India Article 311 (2) — Proper order of discharge under Rule 19 (3) not passed — Consideration of Article 311 (2) premature. (1970) 74 Cal WN 963.

(19) Calcutta Police Regulations, Ch. XV, R. 47 (2) — A particular public servant guided by a particular rule until he has become permanent can be discharged only

Articles 310 & 311 — Note 34 (contd.) in compliance with that rule, also further provided that the order in question does not amount to removal with a stigma. (1972) 76 Cal WN 444.

(20) Discharge of temporary servant — Order of discharge unrelated to charges framed — No enquiry as contemplated by Article 311 (2) held after explanation of the servant was submitted — Article not attracted. (1971) 1 Serv LR 316 (Punj).

(21) Merely because an employee has crossed the maximum age for entry into Government service his discharge simpliciter from service would not amount to dismissal. 1976 Lab IC 1029 (1031) (DB) (Orissa).

35. Retrenchment.— (1) In the absence of any special contract the substantive appointment to a permanent post gives the Government servant so appointed a right to hold the post until, he attains the age of superannuation or is compulsorily retired after having put in the prescribed number of years' service or the post is abolished. His service cannot be terminated except by way of punishment for misconduct, etc., on proper enquiry after due notice to him.

Where the petitioner held substantive post as Sub-Inspector in the Excise Section at the material time, which post was not abolished and he had never worked in the Customs section, but on a direction by the Government to retrench the staff of Customs section, the petitioner was served with the notice of retrenchment:

Held, that the action of the authority concerned in directing retrenchment on the ground of his being of the Customs section clearly amounted to punishment as the retrenchment on administrative grounds was unauthorised and the action contravened Article 311. A 1960 Madh Pra 239 (240, 241).

(2) Miss B, junior most clerk in the department was retained while A was relieved from service.

Held, that the order was in clear violation of the Government orders; but it could not be said that he had been dismissed or removed as a penal step. This was purely an administrative act. The jurisdiction of the High Court under Article 226 could not be invoked. A 1959 Ker 59 (61, 62) (DB).

[See 1969 Lab IC 730 (734) (DB) (Mys). (Abolition of posts — Services of juniors should first be terminated.)]

[But see 1975 Lab IC 856 (858) (All). (Temporary employees — Principle of "last come first go" to be followed — Authorities cannot pick and choose — Such procedure will be hit by Articles 14 and 16.)]

(3) Even while retrenching the employees from services, it is open for the Government to take into consideration its policy having regard to the provisions of Part XVI and Art. 16 (4) of the Constitution and the retrenchment has to be made in such a way so that the quota reserved for the various backward classes is not disturbed. 1976 Lab IC 1075 (Bom).

(4) The petitioner was working as Tracer in Circle 'A' of the Public Health Department. On abolition of Planning and Design division set up in Circle 'B' his services were terminated on the basis of 'first come last go' Principle. **Held** that principle has not been correctly applied, as the gradation list was not being maintained State-wise but Circle-wise. The abolished division was not Part of Circle 'A' therefore the petitioner was not liable to retrenchment. (1977) 2 Serv LR 397 (398) (DB) (Orissa).

(5) Retrenchment of employee — Contention that retrenchment violates Art. 311 — **Held** on facts that contention must be repelled since no foundation was laid for any such contention at any stage and that employee had not acquired any right to post held by him. A 1967 Mys 131 (132) (DB).

(6) If after giving all the possible retrenchees an opportunity to explain the bad record, a selection is made of those who after the inquiry are found to be worse than the others, there can be no objection at least on the ground of contravention of Article 311. But to select the apparently worse without following the principle laid down in Article 311 is wrong, and the element of punishment can be said to have entered into the matter. A 1960 Madh Pra 299 (302) (DB).

(7) Under Merger Agreement the option to continue the State servants in the service of the Union left with Government — Refusal of employee asked to get himself medically examined before being absorbed in Union service and consequent retrenchment — Retrenchment order is not a dismissal or removal. A 1961 Tripura 29 (32).

(8) The creation of the new State of Madhya Bharat did not guarantee continuance of service of the former employee of the covenanting State. The retrenchment of such an employee under a scheme of reorganization according to the Retrenchment Rules cannot amount to a removal. 1961 MPLJ 12 (13).

(9) Temporary servant — Retrenchment on basis of selective tests — Selective test held not discriminatory — Retrenchment cannot be questioned, whatever be the motive. A 1959 J and K 136 (139) (DB).

(10) Where grounds given for retrenchment are "consistently bad record" and 'being unqualified not being a matriculate and when later ground alone is sufficient to justify retrenchment, it cannot be held that the retrenchment itself was illegal for not following Art. 311 procedure because one of the grounds was "consistently bad record." 1971 MPLJ 837.

36. Discharge on account of abolition of post.— (1) Termination of service consequent upon abolition of posts does not involve 'removal' from service. A 1967 Bom 482 (490) (DB). (Observations in A 1958 SC 36 (47, 48) relating to such termination held not disapproved in A 1964 SC 600 (615).) ** **A 1969 All 449 (461, 466) (FB).** (A 1965 J and K 15 (FB), **Dissented;** A 1965 All 406, **Reversed.**) ** **A 1970 Delhi 1 (5) : 1970 Lab IC 31.**

(2) Financial sanction for the post up to certain date — Post stands abolished on that date — No sanction of Council of Ministers is required for abolition. **A 1970 Punj 112 (122) (FB).**

(3) If a post is abolished or if there is no further sanction for continuance of a post no Government servant can claim a right

Articles 310 & 311 — Note 36 (contd.)
to hold the post. Termination of such employees on abolition of post is not illegal. 1975 Lab IC 1000 (1001) (All).

(4) It is not open to the court to go behind the wisdom of the decision of the executive and to substitute its own when the abolition of the post is bona fide and in public interest. (1979) 2 Cal LJ 333 (354) (DB).

(5) Where the services of the employee are terminated on abolition of his post and his services were automatically shifted to the Corporation it was held that the petitioner's service under the State Government had come to an end and the petitioner had offered himself for service under the Corporation and had accepted employment. **Held** that the authorities of the Corporation had jurisdiction to impose disciplinary punishment. ILR (1977) 1 Cut 128.

(6) When a post, whether permanent or substantive, is abolished, the service of the servant holding the post, either on probation or as officiating automatically comes to an end. It does not amount to a punishment or dismisal or removal from service for the purpose of Article 311. **A 1958 SC 36 (42, 48) ** A 1969 All 449 (FB)** ** A 1968 Andh Pra 307: 1968 Lab IC 1293. (A 1965 J and K 15 (FB), **Dissented from)** ** A 1969 Goa 76 (85): 1969 Lab IC 942. ** **A 1973 SC 2641 : 1973 Lab IC 1593** ** 1972 Lab IC 1208 (1214) (All). ** 1970 Ker LT 1008 ** 1971 Lab IC 1329 (1331) (Madh Pra). ** 1970 Ser LR 334 (Punj).

(7) Abolition of permanent post — Termination of Services of person holding that post in consequence thereof — Art. 311 (2) not attracted. **A 1969 All 449 (453, 454) (FB)** (A 1965 All 906 **Reversed.)** ** 1970 Serv LR 334 (338) (DB) (Punj).

(8) Where a temporary post is abolished this does not amount to dismissal of the employee holding the post. A 1957 Hyd 12 (13) (DB) ** A 1956 Cal 662 (667) ** A 1968 Andh Pra 307 (309): 1968 Lab IC 1293.

(9) If further performance of a contract of service under Government becomes impossible as a result of the abolition of the office by statute, no cause of action for damages for breach of contract arises. (1934) 103 LJPC 41 (43).

[See **A 1958 SC 36 (42, 48).**]

(10) Article 311 (2) may apply to the case of termination of service as a result of abolition of post when the post is abolished to victimise and punish an individual servant. A 1968 Andh Pra 307 (309): 1958 Lab IC 1293.

(11) Temporary post — Period of appointment expires when post is abolished — Termination of services on abolition of post cannot be by way of punishment — No question of violation of Art. 311 (2) arises. 1960 Ker LT 1096 (1099). **(A 1958 SC 36, Disting.)**

(12) The mere fact that a certain post was a temporary one would not necessarily lead to the inference that a permanent appointment could not be made in the grade admissible for such post. The employer may well have in mind to fix up the employee at some other post of equal rank on the abolition of the post to which the latter is initially appointed. **A 1962 Him Pra 41 (42).**

(13) Where a temporarily appointed clerk in Government service is relieved from service on the ground of the termination of the vacancy and on his application to the Public Service Commission for registration, the Commission, purporting to act on the report of his last superior, refuses to entertain the application and further passes an order debarring the applicant from service for two years, such an order clearly amounts to an order of punishment and since the Commission is not empowered to pass such an order it is ultra vires its powers. **A 1958 Ker 352 (354) (DB).**

(14) A permanent employee holding a lower post in the same department cannot be continued in service, while discharging a superior employee on abolition of post held by the latter 1978 Lab IC 1290 (1293) (Guj).

(15) The question whether a post should be retained or abolished is essentially a matter for the Government to decide and that such deision if taken in good faith and not used as a cloak or pretence to terminate the services of a person holding that post, cannot be set aside by Court. 1978 Lab IC 1290 (1292) (Guj).

(16) Abolition of post — Services of incumbent terminated — Incumbent cannot claim alternate post as of right. 1977 Lab IC 759 (766) (DB) (Orissa).

37. Termination upon integration of States.— (1) Where on the abolition of the former Indian States as separate units and their integration into new units under the Constitution persons serving in the for[illegible] States were absorbed into the services organised under the new set-up, on general principles of international law, all the appointments in the former States would come to an end automatically on the abolition of such States and the persons holding such appointments would have no rights enforceable against the new States which took their place except to the extent that such new States might have undertaken any obligations towards such persons. **A 1958 SC 228 (232) ** A 1960 Manipur 45 (46).**

(2) **Held,** that the position of the State employees on 15th October, 1949, was no better than that they were retained in Govt. service pending decision of the question of their absorption as contemplated in Art. 8 of the merger agreement which was entered into by the Maharaja of Tripura. That Article gave the Government the power to either continue the servant or to terminate his services and pay reasonable compensation. Pending decision of that question, the employee could not claim that he was entitled to the post. The Government could discharge him without having to follow the procedure laid down in Art. 311 (2). A 1960 Tripura 28 (30).

(3) Where on merger of the Gwalior State, the Madhya Bharat Government terminated the services of an employee of the ex-Gwalior State who was not absorbed in the new State in accordance with the Rules called the "Retrenchment Terms" question of violation of Art. 311 did not arise. **A 1973 SC 1285 (1289) : 1973 Lab IC 873. (1971 MPLJ 837, Affirmed.)**

Articles 310 & 311 (contd.)

38. Discharge from temporary post — Right to lien on substantive post. See also Note 135.— (1) A person who was holding a substantive appointment in a permanent post in the Hyderabad Municipal Corporation before his services were transferred to the Government Department is entitled to hold a lien on the former post. Under Section 3 of the Hyderabad Local Government Service (Declaration as State Civil Service) Act, such a person must be deemed to be in the civil service of the State. And where the termination of his services was not because of the abolition of his former post or as a result of any disciplinary proceedings taken against him, the termination of his services will attract the provisions of Article 311. In the circumstances his right to the permanent post which he held in the Municipal Corporation cannot be taken away. (1960) 1 Andh WR 256 (259) (DB).

(2) Appointment in substantive capacity to temporary post — Post made permanent subsequently — Appointee does not become permanent employee automatically. In such a case the order terminating the services of such an employee as a temporary employee is not illegal. **A 1977 SC 1267 (1268) : 1977 Lab IC 838.**

39. Discharge of Probationer.— (1) An appointment to a permanent post in Government service on probation means, as in the case of a person appointed by a private employer, that the servant so appointed is taken on trial. Such an employment on probation under the ordinary law of master and servant, comes to an end it during or at the end of the probation the servant so appointed on trial is found unsuitable and his service is terminated by notice. **A 1958 SC 36 (42) ** ILR (1965) 2 Mad 24 (31, 32) (DB).**

(2) Probationer — In contradistinction with a confirmed Government servant has no right to hold his post — Termination of his service per se does not visit him with any evil consequences. **A 1977 Punj 7 : 1977 Lab IC 345.**

(3) Probationer — Termination of service in accordance with rules governing conditions of service — Not a dismissal or removal — A probationer can be discharged during the period of his probation and such discharge will not amount to a removal or dismissal where it has been done in accordance with the service rules and not by way of punishment — No right to protection under Article 311 (2). **A 1963 SC 1552 (1553, 1554) ** A 1958 SC 36 (49) ** 1967 Ker LT 896 (897) ** A 1974 SC 2263 (2264) : 1974 Lab IC 1427 ** (1977) 2 Serv LR 371 (374) (FB) (Punj) ** 1978 Lab IC 991 (998) (All) ** A 1977 Punj 7 : 1977 Lab IC 345 (350, 351) (DB) ** 1974 Lab IC 103 (109) (Raj) ** 1971 Lab IC 519 (520) (DB) (Cal).**

(4) Probationer — Discharge on ground of unsuitability — Article 311 (2) not violated — Principles of natural justice not applicable — Fact that order was motivated by previous order of suspension passed after enquiry giving him opportunity of being heard — Not sufficient to hold that Art. 311 (2) was violated. ILR (1979) 2 Kant 1728 : 1979 Lab IC (NOC) 133. (A 1953 Nag 138, **held no longer good law.**)

(5) Rajasthan Higher Judicial Service Rules, 1969, Rr. 25, 26 — Termination of service of probationer in accordance with Rule 26 — Not illegal nor arbitrary nor punishment — Article 311 not applicable. 1977 Serv LJ 601 (DB) (Raj).

(6) Discharging a probationer from service under R. 36 (1) of Rajasthan Police Subordinate Service Rules (1974), for unsatisfactory works — Casts no stigma — Article 311 not attracted. 1979 Raj LW 562 : 1980 Lab IC (NOC) 24.

(7) Termination simpliciter of probationer appointed in temporary post after dropping enquiry against him — Work of probationer never satisfactory — Termination did not attract Article 311. **A 1980 SC 1242 : 1980 Lab IC 698 (703).** (Civil Rule No. 249 of 1967, D/- 10-7-1969 (Assam), **Reversed.**)

(8) On expiry of probationary period probationer does not automatically become permanent unless rules so provide. A 1968 Manipur 58 (62) : 1968 Lab IC 1065.

(9) Probationers — Confirmation of — Person appointed on probation is not automatically confirmed — An order confirming him must be passed by the appropriate authority. (1973) 1 Serv LR 979 (Delhi) ** 1979 Lab IC 952 (954) (Delhi) ** (1971) 2 Serv LR 2 (Delhi).

(10) Confirmation of persons in various pay scales — Order cancelled — Order not giving valid reasons in law for revocation but left to the sweet will of authorities concerned — Such revocation interferes with the civil rights and where no opportunity is afforded to show cause the orders cannot be sustained. 1975 Serv LJ 746 (All).

(11) A probationer's service can be terminated at any time before the expiry of the period of probation without holding any enquiry on the ground of his unfitness for service. Order of termination need not give reasons. If reasons are given and they appear plausible but specious, it does not render the termination illegal, even assuming that the authorities acted mala fide. A 1960 Madh Pra 208 (210, 211) (DB) ** 1970 BLJR 447 (DB) (Pat). (No period of notice of termination is necessary.) ** (1959) 2 Lab LJ 702 (703) (Andh Pra).

(12) If the Government takes the view that a simple termination of service of a probationer is not enough and the conduct of the probationer has been such that he deserves a punishment entailing penal consequences, in such a case, the Government may choose to proceed against the servant on the basis of his misconduct, negligence, inefficiency or the like and inflict on him the punishment of dismissal, removal or reduction carrying with it the penal consequences. In such a case the servant will be entitled to the protection of Article 311 (2). A 1960 Cal 314 (317).

[But see 1977 Lab IC 937 (All) ** 1976 Lab IC 1080 (Cal). (Probationer Police Sub-Inspector under training — Discharge on ground of unsuitability, failure in examination and not undergoing training dutifully and properly — No stigma attached — Article 311 does not provide protection — Order of discharge not by way of punishment.)]

(13) Probationer — Order of discharge of — Ex facie it was passed for unauthorised absence from duty — Affidavit of Government stating that it was passed because he was a deserter, his work was not up to mark and he was engaged in prejudicial activities — Held that order was by way of punishment and S. 126 (2) of the Constitution of J. & K. (1956) has to be complied with. 1973 Serv LJ 915 (Punj).

Articles 310 & 311 — Note 39 (contd.)

(14) Persistent reports that probationer misbehaved towards colleagues and superiors — Order terminating services though did not contain any stigma was punitive in nature — Probationer ought to have been heard. 1978 Lab IC 232 (234) (Delhi).

(15) Where a probationer was discharged without enquiring into the allegations which were basis of discharge, the order was held illegal and quashed. 1979 Lab IC 1333 : (1979) 2 Lab LJ 143 (Kant).

(16) Person appointed on probation for one year — Person's services can be terminated before expiry of period of one year — No damages can be claimed. A 1954 Mys 175 (176) (DB).

(17) If the termination of service of a probationer is based on the ground of misconduct, negligence, inefficiency or other disqualification, and is resorted to by the Government as a measure of punishment, it will amount to "dismissal" or "removal" within the meaning of Article 311 and entitle the Government servant to the protection conferred by that provision. A 1958 SC 36 (42) °° (1977) 2 Serv LR 7 (9, 10) (DB) (Raj).

(18) Probationer — Discharge from service in terms of employment, but while enquiry for accepting illegal gratification was pending — **Held**, order though motivated by alleged misconduct could not be considered as by way of punishment — Protection of Article could not be claimed. A 1966 Madh Pra 333 (335) (DB).

(19) Probationer can be discharged in the manner provided by Rule 55-B of Civil Services (Classification, Control and Appeal) Rules. Mere termination of service does not carry with it any 'evil consequences'. Order discharging public servant, even if a probationer, in an enquiry on charges of misconduct, negligence, inefficiency or other disqualification may appropriately be regarded as one by way of punishment but an order discharging probationer following upon an enquiry to ascertain whether he was fit to be confirmed, is not of that nature and Art. 31 (2) does not apply. **A 1961 SC 177 (180). ((1958) 24 Cut LT 441, Reversed.)**

(20) Probationer holding permanent post in another department and a lien on it; must revert to his permanent post on discharge from probation. A 1963 Manipur 25 (28).

(21) Petitioner appointed as headmistress on a contractual basis, on probation for a period of one year subject to termination if her work was unsatisfactory — Service of memorandum stating that her work was considered to be unsatisfactory and asked to explain why she should not be discharged — After service of order terminating her services — **Held**, if the management felt that her probation was unsatisfactory, it would be entitled to terminate the probation and discharge her — This they did after asking for her explanation and after giving her a personal hearing — Therefore there was no flaw in the order of discharge. (1964) 2 Lab LJ 158 (159) (Mad).

(22) The discharge of a probationer whether during or at the end of probation period, for some specific fault or on ground of his unsuitability for the service amounts to a removal or dismissal. A 1961 Pat 339 (341) (DB).

(23) Where action against petitioner was prompted by unsatisfactory record or unfavourable reports, if not for specific faults, opportunity to show cause would be necessary. 1965 Pun LR (Supp) 586 (592) (DB).

(24) Probationer — No right to post — Enquiry to decide fitness for confirmation not provided — Discharge of probationer — Article 311 not attracted — Lien on permanent post in another department — Effect — He should be reinstated to such permanent post — Discharge from anterior date not legal. A 1963 Manipur 25 (27, 28).

(25) Where there is violation of the legal provisions regulating the procedure for the discharge of a public servant, order of discharge of a probationer must be held ultra vires and illegal. A 1961 Pat 339 (341) (DB).

(26) The discharge of a probationer on account of his unsuitability for service amounts to "removal" or "dismissal". A 1953 Nag 138 (141) (DB).

[But see A 1953 Orissa 329 (332) (DB).]

(27) Petitioner appointed under R. 6, Calcutta Police Regulations (1972), as a probationer for two years held civil post — Order of his discharge casting stigma — Article 311 was therefore attracted. (1972) 76 Cal WN 444.

(28) An officer placed on probation cannot be deemed to be confirmed unless and until an express order of confirmation is passed. The mere expiry of the period of probation does not have the effect of automatically bringing about the confirmation. There has to be some lapse of time between the expiry of the period of probation and an order being passed confirming the officer or extending the period of his probation. It follows, naturally, that there would also be a similar lapse of time even when the competent authority intended to pass an order terminating the probation and reverting the officer. During this period the position of the officer is uncertain. A 1963 All 377 (379, 380) (DB) °° **A 1961 All 450 (456) (FB). (ILR (1959) 1 All 226 and A 1959 All 536, Overruled.)**

(29) In the very nature of the probationary period itself, when the period of probation is specified there can be no question of any notice being given for termination of service before the expiry of the probationary period. Even where a notice is required under the contract of his service, the order terminating his services does not become illegal because of the omission to give notice. In that case the probationer can at the most claim salary for the notice period. For that relief he has the remedy of a civil suit. A 1960 Madh Pra 208 (212) (DB).

(30) Punishment — Order of removal from service — Whether by way of punishment, is a question of intention — Order discharging person on probation held was by way of punishment. A 1961 J & K 7 (8, 9).

(31) At the time when the appointing authority has to consider the confirmation of probation or the termination of the services of the employee, it is entitled to take into consideration all facts and merely because the authority is dissatisfied with the employee it does not follow that the action in terminating the services is penal in nature. Under Statute 13 framed under the Institute of Technology Act of 1961 so long as the period of probation has

Articles 310 & 311 — Note 39 (contd.)
not been completed and declared to have been completed satisfactorily the employee enjoys a status not higher than that of a temporary employee and it is open to the employer and equally to the employee to put an end to the service relationship by notice. (1964) 1 Mad LJ 70 (76, 77, 78).

(32) Probationer has no right to a post. His services may be terminated without enquiry when there is no charge of negligence, misconduct or inefficiency against him. A 1961 Pat 339 (340, 341) (DB).

(33) Termination of probation of employee by Railway Authority — Termination as per Rule 25 of Railway Probation Force Rules, 1959 — Termination after considering explanation of employee — Article 311 not violated. ILR (1978) 2 Ker 262.

(34) A simple order of discharge from service under R. 12.21 of Punjab Police Rules (1934), after expiry of maximum period of probation, held, attracted Art. 311. If it was proposed to deal with an inefficient official after expiry of that period, it was necessary to do so in accordance with the Rules of Chapter XVI of the Rules. **A 1979 SC 336 : 1979 Lab IC 164 (166).**

(35) Where a probationer is discharged from service by an order under R. 12 (bb) of Indian Police Service (Probation) Rules (1954), and without giving any details as to the reasons why he is being removed, the order of discharge is per se stigmatic and therefore, illegal. Part first and part second of R. 12 (bb) are both per se stigmatic in nature. 1979 Lab IC 952 (955) (Delhi).

(36) An order reverting an employee from the officiating higher post to the substantive lower post on ground of unsuitability is not an order of "discharge of a probationer". Unless such order is passed by way of penalty R. 38 or Art. 311 (2) are not attracted. Moreover such a person cannot be said to be a probationer. (1971) 12 Guj LR 437.

40. Termination on ground of lack of competency or on ground of medical unfitness.— (1) Termination of service on the ground that an employee is lacking in ability or capacity to discharge his duties carries with it an imputation against the officer's conduct which may be controverted or explained by him. A 1958 All 141 (144) •• A 1966 All 429 (430) (DB). (Termination on ground of incapacity to perform duties is removal for disqualification — Article 311 (2) applies.) •• (1973) 2 Serv LR 33 (All).

(2) Termination of the services of a temporary employee on the ground of medical unfitness does not amount to a penalty and so does not constitute "removal" within Art. 311. A 1956 Bom 455 (458) (DB) •• A 1954 Raj 189 (191) (DB) •• 1954 Raj LW 520 (524) (DB) •• 1975 Lab IC 91 (94) (Cal) •• 1972 Lab IC 1491 (J & K).

[But see A 1956 All 330 (332) •• A 1954 Cal 399 (400) (DB) •• A 1956 Bom 455 (458) (DB). (It is neither 'removal' nor 'dismissal'.)]

(3) Employee medically examined at the time of appointment — Subsequent medical examination of employee without authority of any provision in service conditions — Discharge based on subsequent medical examination illegal. (1973) 2 Serv LR 33 (All).

(4) Where there is neither service contract nor service regulation, authorising premature termination of service of a permanent employee, such a termination cannot be effected. Civilians in Defence Services (Classification, Control and Appeal) Rules, 1952 do not make any provision for termination of services of a permanent employee. Termination of services of a permanent labourer working in an ordnance factory on the ground of his having become permanently incapacitated due to an injury is not legal. (1964) 8 Fac LR 197 (200) (Cal).

(5) It is a condition implied in an ordinary contract of service that it comes to an end in the event of a supervening incapacity of an employee but where an employee is removed for a defect which he had when he was engaged then his removal from service after the probationary period cannot be justified on the basis of an implied condition of his employment, and therefore his discharge amounts to a punishment. A 1958 All 844 (847) (DB).

(6) A temporary Government servant who is not employed for a specified period may be discharged on service of reasonable notice. If the discharged Government servant is not visited with evil consequences, the discharge is not by way of punishment. An enquiry as to the suitability of a temporary incumbent for being made permanent is not one under Article 311 (2). Termination of his service as a result of that enquiry is not by way of punishment with the result that the termination of his service was not a dismissal or removal within the meaning of Art. 311 (2). A 1967 Cal 262 (265 to 268) (DB) •• **A 1964 SC 449 (453).**

(7) Simple termination of service of temporary Government servant under R. 5 of Central Civil Services (Temporary Service) Rules, 1949 — In reply to writ petition challenging order, affidavit alleging inefficiency and insubordination made — **Held** that termination was simple termination without attaching any stigma to the civil servant and Art. 311 (2) had no application. A 1967 Cal 326 (330) (DB).

(8) Petitioner failing to pass departmental examination — Services terminated under R. 5, Central Civil Services (Temporary Service) Rules — Case is not one of removal or dismissal from service so as to attract Article 311. A 1960 Cal 314 (317).

(9) Schoolmaster — Termination of service on ground of incompetency — Rule requiring charges to be framed and opportunity to be heard complied with — Committee terminating services irrespective of charges — Termination held null and void. A 1957 Mad 561 (563) (DB).

(10) If the ground of termination of the services of the temporary Government servant is non-selection by the Public Service Commission, and the employee was not told when employed that he was liable to be removed if the Public Service Commission did not select him, then he is entitled to the protection offered by Article 311 (2). A 1958 Tripura 28 (33).

(11) It is not necessary for attracting Article 311 (2) that there must be misconduct; it can be attracted on other grounds also. If the reason is inefficiency or incapacity whether physical or mental then also Art. 311 will be at-

Articles 310 & 311 — Note 40 (contd.)
tracted. A 1958 Tripura 28 (33) ** 1980 Lab IC (NOC) 37 (All).

(12) An order discharging a public servant, even if a probationer in an enquiry on charges of misconduct, negligence, inefficiency or other disqualification may appropriately be regarded as one by way of punishment. A 1961 SC 177 (180). (ILR (1958) Cut 77, Reversed.)

(13) Dismissal on ground of physical unfitness is defective where the employee was removed not on ground of physical unfitness but for misconduct without holding enquiry and affording him opportunity to show cause. 1967 All LJ 558 (564).

(14) Promotion to post on officiating basis — Reversion to substantive post on ground of unsuitability due to physical injury sustained in course of work — Does not amount to 'reduction in rank' attracting provisions of Art. 311 (2). 1978 Lab IC 109 (113) (DB) (Orissa).

(15) Loss of vision by about 35 % — Compensation obtained — Reversion from officiating post to substantive post on that ground — Decision cannot be challenged as arbitrary or contrary to material on record. 1978 Lab IC 109 (114) (DB) (Orissa).

(16) Termination of service on reaching age of superannuation — Does not involve allegation of incompetence — Procedure prescribed in Article 311 need not be observed. 1962 Mys LJ (Supp) 457 (459) (DB).

(17) Termination of decategorised employee without offering suitable alternative employment — Not proper — Services could not be terminated without satisfying para 2615. (1979) 39 Fac LR 405 : 1980 Lab IC (NOC) 19 (Ker).

41. Removal on ground of being a member of political party — See also Note 125.— (1) The removal of a Government servant on the ground of his being a member of a political party is a removal as a punishment and is governed by Article 311, Cl. (2). A 1956 Madh Bha 100 (103) (DB).

42. Withholding of salary.— (1) A teacher appointed by M. B. Government holds civil post and no punishment can be awarded to him outside — M. B. Civil Service (Classification, Control and Appeal) Rules, 1956 — Withholding of pay by way of punishment is ultra vires the Rules of 1956 — Such punishment is against the spirit of Article 23 of the Constitution. A 1960 Madh Pra 303 (304) (DB).

(2) Police officer absenting from duty, dismissed — No suspension order passed — Notice for treating absence as leave without pay not given — Extraordinary leave not sought — Earned leave due to delinquent — Period of absence till dismissal date cannot be treated as extraordinary leave without pay — Delinquent entitled to full salary as if on duty. A 1970 Cal 384 (387) : 1970 Cri LJ 225 : 1970 Lab IC 1243.

(3) Last pay certificate issued to a public servant subject to recovery of certain amount in respect of shortage in articles of which he was in-charge — Opportunity of hearing not given — Recovery is without authority of law. (1979) 2 Kant LJ 439 (440).

43. Termination after extension of superannuation — See also Note 103.— (1) Kerala Service Rules (1959), Part I, R. 60 (a) (as re-amended in 1967) — Re-amendment of service rules reducing superannuation age — Termination of service occurring therefrom — Termination is not violative of Art. 311 (2). A 1968 Ker 158 (172, 173) (DB).

44. Authority by whom Government servant can be dismissed or removed — Article 311 (1) — General.— (1) A Government servant cannot be removed or dismissed from service by an authority subordinate to that by which he was appointed. A 1958 Madh Pra 135 (139) (DB) ** A 1957 Andh Pra 197 (200) (DB) ** A 1956 Trav-Co 35 (40) ** A 1954 Mad 1043 (1045) ** A 1967 Pat 347 (350) (DB) ** A 1954 Mad 1155 (1158) (DB). (Reversed on another point in A 1955 SC 817.) ** 1975 Lab IC 1674 (1676) (J & K) ** (1978) 1 Serv LR 422 (425) (Delhi).

(2) Dismissal or removal by a subordinate authority will be illegal and ultra vires. A 1958 SC 36 (44) ** A 1954 SC 245 (247) ** A 1949 PC 112 (114) : 50 Cri LJ 383 ** A 1937 PC 27 (30) ** A 1958 Mad 53 (65) ** A 1957 Pat 100 (101) (DB) ** 1970 Lab IC 601 (604) (J & K) ** 1979 Serv LR 532 (533, 534) (SC).

(3) Person not to be removed by authority subordinate to appointing authority — Inspector, Central Excise — Appointment by Collector — Removal by Asstt. Collector unauthorised and without jurisdiction. 1980 Lab IC 290 (297) (All).

(4) Assistant in Patiala and East Punjab States Union Secretariat —Transferred to Punjab consequent on reorganisation — His dismissal by officer subordinate to Governor — Held, illegal. A 1977 SC 1233 (1235) : 1977 Lab IC 554. (1966 Cur LJ 968 (Punj), Reversed.)

(5) Article 311 (2) forbids imposition of penalty by any authority subordinate in rank to the appointing authority. But it is open to the State Government to confer powers upon any such officer higher in rank than the appointing authority to impose penalties upon the delinquent servants. 1975 Lab IC 552 (556) (Cal).

(6) Temporary servant — Removal by authority subordinate to appointing authority — Removal not by way of punishment — Article 311 (1) does not apply. A 1961 All 284 (286).

(7) Petitioner unqualified to hold post — Termination of services by person not authorised — No interference in writ jurisdiction. A 1961 All 292 (293).

(8) The underlying idea of Article 311 is to ensure certain amount of security of tenure to public servants. A 1958 SC 36 (44).

(9) Neither the legislature nor the Governor may enact a rule under Art. 309 vesting power of dismissal in an authority subordinate in rank to the authority which had appointed the civil servant. Any rule or statute which permits such an action must be held to be ultra vires as infringing the provisions of Article 311 (1). A 1969 Mys 41 (44).

(10) Where a person is dismissed by an authority subordinate to the appointing authority but an appeal to the appointing authority is preferred against the order of dismissal and the appeal is rejected by such authority, it cannot be said that the order of dismissal is passed by the appointing authority. A 1942 FC 3 (6) ** A 1949 Nag 118 (119).

Articles 310 & 311 — Note 44 (contd.)

(11) Appointment of civil servant by Head of the Department — Dismissal order passed by subordinate authority passed in contravention of Art. 311 (1) is void and inoperative — The fact that the order was confirmed on appeal by Head of the Department cannot cure the initial defect. **A 1977 SC 747 (755) : 1977 Lab IC 272.**

(12) For the purposes of Art. 311 (1) it is not the first appointment which is relevant when a person is in continuous Government service. The last appointment has to be taken into consideration for purposes of ascertaining whether a person was given the constitutional protection afforded by Art. 311 (1) i. e. whether he was dismissed by any authority subordinate to one by which he was appointed. A 1960 Cal 278 (280).

(13) An authority superior to the appointing authority can dismiss or remove from service the person appointed. **A 1958 SC 36 (44)** ** A 1956 Pat 228 (230) (DB) ** A 1956 Raj 110 (112) (DB) ** A 1967 Assam 28 (30) (DB). (Order of retirement passed by authority higher than appointing authority — Legal.) ** (1970) 72 Pun LR 635. (Dismissal of employee by order passed by Governor who is an authority higher than appointing authority — Neither Art. 311 nor rules contravened.)

(14) A dismissal by a subordinate authority may be validated by ratification by the appointing authority. 1954 All LJ 515 (520).

(14A) While passing an order of removal of the employee all that is required is that the Authority passing the order must be competent to make appointment of the delinquent at the time of passing of the order. 1980 Raj LW 1 (2).

(15) Where the subordinate authority only acts as the channel through which the order of dismissal is communicated to the dismissed official and the order is actually passed by the proper authority, its validity is not affected. A 1952 Sau 40 (42) (DB) ** A 1950 Lah 59 (62) ** 1962 Mys LJ (Supp) 457 (459) (DB). (A notice of termination of service on attaining a particular age to be given under S. 8 of the Bangalore Transport Services Act need not be issued only by the appointing authority of the employee.)

(16) Where there is no fresh appointment by Government on termination of prior appointment but the permanent employees of the railway company are continued in service on certain terms and conditions after the acquisition of the Railway by the Government, the authority which originally appointed the servant concerned is entitled to remove him from service. A 1957 Ker 1 (2) (DB).

(17) Where a Government servant originally appointed in one State is sent on deputation to another State, and is absorbed in the service of that State the authority by whose order he is so absorbed will have the power to remove or dismiss him from service. A 1956 Bhopal 36 (39) : 1956 Cri LJ 975.

(18) This article does not prevent the authority duly and legally substituted in the place of the original authority who appointed the member of a civil service, from dismissing him. A 1958 Andh Pra 240 (249, 250) (DB).

(19) The appointing authority himself can clearly dismiss or remove a person from service. **A 1953 Trav-Co 130 (139) : 1953 Cri LJ 752 (FB)** ** A 1954 Cal 60 (62) (DB) ** **A 1970 SC 1255 (1262) : 1970 Lab IC 1056.**

(20) Appointing Authority delegating its power of appointment — Appointing Authority does not exhaust its own power and continues to possess power of suspension or reversion. **1975 Lab IC 1624 (1635) (FB) (Delhi).**

(21) When a person is appointed by the head of a department and then transferred to another department, he cannot be dismissed or removed by any one of lower rank than the head of the latter department. A 1954 Raj 207 (Pr. 7) (DB).

(22) Where the actual appointment in the particular case has been made by a higher authority, he alone can dismiss or remove from service, and not a subordinate authority although under the rules such authority may be competent to make similar appointments. A 1957 Madh Pra 126 (128) (DB) ** A 1957 Manipur 37 (37) ** A 1956 Bhopal 36 (38) : 1956 Cri LJ 975 ** A 1956 Madh B 259 (261) (DB) ** A 1956 Mad 419 (421).

(23) An authority of equal rank or grade with the one by whom the appointment has been made, may dismiss or remove the person appointed; it is not necessary that the dismissal or removal must be by the same person by whom the appointment was made or by his direct official superior. **A 1955 SC 70 (73) : 1955 Cri LJ 249** ** A 1957 Madh Pra 126 (128) (DB) ** A 1967 Cal 381 (382) ** 1979 Lab IC (NOC) 65 (All) ** 1979 Lab IC 1141 (1145) (DB) (Andh Pra) ** 1971 All LJ 1103.

(23A) The requirements that the dismissing authority should not be subordinate to the appointing authority operates when the former appointing authority exists and some other authority subordinate to it has exercised the power of dismissal over an employee. This requirement has no application to a situation when the authority dismissing the employee was not subordinate but of equal rank and the former appointing authority had ceased to exist. 1974 Lab IC 1340 (1342) (Raj).

(24) The Government can confer powers on an officer other than the appointing authority to dismiss a Government servant provided he is not subordinate in rank to the appointing officer or authority. **A 1970 SC 1263 (1265) : 1970 Lab IC 1063.**

(25) Show cause notice issued to employee by one officer and personal hearing given — Dismissal order passed by successor is valid. 1979 Lab IC (NOC) 65 (All).

(26) Order of compulsory retirement signed by Secretary in name of Governor — Order is valid, Secretary being authorised to do so under Rules of business. It is not open to Courts to go behind an order purported to have been made by the Governor so long as that order conforms to the requirements of Art. 166 (2) which lays down the rule of constitutional finality. 1962 Mys LJ (Supp) 437 (442).

(27) Authority competent to dismiss Government servant — Appointing authority is such an authority and question of delegation to such authority of power to dismiss would not arise. A 1966 Cal 485 (486).

(28) Promulgation of President's rule in State — Governor making rules under Art. 166 (3) and designating an official to exercise executive power — Order of dismissal passed by such officer in exercise of executive power is an order made by Governor or Government

Articles 310 & 311 — Note 44 (contd.)
and does not infringe Art. 311 (1) — See Ibid, Art. 356. 1975 Andh LT 159 (171) (DB).

(29) Karnataka Police Act (4 of 1964), Sections 137 (2), 131 — Police Patel — Removal or dismissal — Order can be passed only by District Magistrate and not by Sub-Divisional Magistrate as delegatee under S. 131. 1976 Lab IC 361 : (1975) 2 Kant LJ 102.

(30) Employment of persons — Right to make appointments is not arbitrary — Powers are subject to Arts. 14, 16 and 311. A 1968 Ker 244 (247) : 1968 Lab IC 1159.

(31) Initiation of disciplinary proceedings against civil servant suo motu by an authority lower in rank to punishing authority — Entire proceedings are vitiated. (1967) 2 Andh WR 253 (256) (DB).

(32) Disciplinary proceedings against employee of Life Insurance Corporation — Two letters by Senior Divisional Officer and a show cause notice by Zonal Manager, requiring employee to show cause against dismissal — Issue of subsequent charge-sheet — Suspension and enquiry pursuant thereto and eventual dismissal by Zonal Manager — Valid. (1980) 1 Serv LR 136 : 1980 Lab IC (NOC) 41 (Delhi).

45. Delegation of power of dismissal.— (1) The appointing authority cannot delegate his power of dismissal or removal to a subordinate. A 1957 Madh Pra 126 (128) (DB) ** (1957) 61 Cal WN 849 (853) ** A 1956 Madh B 259 (261) (DB) ** A 1953 All 17 (20) (DB) ** **A 1961 SC 751 (761) : 1961 (1) Cri LJ 773** ** 1968 Lab IC 302 (310) (DB) (All) ** A 1967 All 457 (459) ** A 1970 Punj 459 (460) : 1970 Lab IC 1316.

(2) Powers of appointment and removal delegated to subordinate authority — However, delegatee cannot remove from service person appointed by delegator (higher authority) prior to delegation of powers. **1972 Serv LR 299 (FB) (Delhi).**

(3) Effect of Arts. 154 and 163 of the Constitution is that, a Governor rarely passes executive orders personally. He acts through his Ministers and subordinate officers. The words 'President' and 'Governor' appearing in Art. 310 should not be understood as the President and Governor in person. Even where an authority (not being the Governor) duly empowered on this behalf dismisses a subordinate civil servant, Article 310 will be attracted. A 1959 All 771 (774).

(4) Whether a person has a lien in one department or in other department, the Government is entitled, subject to the provisions of Article 311 (1), to delegate power of dismissal to any officer — Rule 14-A of the Fundamental Rules has not the effect of modifying this power. **A 1970 SC 1263 (1266) : 1970 Lab IC 1063.**

(5) The power of the President to dismiss a public servant at pleasure is outside the scope of Article 77 of the Constitution and, therefore, cannot be delegated by the President to a subordinate officer and can be exercised by him only in the manner prescribed by the Constitution. A 1970 Punj 346 (348).

(6) Dismissal of police constables by Chief Police Officer — Purported delegation of powers of Police Force Commission — **Held** Commission has no power to delegate its functions in so far as they relate to the dismissal or reduction in rank of public servant. **(1973) 2 Malayan LJ 143.**

(7) Power of dismissal of constable delegated by Police Force Commission to Chief Police Officer — Power of appointment not so delegated — Dismissal of police constable by Chief Police Officer — **Held** not void in view of amendment of Art. 135 (1) of the Federal Constitution with retrospective effect. (1979) 2 Malayan LJ 276.

(8) Any legislative provision or rule empowering such delegation will be ultra vires. **A 1937 PC 27 (30) ** A 1949 PC 112 (113, 114) : 50 Cri LJ 383 ** A 1957 Madh Pra 126 (128) (DB) ** A 1956 Bhopal 36 (38) : 1956 Cri LJ 975 ** A 1963 Mys 66 (73) (DB).**

(9) It is the appointing authority who can initiate disciplinary action — Power cannot be delegated in absence of statutory provision. **A 1966 Madh Pra 193 (195, 196, 197) (DB).**

(10) What cannot be delegated is the ultimate responsibility to dismiss or remove a civil servant so as to destroy a protection like the one afforded by Art. 311 (2). Any other power, in regard to which there is no constitutional protection or mandatory provision of law or rule having force of law, may be validly delegated. Such matter is entirely in the discretion of appointing authority. Power to initiate inquiry can be delegated. 1966 MPLJ 325 (327) (DB) ** (1968) 1 Lab LJ 396 (399) (Ker). (Dy. I. G. of Police appointing authority — Enquiry held by Superintendent by his order valid.) ** A 1960 Andh Pra 473 (475, 476) : (1960) 1 Andh WR 408 (DB).

(11) Where a Government delegates its powers to hold departmental enquiries against its defaulting officer to the Vigilance Commissioner appointed by it, such delegation is permissible in the context of the exercise of powers under Art. 311 (2). The amendment to Art. 311 (2) by the Constitution (Fifteenth Amendment) Act, 1933 does not make any difference to the principle stated above whatever its other implication might be. A 1968 Mys 296 (300) (DB).

(12) As regards the inquiry into the charges against the civil servant it is not necessary that the notice to show cause must be issued only by the authority competent to dismiss, remove or reduce the civil servant. Nor is it necessary that the departmental inquiry must be held only by the authority competent to dismiss, remove or reduce the civil servant. **A 1956 SC 285 (292) ** A 1956 Cal 662 (666) ** A 1956 Sau 14 (18) (DB).**

[See A 1952 Pepsu 69 (72).]

(13) Article 311 only guarantees the right to a civil servant that he shall not be dismissed or removed by an authority subordinate to that by which he was appointed and that does not include a further guarantee that the relevant disciplinary enquiry cannot be initiated or conducted by any authority lower than the authority mentioned in Art. 311. 1977 Raj LW 354 : 1977 WLN 421 (427).

(14) Power to impose penalty given by head to subordinate authority — Power of head to impose penalty himself not affected. A 1958 Manipur 35 (37, 38).

(15) Domestic Tribunal — Delegation of its essential functions of hearing and applying its mind to materials collected and to come to a conclusion by designated authority will render its decision invalid — Authority taking decision may appoint another person to collect material. **A 1968 Delhi 26 (28) : 1968 Lab IC 24 (DB)**

Articles 310 & 311 — Note 45 (contd.)
** ILR (1965) Andh Pra 482 (501) (DB) ** A 1963 Mys 66 (73, 75, 76) (DB).

(16) Competent authority — Decision to terminate services — Approval of proposal for terminating services together with draft order put up for approval before competent authority — Authority writing word 'seen' on proposal — Word 'seen' held indicated approval of proposal and constituted authority for issuing dismissal order — No violation of Art. 311 (1). A 1962 All 471 (472) (DB).

(17) When the authority competent to punish a delinquent civil servant entrusts the enquiry to a subordinate officer, that officer should himself make the enquiry and not delegate this duty to any other. However, such delegation is only an irregularity which does not vitiate the enquiry unless it appears that it has prejudiced the civil servant. A 1964 Madh Pra 318 (319, 320) (DB).

(18) A statutory body, consisting of numerous members can delegate its functions of conducting an enquiry against any employee to its subordinates so long as there is no prohibition against such delegation under the statute. Therefore the entrustment of the actual conduct of the enquiry to its subordinate officers by the Tamil Nadu Electricity Board cannot be said to be without jurisdiction. (1979) 2 Mad LJ 310 : 1979 Lab IC (NOC) 170 (DB).

(19) Initiation and holding of enquiry culminating in dismissal order, to be valid need not be on authority delegated by appointing authority. (1974) 87 MLW 568.

(20) In departmental enquiry the administrative agency making the findings must address itself to the evidence and on the evidence before it, conscientiously reach a conclusion which it deems to be just. A delinquent officer can only succeed if he is able to establish that the order challenged was made by punishing authority without directing its mind to the evidence in the case. ILR (1965) Andh Pra 482 (503) (DB).

(21) Where an authority is vested with a statutory function that authority alone can discharge that statutory function. The authority cannot abdicate its function to some other authority be it superior, and be content to carry out the mandate of that superior authority. Thus where the notice terminating the service of the employee is issued by the competent authority not in exercise of its individual judgment but in compliance with direction given by Government, the notice cannot be said to be issued by the Competent Authority. 1976 SLWR 481 (484) (Punj).

46. Appeal from dismissal.— (1) Government of India Act, S. 246 — Civil Services (Classification, Control and Appeal) Rules (1930) — Punishment of civil servant in employment of State Government — Order made by Government — Appeal in regard to matter coming under Sch. VII, List 2, cannot be taken to Governor-General (now President of India). ILR (1956) Punj 1213.

(2) Certiorari — Territorial jurisdiction — Dismissal of Government servant confirmed in appeal — Doctrine of merger not applicable — Punishing authority amenable to territorial jurisdiction of High Court while appellate authority functioning and residing outside territorial jurisdiction — Original order of dismissal can be examined. (1961) 3 Fac LR 25 (All).

47. "Subordinate" meaning of.— (1) The word 'subordinate' in Art. 311 (1) of the Constitution means subordinate in rank and not with reference to the functions exercised. Consequently when no officer of equal rank to the appointing officer is available then the order of dismissal or removal will have to be passed by an officer of superior rank. In no circumstances can such an order be passed by an officer of lower rank. Any rule or statute which permits such an action, must be held to be ultra vires as infringing the provisions of Art. 311 (1) of the Constitution. A 1963 Punj 370 (371, 372) (DB). (A 1957 All 439, Dist.; A 1957 Raj 148, Doubted.) ** A 1957 Madh Pra 126 (128) (DB) ** A 1954 Pat 285 (286) (DB). (Lino operator appointed by Superintendent of Government Press cannot be dismissed by Deputy Superintendent.) ** 1975 Raj LW 214.

(2) State Government is not an authority subordinate to High Court. 1978 Lab IC 1748 (1750) (Kant).

(3) Where a Class III employee, was first appointed by the General Manager of the Delhi Road Transport Authority and later on, was deemed to have been appointed by the General Manager (Transport), Delhi Municipal Corporation Undertaking, his removal by the Assistant General Manager of the Undertaking is invalid as he is subordinate in rank to the General Manager in spite of delegation of his functions by the General Manager to him. **ILR (1971) 1 Delhi 568 (FB).** (C. W. 1234 of 1967, D/- 16-5-1969 (Delhi), **Overruled.**)

(4) The question of subordination of the appointing authority of the officer who actually dismissed the Government servant concerned or removed him from Government service concerned has to be determined by applying two tests viz., the test of co-ordinate rank and the test of the head of the department. The test of rank is a good working rule for the purpose of seeing that Art. 311 (1) is satisfied as regards the subordination of the dismissing authority to the appointing authority and if it is not possible to compare the two ranks, then the test of the head of the department may also be usefully employed. **1976 Cri LJ 1256 (1278) : 16 Guj LR 313 (FB).**

(5) Subordination refers to rank and not to powers and duties — Commissioner of Income-tax, Calcutta, not subordinate in rank to Commissioner of Income-tax, West Bengal. If a civil servant was originally appointed by the head of one department, he cannot be removed except by a person not lower in rank to the head of the department to which he is transferred. A 1962 Cal 3 (6, 7, 8).

(6) Word 'subordinate' means subordination in rank and not subordination of function. Where a civil servant is appointed by one authority and subsequently those powers are vested under the rules, in a different authority lower in rank to the preceding appointing authority, the succeeding authority will be deemed to be 'subordinate' to the appointing authority and as such it cannot dismiss the civil servant appointed by the authority who held superior rank to it. **1971 Lab IC 1481 (FB) (J & K).** (A 1963 Tripura 38 and A 1958 Cal 356, **Dissented from.**)

(7) Subordinate authority holding charge of current duties of appointing authority — Not

Articles 310 & 311 — Note 47 (contd.)
competent to dismiss employee — Word "Subordinate" has reference to rank and not to functions. 1971 Raj LW 34.

(8) Article 311 (1) does not require that the dismissal must be by the very same officer who appointed him. The competent authority can be either the officer who initially made the appointment or any other officer who is co-ordinate in rank to him. No subordinate officer has jurisdiction to inflict any of the punishments contemplated by the Madras Civil Services (Classification, Control and Appeal) Rules. Requirements of Art. 311 (1) are not satisfied where the order of compulsory retirement of the petitioner was passed by District Prohibition Officer, holding the rank of the Excise Asstt. Commissioner, when the petitioner was appointed by the Commissioner of Excise. A 1960 Andh Pra 29 (30) (DB).

(9) Petitioner appointed by D. C. of Revenue Division 'X' — Order of his dismissal by D. C. at 'Y' where he was posted — Post of D. C. at 'Y' held was corresponding and not subordinate to that of D. C. at 'X' — Article 311 (1) held not contravened. 1970 Pat LJR 163 (DB).

(10) An officer who is inferior in rank to the appointing authority is not necessarily subordinate to him. 1954 All LJ 515 (517) (DB).

(11) The constitutional requirement -in Article 311 that the dismissing authority should not be subordinate to the appointing authority operates when the former appointing authority exists and some other authority subordinate to it wants to exercise the power of dismissal over a civil servant. The constitutional expression 'an authority subordinate' indicates an existing subordination. But this sensible constitutional rule need not be converted into a senseless fetish by seeking to apply it to a situation where the authority dismissing the civil servant suffers no subordination because the post of the former appointing authority had ceased to exist. A 1958 Cal 356 (358, 359).

[But see A 1969 Mys 41 (44). (A 1959 Madh Pra 43, A 1960 Madh Pra 254 and A 1958 Cal 356, **Dissented from.**)]

(12) Where the petitioner was appointed as a police constable by the D. I. G. of Police of the erstwhile Indore State and he was continued in service of Madhya Bharat State without any order of fresh appointment, his removal from service by the Superintendent of Police, Indore, was not bad as violating the provisions of Article 311 (1). Under the rules in force in the Madhya Bharat State, a police constable could be removed from service by the Superintendent of Police. In the absence of any statutory rules creating a notional subordination it could not be held that the Superintendent of Police in the State of Madhya Bharat was an authority actually subordinate to the Dy. Inspector-General in the erstwhile Indore State. A 1960 Madh Pra 254 (254, 255).

(13) A person is subordinate to another when he is bound under the law to carry out the orders of the latter or when he is under his control. 1954 All LJ 515 (517) (DB).

(14) An official may be regarded as being subordinate to another also when the latter has appellate authority over him. 1954 All LJ 515 (517) (DB).

(15) Deputy General Manager of Mysore Government Road Transport Department cannot remove or dismiss any employee appointed by the General Manager or other authority to whom he is subordinate in rank. A 1963 Mys 66 (76) (DB).

(16) Where a public servant alleges that he has been suspended by an officer subordinate in rank to his appointing authority, the onus to prove the same lies on him. (1963) 6 Fac LR 225 (227) (Cal) •• A 1959 Madh Pra 43 (46) (DB). (Where the appointing authority, namely, the I. G. of Police of the erstwhile Gwalior State has ceased to exist it does not follow that a person appointed by that defunct authority cannot at all be removed.)

(17) Applicability — Appointment of librarian of Bengal Secretariat Library by Assistant Secretary — Dismissal by Deputy Secretary — Dismissal is not by an authority subordinate to that by which he was appointed — Librarian not entitled to the safeguard provided in the Article. A 1960 Cal 278 (283).

(18) Divisional Commercial Superintendent is competent to inflict punishment on non-pensionable Class III Railway staff including a Travelling Ticket Examiner. A 1967 All 112 (113).

(19) Where in accordance with the standing order passed under the Tripura (Council of Advisers) Order, 1953, the Chief Commissioner of Tripura allotted the Department of Relief and Rehabilitation to one of the Advisers and the adviser terminated the services of the petitioner who was appointed by the District Magistrate as being the head of the Department, by no stretch of imagination can it be said that the Adviser in charge was an authority subordinate to the District Magistrate. A 1958 Tripura 38 (40).

(20) Permanent Assistant Clerk in Office of Secretary Board of High School and Intermediate Education — Temporary appointment in higher scale — Transfer by Director of Education as noter and drafter to office of District Inspector of Schools — Assistant clerk disregarding such order — Removal from service — Transfer and removal sanctioned by Governor — Transfer and removal could not be questioned on ground that they were by authority subordinate to appointing authority as such transfer and removal were sanctioned by the Governor. A 1962 All 413 (419, 420, 421) (DB).

(21) Appointment of Inspector of the Patiala State Bank by Board of Directors of Bank with sanction of Maharaja of Patiala — After integration of Pepsu State with Punjab State order of dismissal passed by Punjab Government cannot be said to have been passed by an authority subordinate to the one appointing him. A 1960 Punj 646 (650, 651) (DB).

(22) Subordinate authority — Chief Security Officer in Railway service is not subordinate to Chief Engineer. 1978 Lab IC (NOC) 78 (Pat).

48. Appointing authority.— (1) Where an officer has the power of confirmation of a servant and issues the letter of confirmation, even though the letter is issued under the orders of a higher authority, he should be taken to be the confirming officer, and as such the appointing authority for the purposes of Art. 311, Cl. (1). A 1957 All 439 (443) (DB) •• A 1959 Manipur 33 (36). (Petitioner appointed for fixed period by Chief Commissioner — Petitioner continuing in service after fixed period — No specific order of appointment after expiry of fixed period by Home Secretary who had then authority to make

Articles 310 & 311 — Note 48 (contd.)
appointments — Petitioners held continued in service on original appointment by Chief Commissioner.)

(2) Appointing power implies power of dismissal — Appointing authority taking action and removing an employee — Objection under Article 311 (1) cannot be taken. A 1962 All 166 (172, 173) •• 1972 Cur LJ 731 (Punj).

(3) The appointing authority is competent to even conduct an enquiry to ascertain whether a public servant should be retained in service or not and pass an order discharging him if found unsuitable to hold the post. Such an order does not attract Art. 311 (2). It is only when an order is passed by way of punishment involving penal consequences that the circumstances preceding or attendant on the impugned order are to be examined notwithstanding that the public servant was a mere probationer or a temporary servant. (1978) 2 Serv LR 453 (475) (DB) (Delhi).

(4) Where a civil servant is appointed as a probationer by one authority and is subsequently confirmed in that post by another authority the latter and not the former would be the appointing authority for the purpose of this Article. A 1957 Raj 148 (150) (DB).

(5) Appointment order not signed by the Assistant Security Officer personally but by other person on his behalf — Confirmation order by the Assistant Security Officer — Assistant Security Officer was the appointing authority. 1975 Lab IC 1353 (1356, 1357) (All). (1972 Lab IC 945 (All), Distinguished.)

(6) Where a person is appointed to a temporary post by one authority but is subsequently appointed as a probationer by another authority and also confirmed in that post by the latter authority, the appointing authority for the purpose of this Article would be the latter authority and not the authority who made the original temporary appointment. A 1957 Madh Pra 52 (53).

(7) Temporary or quasi permanent appointment followed by substantive appointment — Authority who made substantive appointment is the appointing authority. 1975 Lab IC 845 (Raj).

(8) Where at the time of the integration of the Princely States with the rest of India, persons serving in the Princely States were absorbed in the services of the relative new States that came into existence as a result of the integration, the authority by whom such persons were appointed to the integrated service or who would have been competent to make the appointment in case there was no actual fresh appointment, must be deemed to be the appointing authority. A 1957 Madh Pra 126 (130, 131) (DB) •• A 1956 Vindh Pra 22 (24) •• ILR (1954) Patiala 696 (709, 710) (DB) •• A 1954 Raj 207 (210) (DB) •• A 1977 Madh Pra 13 (FB).

(9) Officer in one Department later transferred to another department — Head of the department to which the employee is transferred is the appointing authority — The Department from which the employee has gone away will have nothing to do with him any longer. A 1962 All 166 (171, 172).

(9A) A State Govt. employee on deputation to the Electricity Board — Board authorities imposing punishment on the petitioner after departmental enquiry — No approval of the appointing authority taken before imposing punishment — Held, punishment not approved by the appointing authority could not be imposed. 1980 BBCJ 227 (231) (DB) (Pat).

(10) Bifurcation of Excise and Taxation department in two wings as Excise wing and Taxation wing — Petitioners services allotted to Taxation wing — Post of Commercial Taxes Officer — Equivalent to that of Assistant Commissioner appointing petitioner in the former department — Order of compulsory retirement of petitioner by Commercial Taxes Officer — Held to be by appointing authority and hence valid. (1979) 2 Serv LR 209 (211) (Raj).

(11) Railway employee appointed by District Traffic Superintendent — Divisional Operating Superintendent, who replaced District Traffic Superintendent after merger of Railways was not lower in rank and had authority to punish employee by reducing him in rank. A 1966 Raj 37 (38, 39) (DB).

(12) When a Government servant is finally assigned to a particular post without retaining a lien on a previous post to which he was originally appointed, the appointing authority in such a case is the person who has the authority to make appointments to the new post. A 1956 All 476 (477) (DB).

(13) A petitioner can obtain relief under Article 226 only if he can show that he has been dismissed by an authority subordinate to that by which he had been appointed, but not if he merely shows that he has been dismissed by an authority subordinate to that by which he ought to have been appointed. A 1959 Cal 103 (104) (DB).

(14) Appointing authority to be dismissing authority — Appointing authority ceasing to exist — Protection against removal by lower authority does not vanish — Authority who can remove an employee appointed by authority since abolished must be of equal rank. 1972 Serv LR 299 (Delhi).

(15) So far as Railway servants are concerned, they are governed by the rules embodied in the Railway Establishment Code which is now accepted as being a body of rules promulgated by the President under Article 309. The Code itself lays down that in the case of non-gazetted posts the appointing authority is the General Manager or such other officer to whom he may delegate his power.

Though there is also provision in the Code, for the execution of a service agreement in the name of the President, a service agreement of this description is a mere formal document, and does not abrogate the rules embodied in the Code, which prescribes the 'appointing authority' for a staff belonging to Class III or a non-gazetted staff.

Where the appointing authority was a delegate of the General Manager, being a senior scale officer, and the dismissing authority was not subordinate in rank to him, there was no violation of the provisions of Art. 311 (1). (1961) 3 Fac LR 344 (348) (Cal).

(16) Plaintiff was appointed to the temporary post of a mistry in Railway on the recommendation made by the Executive Engineer to the Chief Engineer who accepted it but the actual order of appointment was made by the Executive Engineer.

Articles 310 & 311 — Note 48 (contd.)

No evidence to show that other Executive Engineer passed orders appointing temporary mistries no proof that the Executive Engineer was empowered to appoint a temporary mistry — **Held** that the appointment of the plaintiff was in fact made by the Chief Engineer. A 1962 Raj 244 (246).

(17) A permanent railway employee was removed from office but was re-appointed under the directions of the General Manager for a period of six months in his initial grade with the same seniority with a direction that after this period a special report regarding his work and conduct was to be submitted in order to consider his being continued in service. His re-appointment, according to confidential letter, was to be treated as fresh appointment, though he was given his old rate of pay and seniority.

Held that it could not be said that his re-appointment was by the General Manager though it was made at his direction. A 1966 Punj 297 (300) (DB).

(18) According to instruction under Orissa Panchayat Samiti and Zilla Parishad Act, Zilla Parishad chairman has power of appointment and dismissal of a primary school teacher. 1968 Lab IC 80 (81) (DB) (Orissa).

(19) Railway Protection Force Act (1957), Sections 2 (f), 6 — Assistant Security Officer though superior officer under Section 2 (f) is not an appointing authority as the powers are not delegated to him by Chief Security Officer under Section 6 — Dismissal order passed by Assistant Security Officer contravenes Art. 311 (1) and is illegal. 1972 Lab IC 945 (946) (All).

(20) Conservator of Forests is the "appointing authority" in respect of employees of Class III Services and Posts in Forest Department of Himachal Pradesh. 1973 Lab IC 292 (294, 295) (Him Pra). (A 1967 SC 459, **Distinguished.**)

(21) District Traffic Superintendent is appointing authority for ticket-collector in Railways. A 1971 All 246 (246) : 1971 Lab IC 571.

(22) Government servant appointed by Governor of Punjab — Transfer of service from State to Centre — Governor of Punjab was the highest authority in State and there being no officer equivalent in the Central hierarchy, the appointing authority of the Government servant for the purpose of Article 311 (1) must be held to be the President of India and not the Joint Secretary to the Central Government.

Government servant appointed by Governor of Punjab — Transfer of service from State to centre — Governor of Punjab was the highest authority in State and there being no officer equivalent in the central hierarchy, the appointing authority of the Government servant for the purpose of Art. 311 (1) must be held to be the President of India and not the joint secretary to the Central Government. (1974) 2 Serv LR 682 (Delhi).

(23) Where on taking over of a Railway by the State the Head of the Department or the District Officer in the Railway actually made the offer of re-appointment and received the acceptance to it, such head of the Department or officer was the appointing authority and not the General Manager in pursuance of whose directions such offer was made. A 1972 Raj 196 (200, 201). (A 1959 Raj 214, **Dissented from.**)

(24) Article 311 which prohibits removal or dismissal from service by an authority subordinate in rank to that of appointing authority does not mean that simply because the dismissing authority happens to be an officer of the same rank as that of the appointing authority, he can dismiss any person whosoever he may be on this ground alone. There must be some nexus between the right of the authority passing the order of dismissal, and his control over the service in question. Where the appointing authority was the Divisional Mechanical Engineer but the order of removal from service was passed by the Divisional Electrical Engineer who was equal in rank but to whom the former had not delegated his power, the order of removal was held to be invalid. 1975 BLJR 394.

(25) Petitioner appointed as Assistant Consolidation Officer by Commissioner, before framing of the Punjab Consolidation of Holdings State Service Class III (Executive Services) Rules 1962 — Under these rules the appointing authority was the Director of Consolidation. **Held** that after the framing of the rules, the Director of Consolidation of Holdings being the appointing authority, was competent to issue notice of retirement to the petitioner and not the authority who originally appointed the petitioner. (1980) 1 Serv LR 587 (589) (Punj).

(26) There is no principle that an appointment made by an authority who is later on found to be incompetent in law to make the appointment must be deemed to have been made by the authority competent in law to make the appointment, in case it is also found that it was made under the latter's direction or approval. 1979 Lab IC (NOC) 151 (All).

(27) Government authorising District Collector to make appointments to the post held by the delinquent employee — Order of suspension of the delinquent employee passed by collector subsequently held not ultra vires. 1979 Lab IC (NOC) 52 (Ker) : 1979 Ker LT 99. (**Reversed** on another point in 1980 Lab IC 442 (Ker).)

(28) Employee in Irrigation Department — Dismissal of by order passed by Governor who is an authority higher than appointing authority — Article 311 not violated. 1970 Serv LR 500 (DB) (Punj).

49. Who can dismiss or remove or order compulsory retirement or suspension — Illustrative cases.— (1) Article 311 (1) of the Constitution does not apply to a case of termination of service of a temporary employee. Rule 5 of the Central Civil Services (Temporary Service) Rules permits the Appointing Authority to terminate such service. The Director of the Department if he is an Appointing Authority for Class III employees on the relevant date and the Government servant is a Class III employee, termination of service of the Government servant by such an Appointing Authority is valid, even though the said servant was appointed by the Chief Commissioner. A 1963 Tripura 38 (43).

(2) Dismissal order by junior officer in same rank as the Appointing Authority is not bad — Juniority and seniority in same rank cause no disparity. A 1970 Delhi 240 (242).

(3) Superior authority can inflict penalty though it is not appointing authority — **Held** on facts that though petitioner was appointed by Post-Master, Imphal Post Office, he could be removed by Superintendent of Post Offices, Sibsagar Division at Jorhat who was superior

Articles 310 & 311 — Note 49 (contd.)
authority and who alone could impose major penalties contemplated by R. 13 of Civil Services (C. C. & A.) Rules — Held further that the superior authority could appoint Inquiry Officer to make enquiry and submit his report and that right of appeal of petitioner was not thereby lost. 1968 Lab IC 1145 (1147) (Manipur).

(4) District Traffic Superintendent issuing appointment letter to plaintiff on basis of a letter from the Traffic Manager of a railway — District Traffic Superintendent held to be appointing authority who was competent to dismiss the plaintiff. A 1964 Pat 102 (106) : 1964 BLJR 523 (DB).

(5) Rightly or wrongly Commissioner appointing incumbent — Commissioner alone can terminate the service of the incumbent. 1975 Lab IC 1119 (1120) (All).

(6) Though under S. 14 (3) (iii) of Assam Elementary Education Act (XXX of 1962), Assistant Seceretary has to appoint teachers on the advice of Board, he is still appointing authority and can dismiss those appointed by him with aid of Section 18 — He cannot, however, dismiss those that have been appointed before Act 30 of 1962 came into force — Appointments made under Assam Act (26 of 1964) cannot also be deemed to have been made by him. A 1967 SC 459 (462, 463, 464). (A 1965 Assam 101, Reversed in part.)

(7) Where a company-managed railway is taken over by the State and the old employees are re-employed under the State, their service under the company is terminated and they can be removed from service by the authority who makes the re-appointment or his official superior. A 1953 All 17.

(8) Petitioner a railway employee appointed by Chief Auditor of ex-Bikaner State Railway — Re-organisation of Indian Railways — Post of Chief Auditor of ex-Bikaner State Railway equated to rank of a senior scale officer in Northern Railway — Dismissal by Deputy Chief Accounts Officer, who is higher in rank to a senior scale officer, is valid as it is not by an authority subordinate to one which appointed him — For determining rank of appointing authority of ex-Bikaner State resort should be had to process of equation. 1970 Ser LR 173 : 1970 Raj LW 265.

(9) The authority appointing the petitioner to the Rajasthan State Service being the I. G. of Police, Rajasthan, he could not be removed by any authority subordinate to him. 1959 Raj LW 287 (288) (DB).

(10) Promotion of A. S. I. Police by D. I. G. of Police — Dismissal by Superintendent of Police, a subordinate authority — Order liable to be quashed. (1973) 1 Serv LR 365 (Punj).

(11) Where a person was appointed by Works Manager, Himachal Government Transport, Central Stores, his removal by the Store Purchase Officer who is subordinate to the Works Manager cannot be sustained, more so, when the post of the Works Manager is in existence. (1973) 3 Sim LJ 184 (Him Pra).

(12) The appellant was appointed as a Train Lighting Inspector under an order issued by the Chief Electrical Engineer and was removed from service under an order passed by the Divisional Assistant Electrical Engineer, Central Railway, Nagpur. Held, the order of removal was in patent violation of Art. 311 (1), as the Divisional Engineer was subordinate in rank to Chief Electrical Engineer, on the date of Appellant's appointment. The Divisional Engineer did not cease to be subordinate in rank to the Chief Electrical Engineer merely because the latter's power to make appointments to certain posts had been delegated to him. A 1979 SC 1912 : 1979 Lab IC 1314 : (1979) 2 Serv LR 291.

(13) By an agreement entered into between the State of Punjab and the Union of India, the Bank of Patiala belongs to the State of Punjab and hence the State of Punjab was authorised to pass orders of dismissal on any officer of the said Bank. A 1960 Punj 646 (652) (DB).

(14) Where a person is appointed a permanent tahsildar by the Collector but by a subsequent notification of the State Government he is appointed as an additional First Class Magistrate under Section 12 of the Criminal Procedure Code, he still continues to be a person who must be deemed to have been appointed by the Collector and can be dismissed by him. A 1957 Mad 41 (43, 44) (DB).

(15) Where a person was brought on the approved list of candidates for appointment by the Post Master General but was actually appointed by the Superintendent of Post Offices, he can be discharged by the Superintendent of Post Offices. A 1955 Pat 381 (384) (DB).

(16) The District Superintendent in regard to the area over which he has jurisdiction is the head of the department when there is approval of the Chief Commercial Manager to terminate the services of an employee the order terminating the services cannot be impugned. (1960) 2 Lab LJ 384 (386) (DB) (Andh Pra).

(17) Appointment of P as Extension Officer by State Government — Contention that under G. O. Misc. No. 1110 of 21-7-1960, appointment of extension officer can be done by Inspector-General of Local Administration and therefore Inspector-General is competent to remove P from service — Held, authority competent to remove P was State Government — Fact that officers of his rank could be appointed by Inspector-General did not affect position that in fact P was appointed as 'public servant' by State Government in first instance. ILR (1963) Andh Pra 1040 (1044, 1045).

(18) Petitioner appointed by Principal, Police Training College — Dismissal by Deputy Commissioner of Police, Calcutta — Both belong to same grade, so far as Bengal is concerned — Article 311 not violated. 62 Cal WN 437 (443).

(19) Held, on facts that when the bye-laws of a Co-operative Society (a Co-operative Bank) did not provide any special procedure to be followed for the dismissal of an employee of the Bank, then the ordinary law of Master and Servant would apply. The Board of Directors

Articles 310 & 311 — Note 49 (contd.)
had power to suspend and dismiss the officer of the Bank and the resolution was not ultra vires of the powers of the Working Committee. A 1963 MP 298 (299, 300) (DB).

(20) In respect of a public servant who had been appointed by the Raja of Mandi, an order of compulsory retirement of such servant after the erstwhile State of Mandi merged in the Union of India but before the commencement of the Constitution of India can be made by the Chief Commissioner only. A Deputy Chief Commissioner, who is not authorised to do so, if passes such an order, the order being without jurisdiction is void, illegal and inoperative. A 1959 Him Pra 32 (34, 35, 36).

(21) Removal to be by appointing authority itself — Appointment by Development Commissioner, Madhya Bharat in 1953 — Removal from service in 1957 by Director, Panchayat and Samaj Sewa, Madhya Pradesh, is valid — The appointing authority has taken a new name — What the Court has to see is not the name but the substance, that is to say, the actual duties and responsibilities and status. A 1962 Madh Pra 50 (56) (DB).

(22) Person joining service in State of Pepsu and confirmed by Rajpramukh of Pepsu — Such person transferred to office of Financial Commissioner, Revenue, after formation of Punjab State under the States Reorganisation Act, Section 116 — He cannot be dismissed by any officer subordinate to Governor — Only Governor was competent to dismiss him. **A 1977 SC 1233 (1235). (1966 Cur LJ 968 (Punj), Reversed.)**

(23) Under Section 14 of the Punjab Agricultural University Act the appointing authority of the Stores Purchase Officer is the Vice-Chancellor though the appointment is to be approved by the Board and therefore the Vice-Chancellor has got the authority to terminate the services of the officer. 1966 Cur LJ 930 (932) (Punj).

(24) Suspension of Government servant transferred to University — Vice-Chancellor has no right to suspend. 1977 Lab IC (NOC) 163 (Pat).

(25) Appointment by Controller of Supplies — Dismissal by Deputy Commissioner who was equal in rank — **Held** that it could not be said that the Deputy Commissioner was an authority subordinate to the Controller for the purpose of Art. 311 (1) though there may be subordination in the functions of the Deputy Commissioner. Hence, the order of dismissal did not contravene the provision of Art. 311 (1). A 1963 Orissa 8 (9, 10, 11) (DB).

(26) Displaced Persons (Compensation and Rehabilitation) Act (1954), S. 3 (1) — Appointment of Assistant Settlement Commissioner — Termination of service — Central Government alone and not the State Government can terminate the appointment, both as the appointing authority and also under Art. 310 (1). **A 1975 SC 641 (645, 646) : 1975 Lab IC 390.**

(27) Removal of Government servant — Petitioner appointed by Superintending Engineer — Order of removal passed by Executive Engineer — Order, held not in pursuance of directions by Superintending Engineer — Executive Engineer, the Appointing Authority for post had no authority at time of removal — Removal held invalid. **A 1966 All 232 (234) : (1966) 2 Lab LJ 841.**

(28) Madras Police Subordinate Service (Discipline and Appeal) Rules, 1950, Rr. 2 (g) and 4 — Compulsory retirement of member — Higher authority contemplated by R. 4, need not be authority higher in rank — State Government is authority higher than Deputy Inspector-General of Police, though authority higher in rank is Inspector-General of Police — State Government is competent to order compulsory retirement. **A 1965 SC 1103 (1106).**

(29) Sub-Inspector of Police, appointed by Maharaja of Gwalior and after integration in service of State of Madhya Pradesh — Dismissal by Inspector-General of Police — Does not contravene Art 311 (1). 1977 Lab IC 341 (Madh Pra). (A 1956 Madh B 259 and A 1957 Madh Pra 126 held to be impliedly Overruled by A 1958 SC 228.)

(30) Punjab Police Rules (1934), R. 12 (1) — Where a constable is under the disciplinary control of Superintendent of Police at the time of his dismissal his dismissal cannot be said to be illegal merely because he was originally appointed by the Commandant. (1972) 2 Sim LJ 17.

(31) The services of Government servants appointed by a higher officer cannot be terminated by an officer lower in rank even though the power of the appointing authority is delegated to him later on. 1977 Lab IC 1294 (All).

(32) A police constable was appointed by the Superintendent of Police. He was dismissed by the Superintendent of Police, Kanpur City — Held, the dismissal was in contravention of Article 311 as the Superintendent of Police City was not of same rank as Superintendent of Police who is the head of Police force in the District. Mere authorisation to the Superintendent of Police, City, under the Police Regulations to dismiss constables subordinate to him did not confer equality of rank 1977 Lab IC 1501 (All).

[See also 1977 All Serv LJ 152 (156, 157) (Guj). (Police constable appointed by Commissioner — Removal by District Supdt. of Police — Not proper.)]

(33) Authority to order compulsory retirement — State Government is the proper authority till 3-5-1960. A 1962 Raj 258 (262) : 1962 Raj LW 506 (DB).

(34) Accountant General who was the appointing authority was competent to terminate the services of an employee. ILR (1961) Mys 1129 (1145) (DB).

(35) Appointments and punishments of members of judicial service — Appointment by Government — Punishment by High Court — Whether punishment contravenes Article 311 (Quaere). A 1965 Orissa 183 (185, 186) (DB).

(36) Dismissal not to be by authority subordinate to appointing authority — Subordinate appointed by Inspector-General of Police — Dismissal by Deputy Inspector-General of Police appointed to hold charge of current duties of Inspector-General of Police in addition to his own without being clothed with his rank — Dismissal bad. A 1964 Madh Pra 114 (116, 117, 118) (DB).

(37) Appointment by head of department — Rule framed under Section 309 empowering officer below rank of head of department to dismiss — Employee cannot be dismissed by such officer — The test whether Art. 311 (1) is contravened or not, is not that the authority should be performing same functions but that

Articles 310 & 311 — Note 49 (contd.)
it should not be lower in rank than the authority that appointed a civil servant. A 1960 Madh Pra 183 (183, 184) (DB).

(38) Appointment made by Divisional Accounts Officer — Dismissal order, passed by Deputy Chief Accounts Officer who is his superior, is a valid order. A 1967 Assam 28 (29) (DB).

(39) States Reorganisation Act (1956), Section 116 (1) — Sub-Inspector in Consolidation Department in Pepsu holding same office after its merger with Punjab — No appointment made for posts of Sub-Inspectors in Punjab — Appointment must be held to have been made by State Government — Dismissal by Director of Consolidation of Holdings is bad. A 1964 Punj 480 (481) (DB).

(40) Police Act (1861), Ss. 7 and 1 — Dismissal of constable — Dismissing Officer neither appointed as Deputy Superintendent of Police nor empowered by general or special order to perform his duties — Dismissal invalid. A 1966 Punj 370 (371) (DB).

(41) A promoted as officiating Assistant Sub-Inspector of Police by the Deputy Inspector-General of Police — Dismissal by Suptrintendent of Police violates Art. 311. (1966) 68 Pun LR 317 (319) (DB).

[See also 1976 Lab IC 1263 (1268) (Delhi) •• (1975) 2 Serv LR 683 (Delhi) •• A 1970 Guj 180 (183, 184) : 1970 Lab IC 1267.)]

(42) Dismissal of Government servant — Superintendent of Police (Traffic) in Delhi is competent to dismiss Foot Constable even though he is not District Superintendent of Police. A 1971 SC 1402 (1402, 1403) : 1971 Lab IC 892.

(43) Recruitment as Constable in Police force — Services placed at the disposal of Vigilance Department — Vigilance a wing of Police Department — Dismissal of constable by Superintendent of Police (Vigilance) — Dismissal valid. (1975) 1 Cut WR 152 (DB).

(44) An employee appointed by Governor — Dismissal by Chief Secretary by an order neither expressed to be made in the name of nor by the order of Governor — Order of dismissal is invalid. 1968 Lab IC 302 (313) (DB) (All).

(45) Petitioner appointed as revenue clerk by Maharaja — His services continued even after merger of State — Order of dismissal passed by Deputy Commissioner held was in violation of Art. 311 (1). A 1963 Manipur 51 (54, 55, 56). (A 1957 Madh Pra 126, Held no longer good law in view of A 1958 SC 228.)

(46) Dismissal of employee — Special Dy. Commissioner issuing charge sheet, holding enquiry, giving personal hearing, recommending to dismiss and that recommendation approved by Commissioner — Order is invalid. (1967) 14 Fac LR 395 (399) (Cal).

(47) Temporary Exhibition Assistant under Directorate of Industries — Appointment made by Director of Industries — Additional Director with power of Control over schemes and not over the personnel, has no power to terminate his services. (1963) 7 Fac LR 50 (52) (Cal).

(48) Petitioner removed from service by authority subordinate to authority appointing him — Order quashed as violative of Art. 311. 1959 Ker LR 1117 (1118).

(49) Termination of service — Appointing authority "Chairman Board of Control, Canteen Stores Department" — Notice of termination issued by "Chairman, Board of Administration" who is inferior in authority to "Board of Control" — Notice and termination, held was invalid. 1977 Serv LJ 645 (Bom).

(50) Termination of services — Mechanical Supervisor in Tube-wells Organisation of Irrigation Department — Organisation completely separated from parent Department creating a separate Department in charge of a Director, who was of the rank of Superintending Engineer — Held, dismissal order passed by Director Tube-wells Organisation was void and inoperative. 1978 Lab IC (NOC) 1 (All).

(51) Where an employee an Assistant Station Master of Bengal Nagpur Railway became an employee of Government of India after the Bengal Nagpur Railway was taken over by Government of India and at that time the appointing authority was the Chief Operating Superintendent, then, notice of termination of services of that officer issued by Divisional Operating Superintendent, admittedly subordinate to Chief Operating Superintendent, is liable to be quashed, it being in direct violation of Art. 311 (1). ILR (1970) Cut 853 (DB).

(52) Bengal Subordinate Services (Disciplinary and Appeal) Rules (1936), Rr. 4, 5 and Schedule — Police Regulations — Regn. 768 (b) — Typist appointed by Special Superintendent of Police in Intelligence Branch and C. I. D. — Disciplinary action by Superintendent, Government Railway Police not valid. A 1965 Cal 169 (173, 176) (DB).

(53) An order of compulsory retirement is not an order of dismissal or removal. Therefore, in such case all that has to be seen is whether the authority terminating the service is on the date of the order of termination competent to terminate the services of an officer of the rank to which the Government servant whose services were terminated belongs. 1978 Serv LJ 109 (113) : 1978 MPLJ 59 (DB).

(54) Compulsory retirement Rules vesting absolute authority in Government — Only Governor and Chief Minister competent to exercise power — Order not in conformity with Rajasthan Service Rules. ILR (1961) 11 Raj 536 (539) (DB).

(55) The State Government can validly retire under Rule 5.32 Punjab Civil Services Rules, an Excise Inspector who has been appointed by the Excise and Taxation Commissioner. There is a clear distinction between the two expressions "appointing authority" and "the officer who appointed the Government servant". Rule 5.32 uses the former expression. 1975 Lab IC 646 (651, 652, 655) (FB) (Punj).

(56) Inspector-General of Police appointing authority — Dismissal by Deputy Inspector-General of Police — Dismissal by subordinate authority is illegal. A 1966 Pat 364 (368, 369) (DB) •• A 1969 All 466 (471).

(57) Transfer of servant from one department to another — Lien kept in parent department — Transferee department not competent to dismiss him. A 1969 Manipur 36 (41) : 1969 Lab IC 561.

(58) Servants under the Union and the States — Authority competent to dismiss — Clerk on establishment of Deputy Commissioner as-

Articles 310 & 311 — Note 49 (contd.)
signed duties of Registration Mohrir — Dismissal by Deputy Commissioner is not without jurisdiction — Even if clerks can be dismissed by Registrar only, order is valid as Deputy Commissioner is also ex officio Registrar under Registration laws and his failure to indicate his dual designation is merely a defect of form. (1969) 71 Punj LR 725.

(59) Where a Major who was officiating as O. I. C. Records made appointments to Class III posts and Lt. Colonel who held that post passed termination orders, Held termination orders were passed by competent appointing authority and therefore valid. (1974) 2 Serv LR 668 (Delhi).

(60) Termination of service of Subordinate Judge appointed by Government in the name of the Governor — Chief Minister can dismiss because he is not subordinate to the appointing authority. A 1970 Punj 544 (545, 546) : 1970 Lab IC 1513.

(61) Petitioner posted by Director of Education to Museum — Transfer of Museum from Director of Education to Director of Languages and Culture Affairs by notification — In absence of any statement to contrary transfer of administrative control came into effect immediately — Director of Education has no longer jurisdiction to terminate services of petitioner. 1974 Lab IC 1364 (1365) (Him Pra).

(62) Dismissal of Civilian Employee — Employee appointed as clerk by Chief Superintendent Development Stores, Technical Development Establishment — Transfer to another Organisation of the Ministry of Defence — Promotion by order of the head of the latter office — Removed by order of the head of the latter office after domestic enquiry — Disciplinary authority in the case of the employee was head of the office under Schedule to Central Civil Services (Classification, Control and Appeal) Rules 1965 — Held removal was not by an authority subordinate to the appointing authority. (1975) 2 Serv LR 286.

(63) Order of Termination passed by Appointing Authority — Intimation of termination sent to petitioner signed by authority subordinate to Appointing Authority — Order of termination not illegal. (1973) 2 Serv LR 143 : 1973 Cur LJ 660 : 1973 All Serv Rep 947 (Punj).

(64) Police Patel in Karnataka — Removal or dismissal — Order can be passed only by District Magistrate and not by Sub-Divisional Magistrate, in view of Section 137 (2) of Karnataka Police Act (4 of 1964). 1976 Lab IC 361 (363) (Kant).

(65) Conductors in Road Transport Department of erstwhile Hyderabad State allotted to State of Mysore — Dismissal of — Conductors appointed by Superintendent, Transport Department, Hyderabad — Reorganisation of State — Authority equivalent to Superintendent, General Manager of Mysore Govt. Road Transport Department — Conductors deemed to have been appointed by G. M. Mysore Govt. R. T. Dept. by virtue of Section 116 of States Reorganisation Act, 1956 — Dismissal by authority lower in rank to the General Manager — Illegal. A 1977 SC 747 (754).

(66) Revenue Inspector appointed by Board of Revenue, Hyderabad, in former State of Hyderabad — Reorganisation of States — Revenue Inspector allotted to new State of Mysore — Divisional Commissioner appointing authority in new State of Mysore — Board of Revenue also in existence in new State and higher in rank to the Divisional Commissioner — Revenue Inspector deemed to have been appointed by Board of Revenue — Removal of Revenue Inspector by Divisional Commissioner held illegal. (1979) 3 Serv LR 792 (794) (Kant).

(67) Services of a Government servant loaned to Municipality or Panchayat — Original employment does not cease — Loanee cannot dismiss him — Liability of State Government to pay his wages continues. 1972 Lab IC 1178 (Guj).

50. Who can order reduction in rank.— (1) Railway Board Act (1905), Section 3 — A, officiating as Deputy Chief Engineer of Railway since 7-4-1962 — Order D/- 3-8-1968 reverting him to post of District Engineer, senior scale, signed by Deputy Chief Personnel Officer on behalf of General Manager — General Manager being himself a delegate from Railway Board could not further delegate — Order of reversion was without jurisdiction. A 1969 Assam 112 (115) : 1969 Lab IC 1192 (DB).

(2) A non-gazetted railway servant who was promoted to officiate in Class II service by an order passed by the General Manager cannot be reverted to his substantive post by an order passed by the Chief Engineer. (1957) 61 Cal WN 849 (853) ** 1980 Lab IC (NOC) 73 (Punj). (Demotion of Assistant Patwari by Settlement Officer, Consolidation of Holdings without approval of Collector — Order invalid.) ** 1979 Lab IC (NOC) 111 (Delhi). (Promotion on ad hoc basis by Asstt. I. G. P. with prior approval of I. G. P. — Reversion by Asstt. I. G. P. without prior approval of I. G. P. — Order quashed.) ** 1977 Raj LW 525 : 1978 Lab IC (NOC) 155.

(3) Petitioner was appointed by the Director, Consolidation of Holdings — Reversion by Collector as a result of general retrenchment in consolidation department — Collector though subordinate to the appointing authority, could competently pass the order of reversion. (1980) 1 Serv LR 601 (601) (Punj).

(4) The officer issuing the orders of reversion should not surrender his own judgment and carry out the behests of the higher authorities. A 1966 Andh Pra 116 (120, 121) (DB).

(5) Article 311, Cl. (1) applies only to dismissal or removal and not to reduction in rank or to suspension. A 1953 Hyd 201 (204) (DB) ** A 1954 Cal 60 (65) (DB) ** 1972 Lab IC 1208 (1215) (All). (Order of reversion by an authority subordinate to the appointing authority is not violative of Art. 311 (2).) ** 1972 Lab IC 457 (459) (Orissa). (Punishment of reduction in rank — The authority to impose such punishment need not be the appointing authority.)

(6) Order of demotion passed by Chief Minister in the name of Governor was not constitutionally void in view of Rule 31 of J. & K. Government Business Rules. 1973 Lab IC 1094 (1101) (J & K).

51. Prevention of Corruption Act — Who can sanction prosecution.— (1) Under Section 6 of the Prevention of Corruption Act, 1947, the sanction of the authority competent to remove the officer from service is necessary for his prosecution under the Act. A 1956 Bhopal 36 (37) : 1956 Cri LJ 975 ** 1978 Cri LJ (NOC) 32 (All).

Articles 310 & 311 — Note 51 (contd.)

(2) Prosecution of Assistant Medical Officer of Railway under Prevention of Corruption Act — Sanction of Head of the department who is not competent to remove the accused from service is not valid. A 1968 SC 1292 (1298, 1299). (Cri. Appeal No. 455 of 1965, D/- 4-5-1967 (Pat), Reversed.)

(3) Appointment made by Divisional Personnel Officer in exercise of power delegated by General Manager — Divisional Medical Officer cannot sanction prosecution under Section 6 (1) of the Prevention of Corruption Act. A 1968 Punj 120 (125) : 1968 Cri LJ 372.

(4) Servant of former Bikaner State Railway absorbed in Northern Railway — Authority competent to remove is General Manager, Northern Railway — Sanction for prosecution under Prevention of Corruption Act (1947), Section 6 granted by Divisional Engineer is invalid. A 1963 Raj 126 (129).

(5) Accused, a police officer in Central Police Service appointed by Central Government — Accused allocated to State of Himachal Pradesh in accordance with Section 40 (4), H. P. State Act (1970) — Prosecution under Prevention of Corruption Act (1947), S. 6 (1) (a) (c) — It is only the appointing authority or an authority equivalent to the appointing authority who is competent to accord sanction. 1977 Sim LC 493 : 1978 Cri LJ (NOC) 14 (Him Pra).

(6) Prosecution of a civil servant — Sanction for — Sanction to be from competent authority — Competency to be determined with reference to appointing authority under Article 311 (1). A 1962 Ker 50 (52) : 1962 (1) Cri LJ 334 ** 1977 Sim LC 493 : 1978 Cri LJ (NOC) 14 (Him Pra) ** ILR (1974) 2 Delhi 400. (Reversed on another point in A 1979 SC 1408).

(7) Conferment and imposition of powers and duties of Commissioner of Labour upon Deputy Commissioner of Labour under Section 4 (2) of Bombay Industrial Relations Act (11 of 1947) — Sanction given by him under Section 6 (1) (c) Prevention of Corruption Act (1947) is not valid. 1970 Lab IC 148 (154) (Bom).

52. Officers and servants of High Court — Power to appoint and remove.— See also Note 4.— (1) Appointments and punishments of members or judicial service — Ultimate authority to pass order of punishment, even in case of Subordinate Judge, is State Government. A 1965 Orissa 183 (185, 186) ** A 1970 SC 158. (Termination of services of temporary Civil Judge by State Government upon recommendation of High Court is valid.)

(2) The Chief Justice of a High Court can dismiss the Registrar, Original Side, of the High Court. A 1956 SC 285 (291).

(3) Punjab Civil Services Rules, Vol. I, Part 1, Rule 1.8, Note 2 — Persons on the staff of High Court — Power to interpret change or relax the rule vests in the Chief Justice and not in the Finance Department of Punjab Government. A 1964 Punj 285 (288) (DB).

(4) For the exercise of the powers to remove a subordinate judicial officer or to dismiss him or a reduce him in rank, the authority must have power to initiate disciplinary proceedings against such officer, though he may exercise this power of taking proceedings in consultation with the High Court. (1965) 2 Mys LJ 215 (221, 222) (DB).

(5) Control vested in High Court over District Judges is complete subject only to power of Governor in matter of appointment (including dismissal), posting and promotion. A 1966 SC 447 (453, 455).

(6) As Governor is the appointing authority of all subordinate judicial officers like District Judges and persons holding posts inferior to that of District Judges, it is he who can dismiss or remove them. (1965) 2 Mys LJ 215 (221) (DB).

(7) Where a person in Assam Judicial Service is appointed temporarily as Judge of United Khasi-Jaintia Hills District Council Court without the sanction of the Governor and is continued in service as such even after the expiry of the age of his superannuation, without the sanction of the Government, the termination of the services of such a person without the sanction of the Governor is not illegal. A 1971 SC 1110 (1111, 1112).

(8) High Court has complete disciplinary jurisdiction over the members of the subordinate judicial service and can initiate disciplinary enquiry even where the probable consequence may be, dismissal or removal from service. 1966 Raj LW 359 (364) (DB).

(9) Where A was appointed first as Subordinate Judge and B was then appointed as Subordinate Judge but B was promoted first to the post of a District Judge and thereafter A was promoted to the post of District Judge, A cannot be considered as senior in rank to B in the post of the District Judge. ILR (1974) Cut 731.

(10) Termination of service of a member of judicial service — Enquiry behind his back preceding termination — Recommendation of High Court, not made known to him — Held termination was but by way of punishment. 1977 Lab IC 65 (Bom).

53. Enquiry and report by authority different from that empowered to dismiss.— (1) The question of imposing punishment can only arise after enquiry is made and the report of the Enquiry Officer is received. It is for the punishing authority to propose the punishment and not for the enquiring authority. A 1962 SC 1130 (1134, 1135) ** 1975 Lab IC 76 (81 to 83) (Andh Pra). (Disciplinary proceedings against civil servant — Report by Enquiry Officer — Final orders to be passed by Minister in charge of department and not Secretary.)

(2) A rule authorising any authority other than the appointing authority to hold an enquiry or appoint an Inquiry Officer is not invalid as it does not contravene Art. 311. 1968 Lab IC 1597 (1598) (Raj).

(3) Regulation 229 of the Police Regulations is not mandatory. It only lays down a procedure for the transmission of papers concerning dismissal, removal, compulsory retirement etc. A violation of such a procedural rule cannot give to the aggrieved person any ground for contending that the order of removal from service is bad. A 1961 Madh Pra 365 (366) (DB).

(4) Dismissal of servant — Co-operative association — Managing Committee invested under bye-laws with power to dismiss Manager — Charges of misconduct against Manager — It is not necessary that enquiry into charges should be held by Managing Committee itself — Enquiry into charges by Secretary, who had previously filed criminal complaint against Manager, Managing Committee cannot be said to have delegated its functions merely by deputing Secretary to enquire and report. A 1960 Madh Pra 273 (277) (DB).

Articles 310 & 311 — Note 53 (contd.)

(5) Punishing authority can direct enquiring officer to make a re-inquiry or a fresh enquiry. A 1960 Ker 294 (294, 295).

(6) Dismissal by superior authority on evidence recorded by subordinate officer is not bad provided the superior authority has applied his mind to the evidence. A 1961 Ker 299 (301) (DB) °° (1963) 67 Cal WN 859 (867) (DB).

(7) Punishing authority not bound by recommendations of Enquiry Officer. 1968 Lab IC 735 (741) (Cal) °° **A 1970 SC 158 (161).** (Termination of services by State Government upon recommendation of High Court is valid.) °° 1970 All LJ 1095.

(8) Punishment to Government Servant — Reasons need not be given wherever the Government agrees with the enquiring Tribunal — In case of dissent, reason should be given. A 1966 SC 1827 (1831) °° ILR (1964) Andh Pra 464 (473) (DB) °° (1970) 1 Lab LJ 567 (Orissa).

(9) Government competent to differ from Enquiring Officer — Action based on such contrary view resulting in dismissal of the Government servant does not contravene Article 311. **A 1964 SC 364 (368, 369).**

(10) The exercise of power to appoint or dismiss an officer is the exercise not of a judicial power but of an administrative power and a statutory functionary like the Chief Secretary to the Government of Assam exercising such a power cannot be said to have delegated his function merely because he has deputed a responsible and competent official to enquire into alleged acts of misdemeanour and report. A 1962 Assam 88 (90) (DB). (Reversed on another point in A 1963 SC 1612.)

(11) Enquiry against employee of bank belonging to Government can be conducted by Director of bank. A 1960 Punj 646 (652) (DB).

(12) Rule 10 of the U. P. Disciplinary Proceedings (Administrative Tribunal) Rules, 1947 in so far as it requires the Governor to accept the recommendation of the tribunal in the matter of punishment is invalid as being inconsistent with the Constitution. **A 1961 SC 1245 (1252).**

(13) In disciplinary proceedings, where enquiry was held by person not duly authorised, order of dismissal based upon such inquiry is invalid. High Court will quash it under Article 226. A 1965 Manipur 46 (47).

(14) Departmental enquiry — Enquiry ordered by authority other than disciplinary authority — Removal order passed by enquiring authority — That order however withdrawn — Removal re-ordered by disciplinary authority on basis of same enquiry — Removal cannot be maintained. 1969 Serv LR 689 (Punj).

(15) Where the petitioner who was absorbed by transfer in the office of the Deputy Chief Accounts Officer and was confirmed as Grade II clerk by the Deputy Chief Accounts Officer, the authority competent to act as disciplinary authority for the purpose of imposing penalty of removal is the Deputy Chief Accounts Officer or any officer of equal rank. Though, the Divisional Mechanical Engineer who is of lower rank may issue charge-sheet and conduct enquiry against the petitioner, he is not competent to consider the report of the enquiry officer and to issue show cause notice. 1975 Lab IC 845 (Raj).

54. Authority who can issue notice. See Note 80.— (1) The punishing authority must apply his mind to the findings recorded by the enquiry officer and after indicating his acceptance of those findings must inform the delinquent officer about his acceptance of those findings as well as the proposed action. 1966 Ker LT 141 (147).

(2) The object of an enquiry is to find the truth, and all steps which are conducive or may be conducive to this end, must be deemed necessary steps and any unjustified interference with any of those steps must necessarily bring about prejudice and must be held to amount to a denial of a reasonable opportunity to the charged officer to show cause against the action proposed to be taken against him. A 1963 All 94 (98, 99, 100) (DB).

(3) Show cause notice — Termination of Subordinate Judge's services — Chief Secretary to Government is proper authority to issue it. A 1970 Punj 544 (547) : 1970 Lab IC 1513.

(4) Termination of service of employee of Canteen Stores Department who was civil servant of Union of India — Notice issued on behalf of President of India signed by person not duly authorised by rules of business — Authentication by unauthorised person makes notice invalid and so also termination of service. 1977 Serv LJ 645 (Bom).

55. Order of suspension pending final order of dismissal by another authority.— (1) Mere order of suspension by the High Court pending final order by Government is not one of dismissal or removal and is not bad. **A 1957 SC 246 (249).**

(2) Suspension can be of two types, one by way of punishment and the other as an interim step pending enquiry into the conduct of the Government servant concerned. A 1959 All 629 (631).

(3) Suspension of Public Officer pending inquiry — No steps taken in disciplinary proceedings until he came to be prosecuted in a criminal proceeding — Prolonged suspension without any justification is vexatious and inexpedient and has demoralising effect on public officer — Suspension and disciplinary proceeding quashed. (1973) 2 Serv LR 553 (Orissa).

56. Service Rules — General — See also Article 309.— (1) It is open to the Court to consider the validity of Service Rules under which the Government servants are punished. See **A 1958 SC 232.**

(2) A court can look into the Service Rules in order to determine what the status of the Government servant was according to the rules and whether the particular order in question in the case might be regarded as one of reduction in rank so as to attract the application of Article 311. **A 1957 SC 886 (887).**

(3) Civil Service Rules could be looked into by the Court in order to determine the proper authority by whom the services of an officer could be terminated. **A 1956 SC 285 (291).**

(4) Article 309 is subject to Article 310 → Rule under Article 309 elaborating guarantee under Article 311 (2) does not cut down pleasure tenure. A 1966 Cal 252 (257) (DB).

(5) Member of Public Service — Tenure of office — Parliament or legislature of State can make law regulating conditions of service, including proceedings by way of disciplinary action without affecting the President's or the Governor's powers under Article 310 read with Arti-

Articles 310 & 311 — Note 56 (contd.)
cle 311. A 1961 SC 751 (758, 761) : 1961 (1) Cri LJ 773.

(6) Service Rules — Established practice growing up on basis of interpretation given by higher administrative authorities — High Court can use them as useful guides while interpreting rules. A 1964 Orissa 65 (67) (DB).

(7) Statutory rules — Departmental instructions cannot override statutory rules. A 1968 Punj 436 (439).

(8) Paragraph 376 of the U. P. Manual of Government orders is not a statutory rule. Paragraph 376 does not authorise the higher authority to set aside an order of appointment once it has been lawfully made. 1968 Lab IC 1357 (All).

(9) Bank of Patiala (Staff) Rules (1954), R. 27 — Rule does not offend Article 311. A 1966 SC 1607 (1613).

(10) Central Information Service Rules (1959), Rule 5 — Constitutionality — Rule does not violate Articles 311, 14 and 16 of the Constitution. The fields of operation of Rule 5 and Article 311 are quite different and distinct so that the two do not collide with each other. A 1972 SC 908 (913) : 1972 Lab IC 437.

(11) Statutory Rules — Government has no right to make concession in favour of a particular officer to detriment of and discrimination against other officers governed by same Rules. (1967) 2 Lab LJ 289 (Cal).

(12) It is necessary for the Government to follow the statutory rules made by the Governor so as to inspire confidence in the administration. 1966 Raj LW 262 (267).

(13) Difference in instructions relating to medical fitness of direct recruits and promoted candidates does not suffer from any defect under Article 14. A 1958 Raj 242 (245) (DB).

(14) Service conditions of employees in public sector undertakings are not analogous to those of Government employees. A 1967 SC 948 (959, 960).

(15) Employment of a Government servant does not require a formal document in writing as prescribed by Article 299. A 1960 Pat 366 (369) (DB).

(16) Bombay Police (Punishments and Appeals) Rules, (1956), Rule 17 is not violative of Article 20 (2) of the Constitution. (1966) 7 Guj LR 1091 (DB).

(17) Provisions of Chapter 14 of Maharashtra Act 5 of 1962 — Do not contravene Art. 310. A 1967 Bom 482 (503) (DB).

(18) The principle of 'next below' rule is that if a person working in one sphere of employment is deputed to work in another, every advancement which the person immediately next below him in his parent department acquires or secures must also be made available to the person who was sent on deputation. A 1967 Mys 253 (254) (DB).

(19) Before a Government servant in temporary appointment can claim the protection of Rule 6 of Central Civil Services (Temporary Service) Rules, 1949 he must succeed in establishing that he is a Government servant in quasi-permanent service. (1959) 1 Lab LJ 245 (247) (Andh Pra).

(20) Chief Engineer's Screening Committee — Case of Officiating Engineers reviewed by it under Rule 8 of Punjab Service of Engineers Class I PWD (Irrigation Branch) Service Rules (1966) — List prepared by such committee, and order passed thereon would not be of any legal value. 1969 Lab IC 795 (799) (Punj) (DB).

(21) Employment of a medical practitioner under Employees' State Insurance (Medical Benefit) Scheme, West Bengal does not constitute a 'Service' under the Government. 1969 Lab IC 887 (889) (Cal).

(22) The registration of Bank by itself did not confer on it an authority to take decision on questions of rights or impose on Bank, duty to act judicially in deciding any question under bye-laws. A 1963 MP 298 (300) (DB).

(23) The rules relating to service integration are not justiciable. A 1960 Ker 231 (234).

(24) Violation of ancillary, incidental and unessential rules are not material. (1957) 70 Mad LW 965 (969).

(25) Seniority and confirmation — Determination of — Orders are not final and are revisable — No time limit can be fixed for revision of orders. A 1968 All 276 (279) : 1968 Lab IC 1027.

(26) Rule 2646 (b) of Vol. II of Railway Establishment Code empowering the appointing authority to make an order of compulsory retirement in public interest is valid — See Railway Establishment Code Vol. II, Rule 2646 (b). 1972 Lab IC 84 (Pat).

(27) Tamil Nadu Electricity Board Employees Discipline and Appeal Regulations, Regn. 11 (b) — Non-fulfilment of grounds on which punishment is based as contemplated in Regn. 11 (b) — Order removing the employee from service, set aside. (1979) 2 Mad LJ 310 : 1979 Lab IC (NOC) 170.

(28) Northern Railway Discipline and Appeals Rules for Non-Gazetted Railway Servants, R. 21 prescribing procedure for departmental enquiry — Complies with Article 311 (2) — Provision that charge-sheet to contain punishment to be inflicted — Not violative of Article 311 (2). 1978 Lab IC 1132 (1136) (All).

(29) Railway Establishment Manual, Paragraphs 2301, 2315 and 2318 — Substituted Khalassi for less than 6 months continuous service, not temporary servant — Notice under Rule 149 (1) before termination of service, not necessary. 1971 Lab IC 546 (Orissa).

(30) Railway Servants' (Discipline and Appeal) Rules (1968), Rule 14 (ii) — Conditions of Rule 14 (ii) fulfilled — Notice to show cause before passing order of penalty is not necessary. 1975 Lab IC 1530 (1538) (Gauhati).

(31) The procedure outlined in Rule 9 is nothing but a procedure for holding the enquiry contemplated by Article 311 (2) of the Constitution.

The decision of the Deputy Commissioner under Rule 10 (ii) that it was not reasonably practicable to hold the enquiry in accordance with the procedure prescribed in Rule 9 is beyond challenge. As what is contemplated by Rule 9 is an enquiry envisaged by Clause (2) of Article 311, an order of dismissal passed under Rule 10 (ii) does not attract Article 311 (2). 1974 Lab IC 861 (865) (DB) (Gauhati).

57. Rules contravening Article 311 (2).— (1) Service Rules framed by the Government or other authority with regard to departmental enquiries and disciplinary action against a civil servant will be ultra vires to the extent to which they are inconsistent with Article 311, Cl. (2). A 1956 Cal 662 (667) °° A 1956 Mad 460 (462) : 1956 Cri LJ 1081 °° A 1954 Cal 566

Articles 310 & 311 — Note 57 (contd.)
(568) ** A 1954 Cal 399 (400) (DB) ** A 1954 Cal 383 (386).

(2) Rule 14 (c) of the Revised Leave Rules 1933, cannot be regarded as ultra vires Article 311. A 1958 Cal 407 (411).

(3) J. & K. Constitution (1956), Section 126 — Orders passed for compulsory retirement of permanent civil servant under Articles 225 and 226 of the Jammu and Kashmir Civil Service Regulations — Order under Article 226 being inconsistent with provision of Section 126 of the State Constitution is invalid. A 1964 J & K 92 (95, 96, 97) (FB).

(4) Life Insurance Corporation Act (1956), Sections 11, 49 — Order under Section 11 (2) — Life Insurance Corporation Field Officers (Alternation of Remuneration and Other Terms and Conditions of Service) Order 1957 (also known as Blue Order), Clauses 10, 11, 5 — Regulation under Section 49 as envisaged by Clause 11 of the Order — Services of Field Officer, coming under Blue Order can be terminated only in accordance with Clause 10 of the Blue Order — Para. 4 (h) of circular under Clause 4 (3) of Regulation does not give power independent of Clause 10 of the Order. A 1964 SC 847 (854, 855).

(5) Hyderabad Civil Services (Classification, Control and Appeal) Rules — Rules cannot be so interpreted as to permit encroachment on powers conferred on the President etc. under Article 310. A 1960 Andh Pra 479 (483) (DB).

(6) Public service — Rules relating to — Cannot trespass on rights guaranteed by Art. 311. A 1964 SC 600 (610).

(7) Rule 293 of the Hyderabad Civil Service Rules, 1954, does not contravene Article 311 (2) of the Constitution of India. A 1966 Mys 61 (65) (DB).

(8) By virtue of paragraph 2 of Rule 17 (2), of Kerala Civil Services (Classification, Control and Appeal) Rules shutting out of oral evidence on behalf of accused officer is a defect and the said paragraph is hit by Article 311 (2). 1959 Ker LT 141 (145).

(9) The Hyderabad Civil Services (Classification, Control and Appeal) Rules do not override the express provisions of the Constitution and when action is taken under the express provisions of the Constitution the non-compliance with the Rules cannot be taken exception to. A 1960 Andh Pra 479 (483) (DB).

(10) Member of Secretary of State's Service known as Indian Police — Institution of inquiry against him by State Government is not invalid on the ground of violation of Rule 55 of the Civil Services (Classification, Control and Appeal) Rules, 1930, preserved to him by Art. 314. A 1968 SC 1372 (1376, 1377, 1378).

(11) Central Civil Services (Conduct) Rules are neither illegal nor unconstitutional. A 1967 Pat 347 (350) (DB).

(12) Railway Establishment Code (1959), Vol. 1, Rule 149 (3) — Validity — No provision for enquiry and notice — Rules contravene Article 311 (2) and are invalid. A 1964 SC 600 (610, 611, 612, 617, 618, 620, 626, 642, 643). (A 1956 Pat 221, A 1958 Raj 250, A 1959 All 439, A 1960 Cal 264 and A 1962 Mad 379, Overruled; ILR (1960) 12 Assam 441, A 1963 Assam 94, (FB), Reversed.)

(13) Inspector of State Co-operative Bank removed from service — Contention that the regulation or bye-law of Bank under which he was removed without being given opportunity to show cause is void under Article 13 read with Article 19 (1) (g) — Held that regulation was reasonable under Article 19 (6). A 1955 Pat 223 (225) (DB).

(14) Order withholding increment of railway servant passed in contravention of paras. 1702 and 1712 of Railway Code — Authority under Payment of Wages Act holding loss of wages resulting from order as unauthorised deduction under Section 7 (1), Expl. II, Payment of Wages Act — Order of Authority does not contravene Article 310 of Constitution — Section 7 (1), Expl. II not ultra vires of Article 310. A 1964 Punj 242 (244, 245) (DB).

(15) Rule 2046 (2) (a) of Railway Establishment Code does not require authorities imperatively to retain ministerial servants in service up to age of sixty years. It only makes servants eligible for retention and only gives a direction to authorities that they should ordinarily be retained. A 1958 Cal 657 (659) (DB).

(16) Service condition that person overstaying after expiry of leave shall be deemed to have resigned from such date of expiry — Amounts to removal from service as punishment for absence — Condition violates Article 311 and hence invalid — Fundamental Rules, Rule 14 (c). 1969 Lab IC 117 (118) (Mys).

(17) Service rules made under Article 309 cannot be valid if they contravene provisions of Article 311 (1) and (2). A 1967 Pat 81 (89) (DB). (Reversed on another point in A 1971 SC 823.) ** (1979) 3 Serv LR 198 (200) (Ker) ** 1977 Lab IC 945 (952) (MP) (DB). (Invalidity of termination in violation of Article 311 cannot be cured by making retrospective amendments in the Rules framed under Article 309.) ** A 1970 J & K 94 : 1970 Lab IC 825. (Government Notification No. SRO 36 D/- 11-2-1966 and Note 6 to Rule 52, Kashmir Civil Services (Classification, Control and Appeal) Rules seeking to alter the entire status, emoluments conditions of service and other statutory safeguards held invalid — Violative of Article 311.)

(18) Rule 7 of the U. P. Disciplinary Proceedings (Administrative Tribunal) Rules, 1947 is not violative of Article 311. The discretion of the Tribunal to permit a party to take assistance of a legal practitioner has been preserved, and that merely by providing that no party will have a right of representation, the said discretion is not taken away. 1979 Lab IC 1028 (FB) (All). (1974 All LJ 637, Overruled.)

(19) Rule 1725 (b) of Discipline and Appeal Rules framed under Section 47 (e) of Railways Act, in so far as it contravenes Article 311 (2) of the Constitution is invalid. A 1961 Cal 93 (95).

(20) President has power to make rules having force of law in respect of Union Territory of Pondicherry — Pondicherry Judicial Officers (Qualifications) Rules proclaimed by the President are valid. A 1968 Mad 298 (308, 309) (DB).

(21) The words 'dismissal' and 'removal' have a technical meaning and those words do not embrace in their ambit all sorts of termination of service. Guarantee under Article 311 (2) extends to those cases of termination of services where order of removal or dismissal has been passed by way of punishment. A 1959 All 643 (650, 652).

Articles 310 & 311 — Note 57 (contd.)

(22) There is no conflict between the constitutional provision contained in Article 311 and the Rules framed by the President in exercise of powers under Article 309 of the Constitution. In framing the Rules the President certainly is not authorised to make any such rule which will infringe the constitutional protection envisaged under Article 311, but that does not debar him from providing any further safeguard or privilege to the employees beyond those already provided in the Constitution. 1977 Lab IC 174 (179) (DB) (Pat).

(23) Orders of termination of Government service and offer of service in University both without compliance with Article 311 of the Constitution — These amounted to compulsory transfer of services resulting in extinction of status as civil servant — Para. 38 (2) of the First Statute under Section 24 (d) H. P. University Act, 1970, therefore, offended Article 311 of the Constitution. 1972 Ser LR 819 (Him Pra).

(24) No service rules for fixation of seniority — Government adopting length of service as criterion — Not arbitrary. (1973) 1 Serv LR 975 (Punj).

(25) Section 7 (5), Mysore University of Agricultural Science Act which authorises the issuance of notification whereby the Government servants are to cease to hold the civil posts which they held under the State of Mysore is unconstitutional as it amounts to removal from a civil post under the State in contravention of Art. 311. **A 1971 SC 191.**

(26) Though the rules are framed under Article 309 of the Constitution they are subject to the other provisions of the Constitution including Article 311 — If the procedure adopted in departmental proceeding is violative of Art. 311 resulting in depriving the civil servant of the reasonable opportunity, the proceedings have to be set aside. (1971) 2 Andh WR 65.

58. Two types of Rules.— (1) Orissa Disciplinary Proceedings (Administrative Tribunal) Rules, 1951, are intended to be supplementary to the Civil Services (Classification, Control and Appeal) Rules, 1930. In respect of enquiries against gazetted Government servants there is practically very little difference between these two sets of rules. A 1957 Orissa 70 (72, 73) (DB).

59. Rules, whether "laws in force" — See also Article 313.— (1) A resolution of the Government fixing the scale of dearness allowance under Rule 44 of the Fundamental Rules is "law" within Article 13 and can be declared void if it infringes Article 14. **A 1954 SC 493 (495).**

(2) "Laws in force" — Continuance of operation of U. P. Disciplinary Proceedings (Administrative Tribunal) Rules, 1947 and U. P. Police Regulations framed under Police Act, 1861 — Police Officer can be dismissed by Governor and not only by I. G. of Police or other Police authority. **A 1961 SC 1245 (1250).**

(3) Where the Superintendent of Police who conducted the departmental trial did not observe the provisions of paragraph 486 of the U. P. Police Regulations which have the force of law, the dismissal of an officer as the result of such a departmental proceeding would be illegal. A 1958 All 584 (586, 587) : 1958 Cri LJ 994 (DB).

(4) Paragraph 541, U. P. Police Regulations has no statutory force — Non-compliance thereof does not render the orders of determination of service void. 1973 Lab IC 1050 (All).

(5) The rules governing disciplinary proceedings cannot be treated as administrative directions, but shall have the same effect as the provisions of the statute, whereunder they are made in so far as they are not inconsistent with the provisions thereof. **A 1961 SC 751 (763) : 1961 (1) Cri LJ 773.**

(6) Person affected by any law or rule in conflict with pleasure under Article 310 (1) is entitled to protection under Article 311 — Executive instructions have status of rules and cannot be judicially enforced. 1968 Lab IC 1377 (1381, 1382) (Mad).

(7) Merely because a rule or legal provision has been made under Article 309 or has been continued in force under Article 313 or Article 372 will not make it an "express provision of the Constitution." for the purpose of Article 310, Clause (1). A 1958 Mad 243 (247).

(8) Even statutory provisions not being constitutional provisions relating to conditions of service of a Government servant cannot control the "pleasure" of the President or the Governor under Article 310, Clause (1) and his power to terminate the services of a Government servant. A 1956 Bom 601 (605).

(9) Rules under Article 309 — Bombay Allocated Government Servants (Absorption, Seniority, Pay and Allowances) Rules, 1957 — Bombay Government Resolution, dated 25-10-1957 regarding equation of posts — Confer legal rights enforceable in Court of law. **A 1965 Guj 23 (42, 50, 51) (FB).**

(10) Purely executive instructions will not have the status of rules and will not be capable of judicial enforcement. A 1956 Madh B 40 (42) (DB) ** A 1955 Cal 543 (547) (DB) ** A 1955 Pat 353 (355).

(11) Service Rules whether legally enforceable — Every violation of statutory rule governing service condition cannot give rise to a right in favour of aggrieved person, for the service is at the pleasure of the executive — Remedy of civil servant lies within domain of administration and resort cannot be had to civil court — But violation of provisions of Article 311 (2) will give rise to right in favour of the aggrieved person, enforceable in a Court of law. A 1961 Mad 486 (494) (DB).

(12) Bye-laws of registered Co-operative Society answer the tests of 'laws' and stand on the same footing as statutory rules so far as enforcement is concerned. A 1961 Madh Pra 289 (291, 292) (DB).

(13) Instructions in M. P. High Court's memorandum No. 1375/766-I (iii) dated 4th July 1963 are administrative instructions. They do not clothe a civil servant with any right. 1965 MPLJ 990 (DB).

(14) Dismissal from service — Pleasure doctrine embodied in Arts. 309, 310 — Limitations of — Rules under Art. 309 designed purely for administrative guidance — Madras Police Order No. 90 (3) (b) though considered as one under Article 309, is directory. **A 1966 Mad 203 (210, 211, 212, 213) (FB).** (W. P. No. 1516 of 1956 dated 11-11-1958 (Mad), **Reversed.**)

(15) 'Authority' — Visakapatnam Port Trust — Service Regulations framed by such statutory

Articles 310 & 311 — Note 59 (contd.)
body have the force of the law — Employees have a statutory status and are entitled to declaration of being in employment if dismissal is in contravention of statutory provision — They can also raise the question of discrimination. 1976 Lab IC 886 (FB) (Andh Pra).

60. Alterability of Rules — See also Note 20.— (1) Welfare Officer appointed by Government in factory — Rules of 1949 superseded by Rules of 1955 — Rules of 1955 govern service condition of Welfare Officer in service though appointed earlier. A 1964 All 411 (413, 414, 415).

(2) Article 311 merely protects a Government servant from arbitrary removal or dismissal. In all matters other than removal or dismissal it is always open to the State and its servants to enter into special contracts. 1962 Mys LJ (Supp) 487 (490).

(3) Rules regarding conditions of service of Government servants — Rules apply even to Government servants who joined service prior to framing of rules. A 1966 Mys 61 (64).

(4) Under Article 309 the legislature would be competent to provide for and to regulate the conditions of service by even altering them and putting end to the service subject to provisions of Article 311. A 1960 Punj 284 (285, 286).

(5) Pepsu Secretariat Service, Recruitment, Promotion, Punishment and Seniority Rules (1952), Rule 15 — Clerks appointed in Pepsu Government Service for whom Pepsu Rules were applicable — On States Reorganisation clerks transferred to Punjab — Their reversions on ground of not passing tests prescribed by administrative instructions, were held bad. 1968 Cur LJ 72 (80, 81) (DB) (Punj).

(6) Punjab Government issuing memorandum containing directions regarding confirmation of Assistant Consolidation Officers — Some officers subsequently allocated to Haryana — Services of such officers not confirmed by Haryana Government — Non-confirmation held did not amount to variation of service conditions to their disadvantage. 1968 Lab IC 1342 (1343, 1344) (Punj).

61. Rules not legally enforceable.— (1) Rules and provisions, which fetter the power of the Government to terminate the service of an official at will, whether such termination refers to his entire official career or to his position in a certain rank, will be regarded as conflicting with the rule of "pleasure" laid down in Art. 310, Clause (1) and hence, not enforceable against the Government in a Court of law. A 1958 SC 36 (47) ** A 1958 All 532 (537).

(2) A mere violation of one of service rules regulating conditions of service of a civil servant, who holds his office at the pleasure of the President or the Governor cannot confer any justiciable rights on the civil servant, enforceable in a Court of law. A 1961 Mad 35 (39): 73 Mad LW 585. (Reversed on another point in A 1962 SC 36.) ** A 1961 Assam 74 (76, 77) (DB).

(3) The dismissal or removal of a civil servant in violation of the rules would not by itself entitle him to come to the High Court, but would leave him to appeal to the administrative authorities. A 1959 All 771 (773, 775).

(4) The breach of Service Rules and Regulations as to assignment of seniority to Government servants is not a justiciable matter. A 1958 Mad 243 (247) ** A 1958 Mad 53 (67) ** A 1956 Pepsu 26 (29) ** A 1954 Punj 142 (142) ** 1958 Ker LJ 1070 (1074).

(5) The Government's failure to observe important and fundamental rules in the matter of promotion will not give rise to a cause of action. A 1954 Punj 134 (135).

(6) The Service Rules prescribing the procedure to be followed, while taking disciplinary action against Government servants, including dismissal, removal and reduction in rank, are only of an administrative character and non-compliance with such rules by itself, will not be a matter justiciable in a Court of law. A 1951 Mad 882 (883) (DB) ** A 1953 Trav-Co 130 (139): 1953 Cri LJ 752 (FB) ** A 1958 Mad 53 (67) ** A 1957 All 217 (218).

(7) Rules 8 and 30 of All India Services (Discipline and Appeal) Rules (1969) are not mandatory and failure to literally follow the Rules will not vitiate the disciplinary proceedings provided there has been substantial compliance thereof. 1977 Lab IC (NOC) 45 (DB) (Gauhati).

(8) Substantial charge of misdemeanour against public servant established — High Court setting aside dismissal on ground of non-compliance of Article 166 (1) and (2) — Setting aside of dismissal held not proper. A 1970 SC 679 (682): 1970 Lab IC 568.

(9) It is not the failure to adhere strictly to Rules relating to enquiries into misconduct that confers the right on a civil servant to complain against the punishment and so long as Article 311 is not violated, it is not competent for the High Court to punish a civil servant even though the enquiry may not be strictly in accordance with the Rules. A 1960 Ker 224 (225, 226).

(10) The issue of a circular relating to conditions of service of civil servants by the Government contrary to the Service Rules is not a justiciable matter. A 1953 Hyd 298 (301, 302) (DB).

(11) Departmental rule fixing age-limit for appointment not having statutory force — Appointment in contravention of rule not invalid. 1961 All LJ 170 (172) (DB).

(12) Although the Rules and Regulations relating to the termination of service of Government servants are binding on the Government as much as on the Government servant, the breach of such Rules and Regulations will not render the action taken by the Government invalid, where no grave prejudice has been caused to the Government servant in consequence of such breach. A 1958 Andh Pra 240 (245, 246) (DB) ** A 1957 Andh Pra 197 (202) (DB) ** ILR (1957) Andh Pra 715 (730, 731) (DB).

(13) Reading of Rules 322 and 323, printed at p. 116 of the Manual of Executive Rules and Orders in force in Assam printed in the year 1954 clearly indicates that the rules providing for the procedure of appeal against an order dismissing a civil servant are subsidiary to the rules framed under S. 96-B (2) of the Government of India Act, 1919 and thereafter continued under the provisions of Article 313. A 1962 Assam 28 (30) (DB).

(14) The Court can issue a writ to enforce Service Rules relating to conditions of service and where action is taken adversely affecting the interest of a Government servant in regard to his increment and such action is contrary

Articles 310 & 311 — Note 61 (contd.)
to the Service Rules, the Court can intervene with an appropriate writ. A 1954 Cal 187 (187, 188).

(15) The Court cannot interfere in matters which are purely within the discretion of the Government or Governmental authorities. A 1957 J & K 29 (30) (FB) ** A 1957 J & K 8 (9) (FB) ** A 1957 Nag 95 (96) (DB) ** A 1955 Nag 289 (290) (DB).

(16) Where an officer has been exonerated in a departmental enquiry against him, a fresh enquiry cannot be ordered against him on the same facts in the absence of a specific rule permitting a review of the order of exoneration. A 1958 Raj 38 (39) (DB).

(17) Notification providing for service conditions of municipal Commissioners — Notification has no force of law — Its violation is not amenable to judicial review. 1958 Ker LJ 1070 (1074).

(18) Violation of procedure prescribed by Kerala Civil Service (C. C. A.) Rules, (1957), R. 17 (2), Para 1, by itself does not amount to denial of reasonable opportunity. A 1960 Ker 279 (280 to 284).

(19) Government's failure to observe important and Fundamental Service Rules in the matter of promotion can give no cause of action to the aggrieved Government servant. A 1954 Punj 134 (134).

(20) Indian Railway Establishment Code — Rules therein are for mere guidance — They are not enforceable in Court of Law. A 1960 Bom 14 (18) (DB).

(21) Railway Establishment Manual, Para 66 — Appointment of Class IV servant by Personnel Officer — Held appointment was not invalid ab initio and employee was entitled to protection under Art. 311 (2). 1967 All LJ 558 (563, 564).

(22) Scope — Contravention of rules under Article 309 — Decision of Government is not justiciable unless case falls under Article 311. 1961 Ker LT 461 (462) (DB).

(23) The Rajasthan Police Regulations, 1948, do not have the force of any law, as they are not stated to have been issued in pursuance of any Act. 1959 Raj LW 300.

62. Rules legally enforceable.— (1) The Rules and Regulations regarding the procedure to be followed while taking disciplinary action against a Government servant, including dismissal, removal and reduction in rank, are binding on the Government, and the breach of such Rules and Regulations will be justiciable in a Court of law. **A 1958 SC 36** ** A 1958 All 141 (145) ** A 1958 Andh Pra 240 (245, 246) (DB) ** A 1959 Cal 1 (5) ** A 1958 Raj 38 (39) (DB) ** A 1957 Andh Pra 794 (804) (DB).

(2) Rules such as deal with conditions of service and not tenure of employment and may have statutory force and any violation of them may be enforced by means of writ petitions. A 1958 All 532 (538).

(3) The Rule empowering the State Government to form a subjective opinion regarding the justifiability of a Government servant's retention in service, simply furnishes the background which enables the State Government to exercise such a power. It could not be said that it either casts any stigma or that the material furnishing the background in which the State Government may act, would, by itself, attract the infraction of Art. 311. (1979) 1 Serv LR 641 : ILR (1977) Pat 724 (746) (DB).

(4) Mere non-compliance with the rules without proof of prejudice is not a sufficient ground for quashing the order of the Government. 1959 Lab LJ 569 (673) (DB) (Andh Pra).

(5) Government may direct that the pleasure referred to in Article 310 of the Constitution must be exercised in accordance with rules made in that behalf under the proviso to Article 309. (1967) 69 Punj LR 377 (387).

(6) Madras Civil Services (Classification, Control and Appeal) Rules — Rules are binding on Government — Rules ignored — High Court will direct Government to make enquiry according to rules. A 1961 Andh Pra 289 (292).

(7) The Court can enter into the question of the validity of Rule 3 of the Railway Services (Safeguarding of National Security) Rules, 1949, which empower the Government to terminate the services of a Railway servant on the ground of his being involved in subversive activities. **A 1958 SC 232 (238).**

(8) An I. C. S. Officer was held entitled to a mandamus against the Accountant-General ordering him to pay passage money for his wife and children according to the Service Rules applicable to him. A 1957 Pat 515 (527) (DB).

(9) Suspension of member of All-India Service — Rule 7 (1) of All-India Services (Discipline and Appeal) Rules (1955) — Section 7 (1) not complied with — Suspension held invalid. A 1967 Pat 81 (88, 89) (DB).

(10) It was held by the Supreme Court that the Government servant did not hold a post in the permanent and regular establishment of the Director-General of Health Services, and hence was not entitled to claim seniority in the department. **A 1958 SC 113 (117, 118, 119).**

(11) Where a Government servant was compulsorily retired under Art. 465-A, Note 1 of the Civil Service Regulations, 1920, and it was contended inter alia by the Government servant that the above article and note were not applicable to and binding on him, held that the article and note were applicable to the Government servant and that he was bound by them. **A 1954 SC 369 (373).**

(12) The scales of pay of Government servants cannot be altered to their detriment when such alterations are contrary to the Service Rules. A 1958 All 345 (347).

(13) Procedure laid down under Ss. 5 (1) (b) and 5 (2) of Minimum Wages Act not followed with regard to Notification — All procedure in the Act must be strictly complied with by Government — Notification held to be invalid and must be quashed under Article 226. 1969 Lab IC 338 (340) : 1969 All LJ 261 (DB).

(14) Mere non-mention by the Disciplinary Authority that he has passed dismissal order after considering the report of the Enquiry Officer and the evidence adduced together with statement of charge and the defence put up does not mean that R. 10 of the Railway Servants Discipline and Appeal Rules (1968) is not complied with. (1973) 1 Serv LR 813 (DB) (All). (C. Misc. W. No. 234 of 1970, D/-13-7-71 (All), **Reversed.**)

(15) The West Bengal Services (Classification, Control and Appeal) Rules, 1971 do not contemplate or empower the State Government to

Articles 310 & 311 — Note 62 (contd.)
hold a second inquiry into the self same charges. (1978) 1 Serv LR 583 (584) (Cal).

(16) Employees' State Insurance Corporation (Staff and Conditions of Service) Regulations (1959), Regn. 13 read with third Schedule — Regulations have force of statute — Dismissal of servant in violation of them is void. 1972 Lab IC 1565 (Guj).

63. Termination of service according to terms of contract or conditions of service — See also Note 29.— (1) Rule 6 of Orissa Welfare Officers (Recruitment and Conditions of Service) Rules, 1951 framed by Government under Factories Act applying to Welfare Officer — Rule 6 not in terms providing for any enquiry in case of discharge or dismissal — Dismissal of Welfare Officer on ground of disobedience of superior authority — Order supported by materials on record — Held, no error apparent on face of record — Order cannot be interfered with under Article 226. A 1967 Orissa 26 (28, 29) (DB).

(2) Right to terminate by giving 60 day's pay as provided by Regn. 69 of Regulations framed under Section 45 of Road Transport Corporation Act, 1950 — Right not applicable in case of permanent State Government Employees transferred to M. P. S. R. T. C. — Conditions of service include security of tenure. 1978 MPLJ 858 : 1979 Lab IC (NOC) 35 (DB).

(3) Termination of service according to terms of contract — Order terminating services of temporary nature cannot be challenged on ground of non-compliance with provisions of Article 311 even if the services are terminated because the employee's work was found unsatisfactory provided the order is made in terms of contract of employment. 1971 Lab IC 914 (920) (Bom) ** A 1971 Pat 283 (284) : 1971 Lab IC 1215.

(4) Where the order stated that the officials named therein were being promoted and appointed as computors on purely ad hoc and temporary basis on the clear understanding that the promotees would be liable to be reverted if they were found to be not eligible for promotion under the Rules when the same were finalised, they could not be held entitled to the benefit of the quota rule for the purpose of fixation of inter se seniority, as their promotion was regularised before coming into force of the recruitment rules. 1976 SLWR 627 (630) (Punj).

64. Reasonable opportunity to show cause against proposed action — General.— (1) The object of Article 311, Clause (2) is that no one should be condemned unheard rather than the protection of the services. A 1956 Madh B 100 (102) (DB) ** A 1954 Madh B 177 (180) (DB).

(2) Civil servant cannot be deprived of the protection of Article 311 on the ground of convenience of the Government. A 1961 All 336 (338) (DB).

(3) The section contemplates two stages where delinquent is to be furnished with two opportunities i. e., at the time of holding the enquiry and at the time of the proposed punishment. If the enquiring officer omits to do so or bypasses any one of the stages, he clearly infringes the provisions of the section and the order passed by him is liable to be quashed. 1970 Serv LR 632 (J & K).

(4) The right to reasonable opportunity broadly stated, implies opportunity to deny guilt alleged, and to establish innocence to defend himself by examining himself and his witnesses and to make representation against proposed punishment. A 1969 Delhi 145 (149) : 1969 Lab IC 539 (DB).

(5) Where the delinquent officer was, during the enquiry, given copies of previous statements of the witnesses on basis of which guilt charged was held to be proved and was given an opportunity to cross-examine those witnesses by examining them in his presence, and was also allowed to show cause against proposed punishment, the officer could not be said to have been denied the opportunity to show cause merely because certain witnesses and certain document in original could not be produced. 1971 BLJR 512.

(6) When the services of a probationer are terminated not by way of penalty Statute 13, Cl. (9) does not apply and the order cannot be challenged on the ground that reasonable opportunity to show cause against the order was not given to the probationer. **A 1971 SC 1811 (1813, 1814) : 1971 SCD 763.**

(7) The constitutional guarantee afforded to a public servant is that he shall not be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. A 1967 Pat 347 (350) (DB).

(8) Removal of name from approved list — Opportunity of hearing ought to be given if such removal of name entails postponement of future chances of promotion. 1976 Lab IC 1528 (All).

(9) Reasonable opportunity to show cause against proposed punishment not given — Order of dismissal passed before amendment of Art. 311 (2) in 1963 — Article 311 (2) held was violated. 1970 Pat LJR 163 (DB).

(10) Order terminating employee's service because his conduct and work were not satisfactory — Order casts stigma on employee and amounts to punishment — Termination without opportunity to show cause under Statute 13 (9) of the Institute of Technology Act (1961) is invalid. (1973) 2 Serv LR 672 (Delhi).

(11) The requirement of reasonable opportunity is a statutory protection that is afforded to the servant and a statutory obligation cast upon the State irrespective of whether the protection is claimed by the servant or not. If reasonable opportunity was not given the order of dismissal must be set aside. A 1960 Punj 8 (11) (DB) ** A 1954 Bom 351 (355) ** A 1972 SC 2178 (2182) : 1972 Lab IC 1049.

(12) The stage for compliance with Art. 311, Clause (2) came after the departmental enquiry. A 1955 Pat 305 (315) (DB).

(13) Where the order of removal was passed without considering explanation of the petitioner to the show cause notice served on him the petitioner must be said to have been removed without complying with the mandatory provision of Art. 311 (2). A 1959 All 795 (798) ** 1976 WLN (UC) 335 (340) (Raj).

(14) Where the petitioner was told that the President was "provisionally satisfied" for making order of suspension, the decision was tentative and not final. It became final only on consideration of the representation made by the petitioner. Hence, by that notice an adequate opportunity was given to the petitioner

Articles 310 & 311 — Note 64 (contd.)

to show cause against proposed action. 1976 Lab IC 1742 (Gauhati).

(15) Betterment of chances in service — Scheme prescribing training and a Departmental examination — Passing resulting in advance increments — Selection by seniority — Participation in strike by candidates selected for training — Unauthorised absence treated as break in service — Deletion of name from list of eligible candidates for examination — No opportunity given to show cause — Action, held, was invalid. 1976 Lab IC 934 (Bom).

(16) Reasonable opportunity of hearing — Order of discharge from service on grounds of moral turpitude passed on basis of report of enquiring officer — Delinquent employee not given opportunity of defending against proposed action — Order suffers from inherent defect and must be quashed. 1971 Lab IC 1584 (1586) (Pat).

(17) The onus of proving that a reasonable opportunity was given to the civil servant before he was dismissed, removed or reduced in rank is on the Government. A 1954 Bom 351 (355) (DB).

(18) If an order of confirmation is passed by the authority concerned under some mistake or on the basis of some mis-interpretation of a rule, the same can be set aside or reviewed without notice and provisions of Art. 311 are not attracted in such cases. 1977 Lab IC (NOC) 130 (Punj).

(19) Where pending departmental proceedings a Government servant is placed under suspension and at the conclusion of the enquiry, one or more of the minor penalties enumerated in Items (i) to (iv) of Rule 13 of the Rules are imposed on him and he is reinstated in service, the authority concerned, before passing a specific order under sub-rules (3) and (5) of R. 91 of the Code, has to give an opportunity to the delinquent Government servant to show cause why the proposed order should not be passed. Where, however, the penalty imposed is that the period of suspension should be treated as such, it cannot be construed as an order passed under sub-rules (2) and (5) of Rule 91 of the Code and consequently the question of affording an opportunity to the delinquent to have his say against the proposed punishment does not arise. **1972 Lab IC 1317 (1321) (FB) (Orissa).**

(20) For the purpose of making a reference under the Andhra Civil Services (Disciplinary Proceedings Tribunals) Rules (1953), the status of the officer at the time of reference and the enquiry following it are the deciding factors and not what the delinquent officer was at the time of the alleged misconduct. A 1962 Andh Pra 303 (305) (DB).

(21) Fundamental Rules, Rr. 53, 54 — Relative scope of the rules — Duty of competent authority to give reasonable opportunity to concerned Government servant before taking decision under R. 54. 1974 Lab IC 60 (Delhi) °° 1974 Lab IC 1068 (Him Pra).

(22) Procedure under Public Servants (Inquiries) Act followed — Compliance with Civil Services (Classification, Control and Appeal) Rules is not essential — Constitutional guarantee is satisfied. A 1960 Pat 116 (121, 122, 123) (DB).

(23) Rule 8 (2) of the Rules framed under Sections 7 and 8 of the Madras Hereditary Village Offices Act, requires that at the enquiry, oral evidence should be heard as to such of the allegations as are not admitted by the person charged and he should be entitled to cross-examine the witnesses. (1960) 2 An WR 94 (96, 97) (DB).

(24) The presumption under R. 11 (d) of the Assam Government Servants Conduct Rules, 1937, is a rebuttable presumption and only gives power to the Government to take necessary action against the Government servant. A 1962 Assam 17 (19) (DB).

(25) Rule 1709 of Railway Establishment Code which attempts to deny a Government servant a right to have reasonable opportunity of showing cause against the action proposed to be taken against him within the meaning of that clause, must be held to be ultra vires and unconstitutional, as it does not satisfy etc. A 1963 Raj 57 (60).

(26) Railway Establishment Code, Rule 148 — Termination of service of railway employee under Rule 148 — Rule dispensing with compliance of provisions of Art. 311 (2) is itself invalid and therefore, termination of service in accordance with provisions of Rule 148 cannot be sustained. A 1965 Pat 374 (377) (DB).

(27) Declaration by Railway Board — Subsequent cancellation without notice — No violation of Art. 311 (2). A 1970 Delhi 71 (75) (DB).

(28) Railway Services (Safeguarding of National Security) Rules, 1954 cannot override the provisions of Article 311. 1967 All LJ 645 (648).

(29) Enquiry started with a view to dismiss Government servant — Suspension ordered — Regular enquiry should be held. (1963) 2 East LR 1 (3) (DB) (Orissa).

(30) The effect of Pepsu Government's order intimating position of temporary and officiating Government servants was held to be that on integration in service of Pepsu Government temporary and officiating Government servants became confirmed and no specific and separate orders were required in Departments concerned for confirmation of such Government servants — **Held**, further that reversion of Government employee without compliance with Article 311 was illegal. 1968 Lab IC 1439 (1441) (DB) (Punj).

(31) Reasonable opportunity to show cause — Question as to — Not a pure question of law but both a question of law and fact. (1960) 62 Bom LR 1038.

(32) Explanation II to sub-section (1) of Section 9 of Payment of Wages Act is valid under it the deductions under service rules are subject to qualification mentioned in it viz., that before passing an order of deductions, the employee must be informed in writing of the proposed action and must be given opportunity to show cause — No such opportunity given — Order of withholding increments held not illegal. A 1964 Punj 242 (244, 245) (DB).

(33) Disciplinary proceedings started by former Bombay State against Government servant — Proceeding may be continued by State of Gujarat. (1966) 7 Guj LR 897 (910) (DB).

(34) Two charges framed against petitioner — Mere fact that one charge alone was made out would not vitiate order of dismissal if on charge made out authority could impose punishment of dismissal. (1968) 2 Mad LJ 226 (228).

Articles 310 & 311 — Note 64 (contd.)

(35) Before terminating the services of an employee for overstaying after expiry of leave under Rule 96 (b) read with Rule 86 of Rajasthan Service Rules he must be given opportunity to show cause against his termination. 1977 Serv LJ 134 (136) (Raj).

65. Scope and ambit of right conferred by Article 311 (2).— (1) Article 311, Cl. (2) corresponds to Section 240, sub-section (3) of the Government of India Act, 1935. The provision is mandatory. **A 1948 PC 121 (126) °° A 1958 SC 300 (304) °° A 1949 PC 112 (114) : 53 Cri LJ 383 °° A 1957 Madh Pra 118 (122) (DB) °° (1967) 15 Fac LR 320 (322) (All).**

(2) Object of Art. 311 (2) is totally unrelated to object of Section 12, Probation of Offenders Act. **1972 Lab IC 736 (FB) (Delhi).**

(3) Contravention of Art. 311 (2) will make the action taken against the civil servant illegal and ultra vires. A 1958 Mys 23 (26) (DB) °° A 1956 Madh B 172 (174) (DB) °° A 1956 Orissa 219 (222) (DB) °° A 1952 Orissa 285 (289) (DB).

(4) Fundamental Rule 52 is concerned with an order of removal or dismissal which is effective in law. If the order is null and void, it is non est and does not operate at all in law. The requirements of Art. 311 (2) of the Constitution are imperative and mandatory, and that an order which does not comply with those requirements is null and void. Thus an order dismissing a Government servant without complying with requirements of Art. 311 (2) being a null and void order, will not bring Fundamental Rule 52 into play. ILR (1973) HP 376.

(5) Compulsory retirement — Test whether the order amounts to 'removal' — Order of retirement stating that the employee is retired as he has outlived his utility — Order, held casts a stigma and amounts to punishment and is 'removal' — Enquiry under Art. 311 (2) necessary before such order can be passed. **A 1967 SC 1260 (1263). (A 1965 All 142 (FB), Overruled.)**

(6) It is clear from the provisions of Art. 311, Cl. (2) that under it the Government servant is entitled to show cause against the punishment after the Government has provisionally decided upon the punishment to be awarded to him and that this opportunity cannot be dispensed with. **A 1948 PC 121 (126, 127) °° A 1955 SC 160 (164) °° A 1945 FC 47 (58) °°** A 1958 Orissa 96 (97) (DB) °° A 1958 Orissa 74 (75) (DB) °° A 1958 Raj 153 (154) (DB).

(7) The reasonable opportunity envisaged by Art. 311 (2) includes an opportunity to deny his guilt by the Government servant and establish his innocence. **A 1958 SC 300 (307, 308).**

(8) The only requirements of Art. 311 (2) are that the delinquent officer should be afforded sufficient opportunity of showing cause against the action proposed to be taken, that he must be told of the charges that are levelled against him and the allegations on which they are based and that he must be given an opportunity to deny his guilt and establish his innocence. He should also have an opportunity to make his representations as to why the proposed punishment should not be inflicted upon him. (1961) 2 Andh WR 4 (8) (DB).

(9) Section 126 of the J. & K. Constitution Act contemplates two stages both of which are mandatory — Composite notice containing charges for enquiry and proposed punishment — Not valid. 1974 Lab IC 554 (557) : 1974 Serv LJ 84 (J & K).

(10) The object of Art. 311, Cl. (2) is that no one should be condemned unheard rather than the protection of the services. A 1954 Madh B 177 (180) (DB) °° A 1956 Madh B 100 (102) (DB).

(11) There is no warrant to hold that the "opportunity" under Article 311 does not include "common law" opportunity. A 1962 Punj 400 (402).

(12) Every police officer holds office during the pleasure of the Governor, and is entitled under Art. 311 (2) to a reasonable opportunity to show cause to the satisfaction of the Governor against the action proposed to be taken in regard to him. **A 1961 SC 1245 (1252, 1253).**

(13) Effect of non-compliance — Show cause notice — Absence of — Order of discharge is null and void and not merely irregular. A 1965 Andh Pra 188 (191) : (1964) 2 Andh LT 257.

(14) A person cannot be removed from service after his unconditional reinstatement relying on the proceedings which had ended in such reinstatement. A 1960 All 164 (174).

(15) Officiating civil servant — Reversion to substantive post not in usual course but as punitive measure — Servant is entitled to protection under Art. 311 (2). A 1966 Pat 364 (366) : 1966 BLJR 480 (DB).

(16) When it is proposed to take action against a public servant by way of punishment and that will entail forfeiture of benefits already earned by him, he should be heard and given an opportunity to show cause against that order. ILR (1968) Cuttack 341 (351) (DB).

(17) Reversion from higher to lower post — Requirements of Art. 311 (2) not followed — Order is not valid and legal. A 1966 Orissa 173 (179, 184, 186) : (1966) 8 OJD 211 (DB).

(18) If an order affects the employee financially it must be passed after an objective consideration and assessment of all relevant facts and circumstances and after giving the person full opportunity to make out his own case about that order. (1977) 2 Serv LR 827 (829) (Cal).

(19) Natural justice — Government servant promoted on probation — Reversion thereafter on ground that it was reserved post, without hearing — Though question of reservation was matter of policy for which employee need not be consulted, appointment of employee in this case having been taken place, his subsequent reversion without hearing him was unjustified. 1977 Lab IC (NOC) 59 (Him Pra).

(20) Competent authorities, while considering the case of suitability of subordinate Government servants for promotion to a higher post and in taking a decision in regard to such suitability do not act judicially. (1964) 1 Mys LJ 226 (233) (DB).

(21) If a Government servant is confirmed against a permanent post, he is entitled to continue in that post as long as the post remains. After confirmation he becomes entitled to the protection of Article 311 and can be deconfirmed only after he has been given a reasonable opportunity to show cause against such deconfirmation. (1978) 80 Pun LR 498 (501).

(22) Where the Governor appoints under U. P. Disciplinary Proceedings (Administrative

Articles 310 & 311 — Note 65 (contd.)
Tribunal) Rules, 1947, the Tribunal for enquiry against a Sub-Inspector of Police before commencement of the Constitution, but the order of dismissal is passed after the Constitution comes into force, Sub-Inspector is entitled to protection of Art. 311 (2). A 1961 SC 1245 (1253, 1254).

(23) Disciplinary tribunal framing charges on the basis of statements made and signed by them in the investigation by Police Inspector of Directorate of Vigilance and Anti Corruption will not amount to violation of Art. 311. 1971 Mad LW (Cri) 16.

66. Temporary civil servants.— (1) Reasonable opportunity' allowed to a temporary Government servant is not different from that allowed to a permanent Government servant. A 1961 All 45 (49, 50). (**Reversed** on another point in A 1963 All 94.)

(2) Temporary civil servant — Services terminated for misbehaviour and bad work — No reasonable opportunity given — Order of termination cannot be maintained. A 1965 Raj 108 (109) (DB).

(3) Even temporary employee is entitled to protection under Article 311 if order terminating his service is of punitive nature. 1969 BLJR 441 (442) (DB) ** 1978 BLJ 454 : 1978 Lab IC (NOC) 202 (Pat).

(4) In the case of discharge of a temporary Government servant, the question that he was dismissed by an authority subordinate to that by which he was appointed and that he has not been given any reasonable opportunity of showing cause against his removal does not arise. A 1959 Manipur 33 (38).

(5) Promotion of Head Rakshakas in higher grade — Relevant regulation capable of two interpretations — Selection of petitioners for promotion on Zonal basis and subsequent promotion cannot be held to be bad in law. 1974 Pat LJR 349.

67. Charge-sheet, right of civil servant to.— (1) The materials on which the charges are based must be disclosed to the civil servant and he must be given an opportunity of meeting the same. A 1957 Madh Pra 126 (132) (DB) ** A 1957 Nag 18 (19) ** A 1957 Orissa 184 (188) (DB) ** A 1955 Cal 183 (188).

(2) Order of suspension not followed by charge-sheet within reasonable time — Order liable to be quashed. A 1965 Cal 13 (16).

(3) In order that it can be said the Government servant had a reasonable opportunity he must have been told what the charges levelled against him are and the allegations on which the charges are based. A 1958 SC 300 (307)

(4) Dismissal of Government servant without serving a charge-sheet to him is illegal — Merely issuing a show cause notice in respect of the charges is not sufficient. 1972 Lab IC 394 (J & K).

(5) Charge of mala fides against P and enquiry under Rule 7 — Imposition of penalty under Rule 8 not for mala fides but for acts of omission — **Held**, after stating object of representation under Rule 8, that order imposing penalty could not sustain as attention of P was never invited during enquiry to his acts of omission and he was not given any opportunity under Rule 8 — Rules 7 and 8 were similar to what was provided in Art. 311 (2). 1967 Cur LJ 439 (444) (Punj).

(6) Failure to supply allegations of fact resulting in prejudice — Finding on a matter not related to the charge — Enquiry, held, vitiated due to non-compliance of Rule 16, Rajasthan Civil Services (C. C. & A.) Rules, 1950. 1969 Lab IC 330 : (1968) 1 Lab LJ 475 (Raj).

(7) A finding of fact cannot be set aside at appellate stage — The mere omission to follow R. 7 (2) of the Punjab Civil Services (Punishment and Appeal) Rules, 1952 held could not be deemed enough to offend Art. 311 (2). (1963) 65 Punj LR 945 (949).

(8) Enquiry against Government servant — Order of removal from service — Finding based on matters outside scope of charge-sheet — Held, no reasonable opportunity was afforded and hence order was liable to be quashed. 1965 Cur LJ 289 : 67 Punj LR 513 (516).

(9) Where there must be something against an officer to warrant his dismissal, an officer cannot be lawfully dismissed without first telling him what is alleged against him and hearing his defence or explanation. A 1968 SC 292 (298).

(10) Reversion of a Government servant — Penal consequences — Charge-sheet and enquiry is necessary. (1971) 73 Pun LR 644.

(11) Where second opportunity is afforded to delinquent to establish his innocence under Article 311, defect of mentioning penalties in charge-sheet becomes meaningless. 1968 Raj LW 272.

68. Charges not to be vague.— (1) Where the charges against the civil servant are too vague to enable him to make his representation with regard to them, the opportunity given to him to show cause against the proposed action will not be a reasonable one. A 1956 Cal 662 (665) ** A 1956 Mad 220 (224) ** A 1954 Assam 18 (22) : 1954 Cri LJ 31 (DB) ** A 1963 Tripura 20 (28).

(2) Departmental inquiry — Charges must be definite. A 1961 Tripura 1 (2).

(3) Where the charge and statement of facts accompanying the charge-sheet formed part of single document on the basis of which proceedings are started against delinquent merely because the ground of reprehensible conduct was not included in the charge-sheet, the enquiry could not be held vitiated. A 1963 SC 1723 (1728).

(4) The mere charge that the civil servant work was unsatisfactory is not enough as it does not give him a sufficient idea as to what he has to meet. A 1953 Nag 138 (141) (DB).

(5) A plea that the charges were too vague to enable the civil servant to offer any explanation in regard to them cannot be met by the contention that the findings of the enquiring body cannot be questioned in a Court of law. A 1956 Mad 220 (225).

(6) 'Reasonable opportunity' presupposes that charges must be clear and sufficiently detailed. (1966) 79 Mad LW 428 (431, 432).

(7) It is not, necessary to mention in the charge particulars of the statements made by witnesses on which the charge was based. A 1956 Sau 14 (16, 17) (DB).

(8) In disciplinary proceedings against the servants of Local Bodies, no inflexible rule can be laid down that in every case, the charge must state the evidence in support of the charge. A 1969 All 11 (13) : 1969 Lab IC 1.

(9) Departmental enquiry — Charge memo asking delinquent to answer not the allegations

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constituting the charge but punishment of dismissal that may follow on proof of said allegations — Held, charge memo was vitiated. (1967) 2 An WR 121 (129).

[But see 1978 Lab IC 1132 (1134). (Charge-sheet mentioning proposed punishment — Does not vitiate the proceedings.)]

(10) Where it is clear from the order of dismissal itself that the past record of delinquent was not taken into consideration either delinquent could not take objection that the charge-sheet did not contain allegation that his past record was undesirable and that he was not given an opportunity to explain it. 1959 MPLJ 534 (537).

(11) Proposed punishment mainly based on previous record of the Government servant — Second notice to Government servant must disclose this. **A 1964 SC 506 (509, 510) : (1964) 1 SCA 305.**

(12) A charge-sheet is an accusation based on allegations which may be integral part of the charge-sheet or charge-sheet may refer to statement of allegations to be found in separate document. (1965) 10 Fac LR 8 (11) (Cal).

(13) Statement of accusation in the charge-sheet not giving sufficient information from which delinquent could know as to what evidence would be used against him in support of the charge — Delinquent denied reasonable opportunity to defend himself effectively — Order of dismissal held could not be maintained. 1973 Lab IC 717 (722) (All) ** **A 1971 SC 752 (756) : 1971 Lab IC 456.** (Vague and indefinite charges and failure to supply statement of allegations would render removal of Government servant void and inoperative.)

(14) Statement of fact accompanying charge-sheet — Both form a single document — Ground of reprehensible conduct mentioned in statement of facts but not included in charge-sheet — Enquiry held not vitiated. **A 1963 SC 1723 (1726, 1727, 1728).**

(15) Railway servant charge-sheeted for misconduct — But penalised for negligence coupled with violation of rules — Held, as conduct of servant did not amount to misconduct, charge-sheet must be treated as vague and penal order must be quashed. (1965) 10 Fac LR 263 (Cal).

(16) Reversion from officiating post on the ground of unsatisfactory conduct — Details of unsatisfactory conduct not specified and explanation from public servant not sought — Order offends Art. 311 (2). **A 1964 SC 423 (430, 431).**

(17) Procedure — Reversion of probationer to substantive post for unsatisfactory work — Notice to show cause not mentioning instances of adverse entries — Rule 55 (3) of Civil Services (Classification, Control and Appeal) Rules was not complied with — Order terminating services quashed. A 1959 All 437 (439).

(18) Departmental enquiry — Charge that servant abused his officer — In charge of abuse exact words used are material and hence copy of original complaint of Officer must be supplied to servant. 1968 Lab IC 584 (586) (Cal).

(19) Where stopping of work would amount to a strike if done under certain circumstances the charge-sheet must mention the evidence on which the department wishes to rely to show that the stopping of work amounted to a strike. A 1959 All 614 (617, 618) : 1957 All LJ 480.

(20) Charges not to be too vague — Government servant repeatedly extending leave even after refusal of such leave and being asked to resume duty — Such employee dismissed from service — Charge-sheet given to such employee giving all details of refusal of leave and stating that he deliberately defied orders — In such cases, substance of accusation and not the mere words used is to be seen. 1966 Cur LJ 968 (982) (DB) (Punj).

(21) Reasonable opportunity of showing cause — Charges against railway servant being very vague — Held, he was deprived of reasonable opportunity of his defence. A 1962 Raj 265 (271, 272) ** 1962 Raj LW 246 (DB).

(22) Vague charge — Charge that Government servant had done some act 'with ulterior motive' not sufficient. A 1960 All 543 (544) (DB).

(23) Charges cannot be based on mere suspicion. 1978 (2) Cal LJ 316.

(24) The civil servant has a right to be informed of the charge or charges levelled against him and must be given a reasonable opportunity, and it cannot be said that the petitioner had suffered any prejudice by reason of the cancellation of the original charge-sheet and the issue of a fresh one. A 1959 Andh Pra 618 (619) : 1959 Andh LT 135 (DB).

(25) Although charges against a Government servant should relate to recent offences and stale matters should not be revived, where, to find out whether the assessments of taxes were properly made by the delinquent Income-tax Officer proper investigation was necessary, events more than 3 years prior to framing of charges could form basis of charges. A 1972 Cal 27 (33) : 1972 Lab IC 221.

(26) Service Rules — Hyderabad Civil Services (Classification, Control and Appeal) Rules (1955), Rule 22 — Departmental enquiry under — Procedural instruction in Appendix I — Instruction No. 2 — Mention of proposed punishment in charge-sheet not necessary. (1960) 2 Lab LJ 165 (167) (DB) (Andh Pra).

(27) All charges read over and explained to the railway servant by the Enquiry Officer and he being informed that one of the charges was dropped — Fact that a fresh list of charges had not been given to the petitioner at the time of the commencement of the inquiry was hardly sufficient to vitiate the inquiry which was held against the petitioner. A 1962 Raj 265 (268).

69. Notice to specify particular punishment to be awarded and grounds thereof.— (1) An opportunity of showing cause against the proposed punishment can be given only after the action proposed has been tentatively decided upon. A 1961 All 122 (124, 125) : 1960 All LJ 762. (A 1948 PC 121 and A 1958 SC 300, Rel. on.)

(2) The Government servant must be given an opportunity to make his representations as to why the proposed punishment should not be inflicted on him. **A 1958 SC 300 (307).**

(3) Withdrawal of the scale once granted amounts to punishment and notice as contemplated by Art. 311 (2) should have been issued and apart from that the principles of natural justice also require that the petitioner should not have been condemned unheard when it was proposed to change criteria on the appeal of

Articles 310 & 311 — Note 69 (contd.)
certain persons who felt aggrieved against the final seniority list and the petitioner was to be deprived of the emoluments and the loss in status. (1976) 1 Serv LR 764 (771) (Him Pra).

(4) Notice to a civil servant under Art. 311, Cl. (2) to show cause why he should not be punished is not enough unless the notice specifies the proposed punishment. 1957 MPLJ 469 (478) (DB) (Nag).

(5) Show Cause notice against punishment proposed — Penalty proposed should be clearly and specifically mentioned. 1975 Lab IC 283 (Him Pra).

(6) Notice to show cause against dismissal — Notice not specifying which findings of enquiry officer had been accepted — Notice held was not contrary to Art. 311 (2). A 1976 Pat 158 (167) (DB).

(7) Reasonable opportunity — Giving notice of the misconduct with which an employee is charged and asking him to submit explanation — Not sufficient compliance with requirement of giving reasonable opportunity — Opportunity should be real. 1978 Lab IC 420 (423) (DB) (Punj). (1975 Serv LJ 170, Reversed.)

(8) Reasonable opportunity to show cause against proposed punishment — Notice regarding proposed punishment on basis of alleged six charges — Guilt only under one charge established — No fresh notice regarding proposed punishment — Punishment inflicted on basis of notice already issued cannot be sustained. A 1963 Ker 151 (152) (DB).

(9) Madhya Bharat Panchayat Rules (1951), Rule 145 — Compliance — Order of removal mentioning several grounds — Authority guided by only one ground — Held mention of other grounds is immaterial. A 1962 Madh Pra 50 (55) (DB).

(10) Acts of misconduct charged in earlier proceedings dropped and Government servant reinstated unconditionally — Subsequent charge not including those acts of misconduct — Dismissing authority cannot take into consideration those acts in determining the punishment. A 1960 All 270 (273).

(11) Court does not interfere if any one of the charges established is serious enough to merit punishment awarded to him. But if the punishment is the cumulative result of a number of charges found against him of which a few alone are sustainable and the disciplinary authority would not have awarded the punishment for the said charges alone the punishment cannot be sustained. (1973) 2 Lab LJ 369 (Ker).

(12) Order of punishment based on several grounds some of which are found to be non-existent or irrelevant can be sustained only if the Court is satisfied that the order could have been passed on the basis of relevant and existing grounds even to the exclusion of irrelevant or non-existent grounds. 1972 Lab IC 463 (464, 465) : (1972) 1 Mad LJ 1.

(13) Show-cause notice on certain grounds — Subsequent addition of ground — Dismissal on former grounds — Addition of ground will not invalidate dismissal. A 1960 Madh Pra 80 (81) : 1960 MPLJ 403.

(14) At the initial stage when charges are framed and served upon the delinquent officer, the punishing authority or the inquiring officer should not propose what punishment ultimately he is to be given. That is not the stage when any opinion as to the punishment can either be formed or expressed. Expression of such opinion amounts to prejudging the issue which is likely to create misapprehension in the mind of the delinquent officer. A 1969 Andh Pra 234 (235) •• A 1961 Cal 626 (633) : 65 Cal WN 607 (DB). (Overruled on another point in A 1966 SC 951.)

(15) First show cause notice framing charges as well as proposed punishment is invalid — Even if authority issues another notice, requiring show cause against the proposed punishment invalidity is not cured. 1968 Lab IC 735 (738, 739, 741) : 1968 Serv LR 625 (Cal).

(16) The mention of punishment in the charge would not by itself indicate any prejudice on the part of the enquiry officer much less on the punishing authority. The enquiry would not be vitiated by a memorandum accompanying the charge calling upon the delinquent to show cause why he should not be punished. (1966) 79 Mad LW 422 (423, 425) (DB).

(17) Second notice — Absence of express statement that the dismissing authority has accepted findings of enquiry officer — Officer cannot complain denial of opportunity where the dismissing authority has purported to issue the notice after accepting the enquiry report in its entirety and has also enclosed a copy of the report with the notice. A 1963 SC 1612 (1615, 1616, 1618). (A 1962 Assam 88, Reversed; A 1957 Orissa 184 and A 1960 Orissa 37, Overruled; A 1957 Andh Pra 370, Criticised.)

(18) It is when definite conclusions have been come to as to the charges and a provisional decision is taken as to the punishment to be imposed that the show cause notice is given to him to explain why the proposed punishment should not be imposed on him. 1966 Ker LT 180 (187, 188) (DB).

(19) The failure to state in the notice to show cause against the proposed action, that the Government have accepted the findings of the Disciplinary Proceedings Tribunal and have arrived at the provisional conclusion in regard to the penalty to be imposed does not amount to an infraction of the provisions of Rule 8 (b). A 1960 Andh Pra 15 (16) : (1959) 1 Lab LJ 560 (DB).

(20) Notice to show cause against punishment of dismissal — Non-specification of evidence and reasons for conclusions — Held not defective on ground of vagueness. A 1974 SC 1589 (1595, 1596) : 1974 Lab IC 1010.

(21) Where the punishment ultimately imposed is more severe than the one which was mentioned in the notice as the proposed punishment, the notice will not be according to Art. 311, Cl. (2). A 1955 Orissa 33 (35) (DB).

(22) Where the original charges themselves were sufficiently serious to justify the dismissal of the civil servant on the proof of the charges and the authority has proposed to dismiss him on those charges, the failure to give fresh notice in regard to the additional charges will not in-

Articles 310 & 311 — Note 69 (contd.)
validate the order of dismissal. A 1956 Pat 228 (232) (DB).

(23) Show Cause Notice need not specify separate punishments for separate charges. A 1963 Madh Pra 115 (120) (DB).

(24) Dismissing authority differing from findings in enquiry report either wholly or in part — Statement as to the provisional conclusions reached by the dismissing authority in the second notice is necessary. A 1963 SC 1612 (1615, 1616, 1618). (From the fact that enquiry report had suggested punishment of withholding of three increments while in show cause notice, action proposed was removal from service, it cannot be inferred that dismissing authority did not accept findings recorded by enquiring officer in favour of delinquent. A 1962 Assam 88, Reversed; A 1957 Orissa 184 and A 1960 Orissa 37, Overruled.)

(25) In issuing the second notice the dismissing authority has to come to a tentative or provisional conclusion about the guilt of the officer as well as about the punishment. A 1963 SC 1612 (1614, 1615).

(26) Departmental enquiry — Initiation, by issuing notice stating therein charges providing for minor penalty — Before passing the final order, fresh notice on the same facts issued which contained charges providing for major penalty — Subsequent notice valid as employee was not exonerated as regards charges in earlier notice. 1977 Raj LW 354.

(27) When the civil servant concerned receives a notice to show cause under Article 311 (2), he is entitled to challenge the correctness and propriety of the findings reached by the officer competent to punish him and of issuing a notice to show cause against the action proposed to be taken against him. A 1963 Madh Pra 115 (118, 119, 120) : 1963 MPLJ 139 (DB).

(28) In cases which involve one of the punishments mentioned in Article 311 (2), it is not open to the enquiring or the punishing authority to waive the enquiry under Rule 17 (i) (b) of the Civil Service, Classification, Control and Appeal Rules. Where the show cause notice does not clearly indicate the nature of the punishment proposed it is a serious defect and constitutes violation of principles of natural justice. A 1965 Mad 155 (156, 157) : (1964) 1 MLJ 397.

(29) Government servant cannot claim that notice to show cause against the action proposed to be taken against him should have been issued after the expression of opinion by the Public Service Commission and not before. A 1960 Mad 393 (393, 394) : (1961) 1 MLJ 46 (DB).

(30) C. P. and Berar Home Guards Act (XV of 1947) — C. P. and Berar Home Guards Rules (1947), Rule 12 (6) — Procedure — Enquiry Officer holding charges proved but upon certain extenuating circumstances recommending lenient punishment — Government agreeing with finding but not with recommendation — Held, notice to show cause against proposed punishment not necessary — Recommendation by Enquiry Officer for award of light punishment not binding on the Government. A 1961 Madh Pra 261 (271, 272, 273) : 1961 MPLJ 558 (DB).

(31) Punishment based on gravity of charges proved against the Government servant but was not based mainly on his past record which was also considered — Non-disclosure in the second notice, of past record and intention of punishing authority to take into account such record — Punishment awarded is valid. A 1967 Madh Pra 207 (209) : 1966 MPLJ 1111 (DB).

(32) Reasonable opportunity to show cause — Punishment can be based on previous record of servant — Authority, however, must give reasonable opportunity to him to explain adverse remarks in previous record. ILR (1965) Cut 147 (153) (DB).

[But see ILR (1972) 2 Delhi 84. (Where in a departmental enquiry the punishing authority, without any reference to the past record of services of the delinquent, decided to impose provisional punishment of removal and the past record was taken into account subsequently while confirming the punishment, objection could not be raised that the past record could not be taken into consideration as the delinquent was not given an opportunity to show cause why the past record should not be taken into consideration.)

(33) Where in the show cause notice sent to the plaintiff, a D. S. P. before he was dismissed from service, the Government informed the plaintiff that after considering the report of the I. G. P., the inquiry officer, they had found the plaintiff guilty of the charges levelled against him and they had also accepted the recommendation of the I. G. P. that the plaintiff should be dismissed from service, the notice is vitiated. A 1963 Guj 244 (249, 250).

(34) Show cause notice as to why petitioner should not be discharged from service — Petitioner showed cause — Orders passed dismissing petitioner from service — Punishment of discharge is lesser than punishment of dismissal — Held, provisions of Article are contravened. 1967 BLJR 58 (59) (DB) (Pat) •• 1974 Lab IC 1068 (1070) (Him Pra) •• A 1970 Orissa 81 (82) : 35 Cut LT 926.

(35) It is open to the authority to punish a public servant of a charge lesser than the charge which has been levelled against him and it was unnecessary to enumerate the lesser charge in the charge-sheet as well. (1974) 2 Serv LR 602 (Delhi).

(36) Where compulsory retirement amounts to dismissal or removal second opportunity to show cause against proposed action is imperative and in absence of such notice the order is invalid and ineffective. A 1966 Pat 97 (105) (DB).

(37) Loss of seniority or forfeiture of portion of pay and allowances amounts to reduction — Punishment by such reduction contemplated by Government — Second notice is necessary. A 1962 Orissa 140 (140, 141) : (1962) 4 Orissa JD 74 (DB).

(38) The competent authority should consider the explanation of the employee and after a clear finding of the guilt and tentatively deciding upon the proposed punishment, should issue the second notice. Discharge order without prior to issue of such notice was invalid. (1963) 2 East LR 18 (20) (DB) (Orissa).

(39) Where the notice to show cause reveals that the competent authority has accepted the findings of the Enquiring Officer it is unnecessary for him to deal with the matter once again and indicate the reasons for the findings. It is not necessary for him to discuss the evidence afresh and to indicate his own reasons for

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the proposed punishment in the show cause notice. ILR (1964) Andh Pra 464 (473, 474) (DB).

(40-41) Where the petitioner had submitted an explanation questioning the findings arrived at by the Tribunal and also the punishment proposed to be inflicted on him it was held as regards the notice served by the Government that there was no defect in the notice and that it gave him the reasonable opportunity contemplated by Article 311. (1957) 2 Andh WR 425 (429, 430) (DB).

(42) If the enquiring authority thinks it proper, he can suggest punishment, specially when charge sheet makes a reference thereto. (1963) 67 Cal WN 859 (DB).

70. Enhancement of punishment by higher authority.— (1) Appellate authority can pass dismissal order in place of reversion passed by original authority — But before doing so it must give fresh notice that it proposed to inflict higher penalty. A 1962 Pat 276 (279) (DB) ** (1979) 3 Serv LR 586 (588) (Punj).

(2) (Prior to amendment) — Enhancement of punishment — Second opportunity was given and orders passed — Failure to exhibit on record notice served on delinquent to show cause, not material. (1969) 2 MLJ 362.

(3) Punishing authority is not bound by recommendations of enquiring authority — It can propose a higher punishment than the one recommended by the enquiring authority. 1973 Kash LJ 83.

[But see 1976 Serv LWR 586 (589) (Punj) (Where a notice is served upon a public servant to show cause why a particular penalty be not imposed upon him the punishing authority cannot subsequently impose a more drastic penalty But the vice-versa condition, i. e. the case in which notice mentions a more drastic penalty than the penalty which is ultimately imposed, cannot be held to be illegal either in principle or an authority.)]

(4) Decision of Government to revert the delinquent employee — Government later reopening the question and deciding to dismiss him — They have no power to do so. A 1963 SC 395 (397).

(5) Police head-constable reduced to rank of constable by order of Deputy Inspector-General of Police — Inspector-General of Police enhancing punishment to one of removal in appeal — Order is without jurisdiction. A 1960 Raj 56 (58) (DB).

(6) Rajasthan Police Regulation (1948), R. 100 was superseded on relevant date by Rajasthan Civil Services (Classification, Control and Appeal) Rules, 1950 — These Rules have no provision for enhancement of punishment awarded to ministerial officer — I. G. of Police cannot enhance punishment awarded by D. I. G. A 1958 Raj 284 (285) (DB).

(7) Enhancement of punishment by varying or modifying earlier order — Article 311 (2) must be complied with. A 1968 Andh Pra 153 (155 and 156).

(8) Enhancement of punishment made in exercise of revisional jurisdiction does not amount to second punishment. A 1960 Bom 225 (230).

(9) I. G. Police could impose higher punishment only when the authority imposing the minor punishment has not got the powers to impose the major punishment. A 1958 Raj 284 (285) (DB).

(10) Punjab Civil Service (Punishment and Appeal) Rules (1952), Rule 14 — Penalty inflicted upon public servant by subordinate authority — Government or head of department has power under Rule 14 to enhance it, after giving the public servant opportunity to be heard against it. A 1966 Punj 175 (178).

(11) Where previous record of service and adverse entries which had not been conveyed and which did not form the basis for framing the charges against the delinquent Government servant were taken into consideration while enhancing the punishment and no specific notice in respect of those charges calling upon the delinquent to explain as to why action should not be taken against him was issued the order is vitiated and is liable to be quashed. (1979) 3 Serv LR 590 (592) (DB) (Punj).

71. Additional charges and amendment of charges.— (1) Where additional charges are framed after a prior notice to show cause, a fresh notice to show cause with respect to the additional charges should be given. A 1956 Pat 228 (232) (DB).

(2) Tribunal can amend or alter charge. A 1965 Orissa 183 (186) (DB).

(3) Power of enquiry officer to frame fresh charges — No bar to such power. A 1960 Punj 147 (149).

72. Powers of revising authority.— (1) Where a superior disciplinary authority in exercise of revisional power proposes to impose a penalty higher than the one originally imposed, it is at liberty to propose one of the more severe penalties but only tentatively and must keep an open mind, until consideration of the cause shown by delinquent against proposed penalty, whether or not to impose that penalty or any other major penalty. (1962) 66 Cal WN 54 (62): 1962 (2) Cri LJ 529.

73. Bias and want of bona fides— See also Note 75 (d).— (1) If there are good reasons to think that the mind of tribunal or authority was prejudiced against person whose conduct was subject to scrutiny, by reason of something preceding it, then the tribunal's finding should not be allowed to stand. 1962 (2) Cri LJ 529 (531 to 533): 66 Cal WN 54 (58, 60).

(2) Indication of punishment in charge memo by enquiry officer — Amounts to prejudging the case — Whole proceedings are vitiated. (1967) 2 Andh WR 253 (257) (DB).

[But see A 1971 Cal 336 (340, 341) ** ILR (1971) 2 All 344.]

(3) All the stages of enquiry against a Government servant are quasi-judicial in character and the delinquent officer is entitled to unbiassed enquiry at both stages. ILR (1965) 1 Mad 487 (493) (DB).

(4) Punishment indicated even in charge framed — Not sufficient to indicate any bias in the disciplinary authority. A 1963 Manipur 28 (32, 33).

(5) Mere delay, though of a long period, between suspension and dismissal, is not sufficient to impute mala fides. A 1970 Delhi 52 (55) (DB).

(6) Where the enquiring officer only appraises the evidence and submits his conclusions along with the record of enquiry to the authority competent to impose the punishment, there is no decision which is reached by the enquiring authority which

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can be challenged as being tainted by bias or for other like reasons. ILR (1965) 1 Mad 487 (495) (DB).

(7) Representation by the petitioner officer addressed to Chief Minister, Punjab — President's rule in Punjab when office notes were put up before Secretary of the Department — Representation ordered to be filed by Secretary — It cannot be said that Secretary had mala fide intention in withholding representation from the Chief Minister. **A 1970 Punj 112 (125): ILR (1969) 2 Punj 304 (FB).**

(8) Remote apprehension that enquiry officer would be biased not sufficient to render disciplinary proceedings bad on ground of bias. 1979 Lab IC 258 (261) (Ker).

(9) Reversion from officiating to substantive rank — Malice alleged — Malice must be established by sufficient materials. (1968) 72 Cal WN 817.

(10) Compulsory retirement of Government servant under Rule 56 (d), Fundamental Rules — Mala fides — Bias of one of the recommending authority does not vitiate order. (1978) 2 Mad LJ 202: 1979 Lab IC (NOC) 20.

(11) Mere indication of the offence in the charge with a citation of facts and allegations thereon on which such charge is based accordingly will not by itself and without more indicate any bias of the disciplinary authority against the Government servant. (1979) 1 Cal LJ 227: 1979 Lab IC (NOC) 48.

(12) Railway employee — Reversion from officiating post — Order challenged under Art. 226 as mala fide — Allegations of fact to establish mala fide controverted — **Held** it was not possible for the High Court to determine the disputed question of fact and to hold the order to be invalid on the ground of mala fide. 1979 Lab IC 768 (771) (DB) (Pat).

(13) Delinquent servant not participating due to apprehension of bias of Enquiry Officer — Enquiry, held, vitiated. 1979 Lab IC 679 (685) (Him Pra).

(14) Order of suspension because of registration of criminal case — Cr. proceedings not started — Departmental enquiry initiated — Pending enquiry incumbent reverted to substantive rank — Such conduct on the part of punishing authority falls within the perview of malice in law — Order of reversion could not have been passed without complying with provisions of Art. 311. 1977 SLWR 416 (421) (DB) (Punj).

74. Reasonable opportunity, what amounts to — General.— (1) The tests to be applied to find out whether a departmental enquiry was conducted in accordance with the principles of natural justice and whether the delinquent had reasonable opportunity or not are as follows: (i) Whether an opportunity to deny the guilt and establish his innocence had been given by framing definite charges and by disclosing the allegations on which the charges were based. (ii) Whether opportunity to defend himself by cross-examining the witnesses produced against him and examined in his presence and to examine himself or any other witnesses in support of his defence was given; (iii) Whether no materials had been relied on against the delinquent in the enquiry without his being given an opportunity to explain the same: (iv) Whether opportunity to make his representation as to why the proposed punishment should not be inflicted upon him had been given. 1968 Lab IC 1268 (1270) (Tripura) ** (1977) 1 Serv LR 10 (25) (Guj) (DB). Unless special circumstances are shown to exist in a given case, an inquiry held in compliance with such requirement would ordinarily be held to satisfy the provisions of Art. 311 (2)). ** 1972 Lab IC 1237 (1241) (J and K). ** A 1970 Orissa 220 (221) ** 1970 Lab IC 1506 ** 1967 Raj LW 24 (27) (DB) ** A 1963 Tripura 20 (26, 27, 28) ** A 1960 Pat 116 (123) (DB).

(2) What is reasonable opportunity has not been defined in the Constitution or the General Clauses Act. But the words have acquired a legal meaning and it cannot be left to the vagaries of each individual. The word 'reasonable' must therefore mean according to rules of natural justice which are rules of law. A 1958 All 532 (539, 540).

(3) The essential element of reasonable opportunity is that the petitioner must know the precise charge against him and the evidence on which it is based. A 1960 All 323 (330).

(4) The delinquent in a disciplinary proceeding is entitled to an opportunity to know the material against him, to have the evidence recorded in his presence, to have the right of cross-examining the witness examined and to have a chance to examine witnesses in support of his defence. 1977 Lab IC 1789 (1790) (DB) (Orissa).

(5) It is only when an action of the type, namely, dismissal or removal or reduction in rank is proposed that there should be an opportunity. This opportunity should be a reasonable one and therefore, the opportunity to show cause should cover both the points, namely, the question of guilt and the nature of punishment. A reasonable opportunity contemplated by Art. 311 of the Constitution must refer to the opportunity to show cause against the truth of the charges framed and the opportunity must also cover the question of the nature of punishment. A 1963 Guj 244 (247, 248).

(6) All enquiries, judicial, departmental or other, into the conduct of individuals must conform to certain standards. (1959) 2 Mad LJ 15 (24, 25).

(7) That the opportunity to show cause must be reasonable implies that the finding arrived at in the enquiry against the public servant and on which action is taken against him is a bona fide one and it is open to examination by the Court to see whether it is such that it could possibly be reached by any reasonable person. A 1956 Mad 220 (225) ** A 1956 Pepsu 19 (26).

(8) Question of reasonable opportunity to show cause is dependent on peculiar facts of each case. What is reasonable is not necessarily what is best but, what is fairly appropriate under all circumstances of case. A 1969 Delhi 145 (147): 1969 Lab IC 539 (DB) ** A 1956 Punj 58 (62) (DB) ** A 1954 Bom 351 (355) (DB). (Impliedly **Overruled** on another point in **A 1963 SC 375.**)

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(9) What constitutes a 'reasonable opportunity' will generally depend on the facts and circumstances of each case. A 1959 Madh Pra 322 (327) (DB) ** **A 1945 FC 47 (58)** ** (1970) 2 Andh WR 10 (DB) ** (1966) 2 Mys LJ 97 ** A 1958 Raj 1 (6) (DB) ** A 1957 All 274 (275) (DB) ** A 1957 Andh Pra 414 (417) (DB) ** A 1957 Andh Pra 197 (200) (DB) ** ILR (1957) Andh Pra 715 (738) ** ** A 1969 All 11 (14): 1969 Lab IC 1 ** A 1958 All 532 (537, 538). ** **A 1976 SC 1080.**

(10) Where orders were made against a person, it becomes duty of the authority to hear judicially that is to say, in an objective manner impartially and after giving reasonable opportunity to parties concerned in dispute, to place their respective cases before it passing an order which affects a person, without giving him an opportunity of being heard would be held to be vitiated as being contrary to principles of natural justice. 1969 Lab IC 712 (716) (DB) (Andh-Pra).

(11) Where no date was fixed calling upon the delinquent to cross-examine the witnesses and to make comments upon the documents presented on behalf of the appointing authority, and there was no enquiry after the denial of the charges, it could not be said that the delinquent did not avail of the opportunity though given. Under the circumstances, the order of dismissal could not stand. A 1970 Orissa 56 (57, 58).

(12) If the safeguards provided by Article 311 are not to be rendered illusory, the words 'reasonable opportunity' must be deemed to mean 'a real and adequate opportunity which is not merely nominal or a sham one.' A 1958 Punj 327 (329, 330) (DB). (Delinquent asked to defend himself before person who is already biased against him — Order of dismissal quashed.) ** 1978 Lab IC 420 (423) (DB) (Punj).

(13) Where reasonable opportunity has been given the failure to give "reasonable facilities" is not a ground of complaint. A 1955 Pat 305 (315) (DB).

(14) Reversion on ground of antecedents and unsatisfactory character — Confindential information — Exclusion from service on ground of antecedents and unsatisfactory character may affect his reputation and make him ineligible for future employment — This entitles the civil servant to opportunity to defend himself. A 1965 Ker 149 (152).

(15) Order of removal from service which denied to non-applicant reasonable opportunity of defending himself in disregard of protection afforded by Article 311 (2), was a nullity and non-existent in eye of law. (1968) Jab LJ 1036 (1039).

(16) It is not for the delinquent Government servant to dictate the manner in which an enquiry shall be held in respect of his misbehaviour. He cannot even claim an enquiry as of right. All that he is entitled to under Art. 311 (2) of the Constitution is to have a notice of the charges levelled against him with opportunity to submit his explanation thereto and a further notice of the punishment that is proposed to be inflicted on him with a like opportunity to submit whatever he has to say in answer thereto A 1962 Ker 43 (47) (DB).

(17) In the context of Article 311 (1) of the Constitution which forbids removal of a civil servant from service by way of punishment 'by an authority subordinate to that by which he was appointed' it is reasonable to construe the provision in paragraph 1 of Rule 17 (2), Kerala Rules, as implying that it is the same authority that can initiate and pursue the steps enjoined by it. Article 311 (2) does not purport of define what is reasonable opportunity; it does not leave it to be defined by rules either. What reasonable opportunity means, has therefore, to be determined by the Court. It means reasonable according to the rules of natural justice which are rules of law. A 1960 Ker 279 (280 to 284).

(18) In answer to a second show-cause notice under Article 311 (2), a Government servant is entitled to make his representation both on the merits as well as on the quantum of punishment. In other words he is entitled to show two things viz., (1) that he is not guilty and (2) that the punishment is severer than warranted. A 1961 Guj 130 (135, 136, 137) (DB).

(19) Memo of charge mentioning proposed punishment violates Art. 311 (2) —It shows that even before the charges were enquired into and a finding arrived at on the basis of the enquiry the Government servant had been prejudged. A 1964 Mad 375 (375, 376).

(20) A punishment of suspension for a short period of six months as a result of departmental proceedings is not one of the type of punishments covered by Art. 311 and where it is proposed to inflict such a punishment it is unnecessary to issue a second show cause notice to the person proceeded against. A 1964 Mad 518 (518).

(21) Question whether sufficient opportunity under Article 311 (2) was given to Government servant before his dismissal is one of fact — Concurrent finding by Courts below that sufficient opportunity was given — Finding is binding on High Court in second appeal. ILR (1961) 2 All 90 (93) (DB).

(22) The question whether reasonable opportunity has or has not been afforded to Government servant must depend on facts of each case. **A 1969 SC 1302 (1304): 1969 Lab IC 534.**

(23) Departmental Enquiry — Person who had not given evidence at preliminary investigation as witness examined as witness at close of departmental enquiry — Prayer of delinquent for short adjournment for cross-examination of witness refused — Delinquent had not even time to copy out deposition in chief before he had to cross-examine — **Held** delinquent was not given reasonable opportunity to defend himself. (1963) 6 Fac LR 26 (34) (Cal).

(24) When the Government servant concerned did have the opportunities referred to envisaged in Art. 311 (2) the mere fact that the show cause notice at the second stage mentioned all the three punishments referred to in Art. 311 will not make the notice bad. **A 1969 SC 536** (539, 540, 541) ** A 1969 Delhi 145 (149): 1969 Lab IC 539 (DB) ** A 1964 Cal 68 (71, 73) (DB).

(25) The reasonable opportunity contemplated by Article 311 (2) has manifestly to

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be in accordance with the rules framed under Art. 309. **A 1963 SC 779 (785, 786).**

(26) In determining the reasonableness of opportunity to show cause against action proposed, court cannot be influenced by considerations which are extraneous to legal issue involved viz., resort to hunger strike and similar extra legal methods for enforcement of legal rights. A 1969 Cal 397 (401, 402): 1969 Lab IC 1094.

(27) Compliance with Rule 55 of the Civil Services (Classification, Control and Appeal) Rules is necessary. The person proceeded against should have an opportunity of rebutting evidence that is proposed to be used against him. ILR (1957) 9 Assam 223 (242) (DB).

(28) Under Article 310 the tenure of an employee under State Government is at the pleasure of the Governor. This pleasure being restricted by the provisions of Article 311 of the Constitution, an order of dismissal can only be set aside on the ground that the provisions of Art. 311 (2) have been violated. A 1962 Assam 17 (18) (DB).

(29) The protection granted to the petitioner under Article 311 of the Constitution is confined to an opportunity being given to him to disprove the charges and establish his innocence. A 1960 Assam 141 (143, 147, 148) (DB).

(30) Dismissal order passed without giving reasonable opportunity to dismissed teacher to defend himself — Order is against the principles of natural justice and invalid and therefore, liable to be quashed under Articles 226 and 227. 1968 Lab IC 80 (81) (DB) (Orissa).

(31) Restrictions in regard to the right of representation as provided in Clause 5 of Rule 11 of the Civil Services (Classification, Control and Appeal) Rules are not unreasonable and do not amount to a denial of fair and reasonable opportunity to the delinquent Government servant to defend himself. A Government servant is in a responsible and privileged position. The opportunity that can be afforded to him to explain the charges against him need not be identical with that which is allowed to an ordinary accused. It is sufficient if the portunity is a reasonable opportunity. (1964) 1 Mys LJ 333 (DB).

(32) The expression giving reasonable opportunity means opportunity, the vital elements of which are timely notice and full opportunity to the person concerned, to present all the evidence and arguments which he deems important for the purpose of his case. The enquiry officer must conduct the hearing with open-mindedness, fairness and impartiality and must approach the hearing without bias and without prejudgment of the issues. **A 1959 Punj 402 (412, 413)** (DB).

(33) A Government servant cannot claim a right to be associated with the investigation which culminates in the enquiry against him either under any statute or rules or even under the principles of natural justice. (1965) 67 Punj LR 763 (766).

(34) If the accused has notice of the charges and enquiry into the charges is conducted in accordance with the principles of natural justice then there is no illegality or invalidity merely because some charges relate to the period subsequent to the order of suspension. ILR (1972) 1 Cal 558.

(35) Rules under Article 309 — Rules are open to judicial scrutiny and High Court can examine whether they are consistent with the provisions of reasonable opportunity envisaged in Art. 311 (2). 1972 Lab IC 1505 (Cal).

74 (a). Two opportunities — Editor's note.— (1) Art. 311 (2) as amended by the 42nd Constitution Amendment does not require giving of "two opportunities." Therefore, cases under this note are omitted in this edition. (See also Note 1-A) — Ed.

74 (b). Right to copy of findings of enquiry and other documents.— (1) Non-supply of copy of enquiry report amounts to denial of reasonable opportunity. **A 1969 SC 1302 (1303) : 1969 Lab IC 534 **** 1980 Lab IC 290 (298) (All) ** 1976 All LJ 204 (207) ** A 1976 Andh-Pra 75 (77) ** 1975 Lab IC 1518 (1519) (All). ** ILR (1974) 1 Cal 514. ** (1971) 2 Andh WR 65 ** 1969 Lab IC 1441 (1443) (Goa). (Rule 15 of Central Civil Services (Classification, Control and Appeal) Rules (1965) are mandatory — Removal of delinquent servant from service — Disciplinary authority must supply copy of report of Inquiring authority along with show cause notice.) ** A 1967 Punj 344 (345) ** (1967) 14 Fac LR 449 (456) (Cal) ** A 1963 Bom 137 (142) (DB) ** A 1960 Mys 159 (161, 162) (DB) ** A 1959 All 47 (49).

(1A) The failure on the part of the competent authority to provide the plaintiff with a copy of the report of the Enquiry Officer amounts to denial of reasonable opportunity contemplated by Art. 311 (2). It is true that the question whether reasonable opportunity has or has not been afforded to the Government servant must depend on the facts of each case but it would be in very rare cases indeed in which it could be said that the Government servant is not prejudiced by the non-supply of the report of the Enquiry Officer. **A 1969 SC 1302 (1303, 1304) : 1969 Lab IC 1534.**

(2) Government servant admitting charge framed — Accepted by Inquiring Officer and further inquiry dispensed with — Omission to furnish copies of document would not vitiate disciplinary proceedings. 1978 Lab IC 1424 (1427) (Goa).

(3) Enquiry Officer relying on report in preliminary enquiry to the prejudice of delinquent without giving copy of it and opportunity to meet allegations contained therein — **Held**, enquiry was vitiated. 1968 Lab IC 1268 (1272) (Tripura).

(4) Disciplinary proceeding — Copies of statements of witnesses not supplied to delinquent who was only a layman — Statements, however, read out at inquiry and delinquent asked to cross-examine witnesses there and then — **Held**, there was no due inquiry. ILR (1969) Delhi 347.

(5) Departmental enquiry — Preliminary enquiry — Report — Demand of, may be refused. A 1960 Madh Pra 178 (179) (DB).

(6) Departmental enquiry — Right of delinquent to copy of enquiry officer's report — Reasonable opportunity can be said to have been refused only if the delinquent

Articles 310 & 311 — Note 74 (b) (contd.)

had asked for such a copy and the same had been refused. 1973 Rajdhani LR 464 (Delhi).

(7) Omission to supply the delinquent a copy of the findings of the enquiry relating to one of the charges — Fatal to the order of dismissal. 1968 Lab IC 302 (314) (DB) (All). ** ILR (1976) An Pra 281 (292, 293).

(8) **Held** on facts that there was transgression of rules and the punishment could not be sustained. One of the steps which should have been taken by the Government before it disagreed with the finding of the Inquiring Authority in which case alone it could impose a punishment on the petitioner was to comply with the requirements of Rule 11 (10) of the Mysore Civil Services (C. C. A.) Rules, as provided in Rule 14-A (1) (f). (1963) (1) Mys LJ 167 (169, 170) (DB).

(9) The supply to the delinquent of a copy of the report of enquiry is not a matter of statutory rule, but is in conformity with rules of natural justice which require that he should be put in a position to defend himself. (1961) 3 Fac LR 442 (444) (Cal) ** A 1970 Punj 81 (83).

(10) Supply of copy of enquiry officer's report at the punishment stage is not essential in every case. (1958) 60 Pun LR 16 (19, 20).

(11) Whether the opportunity afforded to a public servant in a particular case is reasonable must depend upon the circumstances of that case. A 1969 All 11 (13): 1969 Lab IC 1.

(11A) Service Rules providing for inspection of documents — The provision implies taking down notes of inspection. 1977 Lab IC 1408 (Cal).

(12) The report of a fact-finding Enquiry Committee, preparatory to the issue of a charge-sheet, is not something which has to be disclosed to the delinquent in a departmental proceeding, unless such a report is actually relied on for the purpose of the finding and the report. (1961) (3) Fac LR 344 (345) (Cal) **A 1974 SC 1589 (1593, 1594): 1974 Lab IC 1010** ** 1972 Lab IC 718 (723) (Punjab). ** 1968 Raj LW 272.

(13) Reasonable opportunity — Copies of statements of witnesses at preliminary inquiry not supplied despite request — It amounts to denial of reasonable opportunity. 1973 Rajdhani LR 464.

(14) Disciplinary enquiry against a railway employee — Refusal of authority to supply copies of the proceedings and the findings recorded in the preceding preliminary enquiry — Amounts to deprivation of reasonable opportunity within the meaning of Article 311 — Punishment imposed stands vitiated. 1970 Lab IC 468 (469) (Mys).

(15) Failure to supply copy of report made by investigating officer — Charge-sheet containing almost everything stated in report — No prejudice caused to defence of delinquent servant — Plea of failure to afford reasonable opportunity is not tenable. A 1969 All 542 (546): 1969 Lab IC 1318. ** 1974 All Serv LJ 359 (Punj) ** 1969 Lab IC 773 (776) (Cal).

(16) Where in departmental enquiry all documents on which charges were framed were made available and inspection was taken by petitioner, it cannot be said that there was denial of reasonable opportunity to him because he was not supplied copies of those documents. (1974) 2 Serv LR 679 (Delhi).

(17) Where the civil servant is not supplied with a copy of the findings of the Enquiry Committee, he is not given the opportunity assured to him by Article 311 (2), as he deprived of a valuable right to submit satisfactory reply to the notice issued against him on the basis of the findings of the Enquiry Committee. A 1961 All 338 (341, 342 (DB) ** 1976 Lab IC 1056 (1057, 1058) (J & K) ** 1975 Lab IC 682 (684, 685) (All). ** A 1967 All 111 (112) : 1966 All LJ 835. (A 1957 All 274 held impliedly Overruled by A 1964 SC 364.) ** A 1961 All 276 (278) ** A 1960 All 543 (544) (DB).

(18) Departmental enquiry — Section 145 of the Evidence Act — Denial to supply previous statements of witnesses — No adequate opportunity to defend. A 1960 Madh Pra 178 (179) (DB) **A 1968 Punj 312 (323, 324): 1968 Lab IC 967 (FB)** ** 1967 Cur LJ 401 (406) (Punj) ** (1966) 68 Pun LR 174 (180) ** (1959) 2 Mad LJ 15 (25).

(19) Delinquent charged for receiving illegal gratification — Failure to supply copy of complaint forming basis of departmental enquiry to the delinquent in spite of his request — His dismissal is illegal. A 1970 Pat 23 (25) : 1970 Lab IC 53 (DB) ** 1965 MPLJ 204 (206, 207) (DB).

(20) In a disciplinary proceeding, Evidence Act does not apply. Inquiring officer is entitled to receive any relevant fact in evidence, which may not strictly be evidence under Evidence Act. But even then it is not proper for inquiring officer to make local inspection after completion of enquiry so as to collect independent knowledge for finding out for himself which of the two discrepant versions of evidence is correct. (1963) 6 FLR 26 (35) (Cal).

(21) Copies of statements of witnesses examined during investigation must be supplied to Government servant. A synopsis does not satisfy the requirements of giving the Government servant a reasonable opportunity of showing cause against the action proposed to be taken. Though the Government servant is given an opportunity to cross-examine the witnesses unless the statements are given to him he will not be able to have an effective and useful cross-examination. **A 1974 SC 2335 (2335) : 1974 Lab IC 1442** ** ILR (1969) 2 Cal 378 ** (1969) 18 Fac LR 137 (Cal).

(22) Statements of witnesses made at preliminary enquiry preceding departmental enquiry — Delinquent is entitled to copies of such statements, only if those witnesses are examined at the departmental enquiry and only if he asks for such copies. **A 1967 Madh Pra 215 (216, 217) (FB)** ** A 1960 Madh Pra 178 (179) (DB). **** A 1977 SC 1619 : 1977 Lab IC 849** ** 1980 B B CJ 227 (230) (DB) (Pat) ** 1979 Lab IC 1151 (1153) (DB) (Bom) ** 1977 Lab IC (NOC) 26 (Delhi) ** (1971) 1 Serv LR 36 (Mys) ** (1972) 1 Andh WR 1.

(23) Natural Justice — Charges against Government servant based on report of C. B. I. — Report based on statements of

Articles 310 & 311 — Note 74 (b) (contd.)
witnesses produced at enquiry — Notice to show cause against dismissal served — Prayer for supply of copies of C. B. I. report and statements of witnesses refused — Violates principles of natural justice. 1977 Lab IC (NOC) 20 (All).

(24) Where adjournment is asked for inspection of deposition of witnesses examined at local inspection, it should be granted. If time is not granted, it can be held that delinquent was not allowed proper and reasonable opportunity of defending himself in disciplinary proceedings taken against him. A 1964 Cal 184 (188, 189) (DB). ** (1979) 3 Serv LR 592 (595) (J & K).

(24A) Natural justice — Merely calling for reports of certain officials without disclosing those reports to delinquent is contrary to principles of natural justice. 1975 Lab IC 682 (684) (All).

(25) Departmental inquiry — Officer proceeded against is not entitled to copies of correspondence between officer holding preliminary inquiry and superior officer on question of starting departmental inquiry. A 1963 Madh Pra 115 (117) (DB).

(25A) Where validity and legality of order of removal is questioned by the Government servant, it is in public interest that all facts, comments and the notings relating to the enquiry should be before the court to enable it to pass an appropriate order on appreciation of contentions of both sides. No privilege to disclosure of such matters can be claimed. (1978) 2 Serv LR 68 (74) : 1978 Rev LR 483 (Punj).

(26) The dropped charges were revived by Government on a confidential report by the Public Service Commission, which gave reasons for its view. The delinquent officer had no access to this report. Even if he was not entitled to such access, he was at least entitled to know the grounds upon which the Government disagreed with the explicit findings of the head of the department. The officer was not given any reasonable opportunity to show cause against not merely the enhancement of the penalty, but also the revival of the charges. A 1963 Mad 14 (15) (DB).

(27) Police Rules under Police Act (1861), Sections 7 and 12, R. 16.24 (Punjab) — Delinquent official already having requisite copies of statements of witnesses to be examined in departmental enquiry and neither disputing the fact nor asking for another set — Another set of those very copies is not required to be furnished. A 1969 Punj 131 (138) : 1969 Lab IC 573.

[See however 1971 Lab IC 1225 (1227). (Dismissal or removal — Omission to furnish delinquent with copy of recommendation of Vigilance Commission is fatal to validity of ultimate order of punishment passed by Government.)]

(28) Disciplinary proceedings against Government servant — Refusal to give copies of relavant documents to delinquent, at initial stage before he puts in defence, not violative of principles of natural justice. A 1964 Cal 184 (187 to 189) ** 1971 BLJR 719 (Pat).

(29) Conduct of enquiry without supplying copies of documents or without allowing opportunities to inspect the same was bad. (1966) 12 Fac LR 213 (219) (Cal) ** A 1961 SC 1623 (1629) ** (1966) 7 Guj LR 897 (911) (DB).

(30) Documents and statements on which charges were based not supplied though called for — Reasonable opportunity to meet charges held not given. A 1963 Tripura 20 (Pr 15) ** A 1962 Raj 265 (269) (DB).

(31) Non-production of certain relevant documents which the delinquent called for in order to enable him to cross-examine a witness was a serious lacuna in the enquiry. (1966) 12 Fac LR 164 (169) (Cal).

(32) Failure to give enough time to delinquent officer to inspect and prepare copies of documents to use them for his defence — Constitutes violation of reasonable opportunity. (1970) 2 Andh WR 10.

(33) Disciplinary proceeding against Government servant — Servant asking for copies of certain documents — Copies not supplied — Documents not produced at time of enquiry — Report of enquiring officer referring to these documents — This is highly irregular. A 1962 Tripura 15 (17).

(34) A document cannot be withheld from delinquent officer on the ground of privilege under Section 123 Evidence Act unless the State shows that the claim of privilege strictly falls within four corners of provisions of law. A 1967 Punj 387 (389).

(35) Government employee challenging his reversion from officiating post — Official communication dealing with his fitness to hold post — Employee seeking its production — Non-disclosure of such documents necessary for proper functioning of public service — Production not ordered. A 1969 Delhi 246 (257) : 1969 Lab IC 974 (DB).

(36) Delinquent refused copies of statements of vigilance staff — However, indications of nature of evidence of each witness given — **Held** that it cannot be said that he is prejudiced in any way. A 1968 Orissa 14 (16, 17) (DB).

(37) Delinquent asking for inspection of documents to make out copies to prepare defence — Permission to make copies given — Delinquent remaining absent and not participating in enquiry — He cannot make grievance that enquiry was bad as he did not have copies of documents to lead his defence. 1976 WLN (UC) 340.

(38) Public servant given opportunity to meet all evidence on record — Anti-corruption Department Report of confidential inquiry held before framing charge not referred to by Inquiry Commissioner — There is no denial of reasonable opportunity if public servant is not allowed to meet the contents of the report. A 1960 Pat 116 (121) (DB).

(39) Appointment to Government service — Right of applicant to compel Government to disclose materials in the consideration of antecedents and character of applicant — **Held** applicant had no such right. A 1965 Ker 19 (26).

(40) Reasonable opportunity of showing cause — Charge that railway servant concerned failed to show improvement in

Articles 310 & 311 — Note 74 (b) (contd.) working in spite of bad reports against him — Such report must be made available to him. A 1962 Raj 265 (269) (DB).

(41) **Held** on facts that the Departmental Promotion Committee went wrong in acting upon the confidential records which were not shown to the petitioner. 1966 Ker LT 372 (373, 375).

(42) The notice to show cause under Article 311, Clause (2) cannot be given on the basis of an unauthorised report by an inquiry officer who had no jurisdiction under the Service Rules to make the inquiry. A 1955 Nag 160 (163) : 1955 Cri LJ 974 (DB).

(43) Investigation by C. I. D. into charges of corruption against police officer — Investigation started at instance of pseudonymous petition — There would be no question of confronting any of prosecution witnesses with the statement in it and therefore, refusal to supply copy of it to delinquent officer will not amount to not giving fair opportunity to defend. **A 1966 Mad 203 (215, 216, 217) (FB).**

(44) **Held**, on facts that the civil servant who was dismissed was clearly entitled to copies of the earlier statements of the witnesses who gave evidence before the Enquiry Officer. Those statements were relevant. As copies of those statements were plainly not given to him, the enquiry conducted by the officer was not in accordance with rules of natural justice and the dismissed civil servant was denied a reasonable opportunity of defending himself against the charges. 1964 MPLJ 765 (771, 772) (DB) ** (1967) 1 Lab LJ 455 (460) (DB) (Guj).

(45) Reasonable opportunity for defence — Enquiry into sixteen charges against officer — Officer found guilty of fourteen charges — Officer not supplied with copy of document relating to one charge out of sixteen — Even assuming that this document should have been summoned to give an opportunity to the officer for his defence it would have affected only one of the 14 charges, and could not be construed as a document which had prejudiced the disposal of the rest of the charges. **A 1966 Mad 203 (215, 216, 217) (FB).**

(46) Inquiry Officer not relying on preliminary inquiry report of Sub-Inspector against civil servant concerned — Such report not referred to either in the charges levelled against civil servant or in statement of allegations supplied to him — Non-supply of copy of such report to civil servant is not a vital flaw so as to vitiate inquiry proceedings. A 1961 Guj 130 (134, 135) (DB).

(47) Petitioner demanding inspection of certain documents — Relevant documents furnished — Prayer for irrelevant documents disallowed — Petitioner not shown to be prejudiced — Enquiry not vitiated. A 1969 Delhi 145 (148, 149) : 1969 Lab IC 539 (DB).

(48) Though it is competent to take into consideration the record of the past service of civil servant in order to determine the appropriate punishment, the civil servant concerned must be apprised of that record before taking it into consideration and also of the fact that it would be so taken into consideration. A 1957 Madh Pra 126 (133) (DB) ** A 1967 Orissa 49 (50, 51) (DB) ** A 1965 Manipur 46 (48, 49).

(49) Civil Servants — Service book — Service book is maintained by the head of office and Government servant cannot be fastened with notice of contents thereof. A 1962 Him Pra 41 (42).

(50) In cases of wrongful dismissal normal rule is that the dismissed employee is entitled to reinstatement but there can be cases where it would not be expedient to follow the normal rule and to direct reinstatement. (1965) 10 Fac LR 223 (226) (Cal).

(51) Departmental enquiry — Petitioner requiring copies of certain documents before replying to charges — Petitioner informed about offices where documents were available for his inspection — No prejudice held was caused to him. A 1966 Punj 175 (178).

(52) Rule 15 of Central Civil Services (CCA) Rules is adequate for giving reasonable opportunity to the Government servant in a departmental enquiry. Under that rule the delinquent can only apply for inspection of record and take extracts from record. He cannot ask for copies to be prepared for him by the Government. ILR (1972) 2 Delhi 84.

(53) Where on an application being made for the copies of the statement of the witnesses recorded during the course of preliminary enquiries a memorandum was issued mentioning the names of the witnesses and the nature of the evidence they were to give and there was nothing to show that the enquiry officer had recorded the statement of any of the witnesses before the issue of the memorandum, the enquiry proceedings could not be challenged on the ground that the non-supply of the copy had taken away the right of effective cross-examination of the witnesses. 1973 Lab IC 376 (378, 379) (Delhi).

(54) Reasonable opportunity, what amounts to — Administrative Tribunal, after enquiry into charges against delinquent submitting its report to State Government — Though finding of assessor forms part of such report, copy of assessor's report not supplied to delinquent — Order of removal, held, vitiated. 1975 Lab IC 511 (512) (All).

74 (c). Right to personal hearings.— (1) Rule that a party to whose prejudice an order is intended to be passed is entitled to a hearing applies alike to judicial tribunals and bodies of persons invested with authority to adjudicate upon matters involving civil consequences. **A 1969 Ker 317 (319) : 1969 Lab IC 1476 (FB).** (A 1953 Trav-Co 140 and A 1954 Trav-Co 32 and A 1957 Trav-Co 124 and A 1958 Ker 1 and 1959 Ker LT 553 held not applicable in view of A 1967 SC 1269.)

(2) Unless the statutory rules so require, or a specific prayer for a personal hearing is made by the appellant in writing in the

Articles 310 & 311 — Note 74 (c) (contd.)
petition of appeal itself, it is not incumbent on the appellate authority to afford a personal hearing to a person aggrieved against an order imposing punishment on him in departmental proceedings. Each case must necessarily depend on its own facts in this respect. 1972 Lab IC 713 (Punj) ** 1969 Lab IC 215 (222) (Cal).

(3) Domestic inquiry — 'Reasonable opportunity' — Does not necessarily include right to personal hearing or right to be represented by a lawyer. (1973) 1 Andh WR 147.

(4) Personal hearing is not a postulate of natural justice. A 1970 Madh Pra 132.

(5) The right which is envisaged by Rule 32 of the Kashmir Civil Services Rules is an important and substantive right and denial of this right to the petitioner vitiates the proceeding against him. A 1958 J and K 28 (28, 29) (DB).

(6) Rules affording personal hearing to delinquent officer at enquiry stage and at appellate stage — No such hearing given — Enquiry is vitiated. 1969 Lab IC 896 (898) (DB) (Orissa) ** A 1965 Cal 557 (560, 561) ** 1967 Cur LJ 156 (166).

(7) Dismissal of public servant — Appeal — No rule that personal hearing should be given, though it is better to give such hearing. A 1969 All 11 (14) : 1969 Lab IC 1.

(8) The right to be heard is, broadly speaking, the right to represent his case and a denial of this right may in some cases, amount to a denial of reasonable opportunity. A 1963 All 94 (100) (DB).

(9) Affording a personal hearing is a part of the reasonable opportunity guaranteed under the Constitution. A personal hearing includes a right to argue the case. A 1961 All 45 (50). **(Reversed** on another point in A 1963 All 94.)

(10) Natural justice — Dislodging of an employee from his post on the ground that he does not possess the necessary qualification — He must be given a prior notice and a hearing — It is the minimum requirement of principles of natural justice. 1976 Lab IC 727 (All).

(11) Termination of service on ground of unsuitability — The Act and Rules contemplate that personal hearing should be given to the employee by the committee to enable him to clear up his position. **A 1979 SC 1237 : 1979 All LJ 782.**

(12) Northern Railway Discipline and Appeal Rules, Chapter VI, Rules 51 and 53 and Rule 21 (c) Note 2 — No oral inquiry necessary in cases of punishment other than dismissal, removal or reduction in rank. A 1967 All 112 (114).

(13) Administrative Tribunal — Quasi-judicial proceedings — Police Official — Disciplinary proceedings — Punishment confirmed in appeal — Denial of opportunity by appellate authority to appellant to be heard in person — Appellate order being quasi-judicial cannot be upheld. A 1963 Assam 183 (184) (DB).

(14) Personal hearing given to servant by the Tribunal — State Government not giving any personal hearing before passing of order of removal — Removal is not illegal. 1968 Lab IC 1333 (1334, 1335) (DB) (Orissa).

(15) A police officer who has been dismissed after a full-fledged departmental inquiry has no right of personal hearing to be given in an appeal preferred against the order of dismissal. ILR (1971) Guj 662.

(16) No rules were framed by the Government of West Bengal as contemplated by the Indian Police Cadre Rules, but rules framed by the Centre were followed by the State Government as ad hoc rules and a Selection Committee was appointed which went into the merits of the various officers and decided as to whether they could be promoted or not. The petitioner who was acting as Additional Superintendent of Police, having been reverted to the rank of Deputy Superintendent of Police by this Committee, he applied under Article 226 :

Held, that, as the reversion was done by way of punishment, the petitioner ought to have been served with a charge-sheet and heard in defence. The order of reversion should have been made after giving him an opportunity to be heard. A 1958 Cal 548 (548, 549, 550).

(17) Before proceedings are taken to adjust liabilities against the death-cum-retirement gratuity payable to the employee, the employee should be afforded a reasonable opportunity to explain under Rule 2 of the Kerala Civil Services (Classification, Control and Appeal) Rules 1960. (1980) 1 Serv LR 284 (285) (DB) (Ker).

(18) Even if refixation of the date of birth of the officer cannot be construed as amounting to penalty, nevertheless such refixation could be made only after complying with the principles of natural justice by giving her an adequate opportunity of being heard (audi alteram partem) and prove her correct age. A 1965 Orissa 81 (85, 86) (DB).

(19) Punishing authority should give a personal hearing to person charged and next, the punishing authority should pass final orders. A 1959 Cal 1 (4, 5) (DB).

(20) Reasonable opportunity to show cause against proposed action — Removal of Officers from office of Co-operative Bank for default in repayment of loan without giving an opportunity to explain their position, is opposed to natural justice and hence wrong. 1966 Cur LJ 405 (406) (Punj).

(21) Though it is not necessary that an opportunity for a personal hearing should be given by the dismissing authority to constitute a reasonable opportunity under Article 311, Clause (2), yet, it may be desirable in some cases that the dismissing authority should afford an opportunity of a personal hearing to the civil servant concerned. A 1956 Orissa 219 (222) (DB).

(22) Where a public servant, against whom a departmental enquiry has been held, on receipt of the usual notice of punishment, shows a written cause and further prays that he may also be personally heard, the failure, to give a personal hearing does not cause irregularity or prejudice. A 1963 Madh Pra 216 (218) (DB).

(23) An opportunity of making oral representation is not a necessary postulate of an opportunity of showing cause within the meaning of Article 311 (2). A 1964 Madh Pra 114 (116) (DB).

Articles 310 & 311 — Note 74 (c) (contd.)

(24) An opportunity of showing cause against the action proposed to be taken against a public servant must be reasonable opportunity. **A 1960 SC 493 (500).**

(25) A Government servant against whom charges are held proved after enquiry and punishment is proposed to be imposed is not entitled to a personal hearing at that stage. (1966) 7 Guj LR 897 (915, 916) (DB).

(26) Government servant — Dismissal on ground of disobedience — Finding of appellate authority based on admission in petition of appeal itself — No inquiry is necessary. A 1967 Orissa 26 (28) (DB).

(27) Notice calling upon servant to show cause against proposed punishment and also granting oral enquiry, if desired by him — Notice not mentioning that punishment was also based on adverse remarks in his confidential character roll — Confidential roll found discussed with him in personal hearing — **Held,** servant was given reasonable opportunity to explain adverse remarks. ILR (1965) Cut 147 (150, (151) (DB).

(28) Tribunal giving personal hearing — State not giving opportunity for making oral representation — There is no denial of reasonable opportunity. A 1964 Orissa 241 (244, 245) (DB).

(29) Personal hearing — Appellate authority's discretion to give — High Court cannot control the exercise of that discretion. A 1959 Punj 643 (645).

(30) Reasonable opportunity — Personal hearing not necessary — All that is needed is that reasonable opportunity to show cause against action to be taken must be given — Permission to be represented by counsel is discretionary with Enquiry Officer. A 1966 Punj 175 (178).

(31) Malayan case — Detailed procedure as laid down by Public Officers (Conduct and Discipline General Order Chapter D) Regulations (1969) followed before a Police Officer was dismissed. No denial of natural justice merely because oral hearing was not given. (1976) 1 Malayan LJ 203.

(32) Malayan case — Dismissal of Police Officer — Held that he was given reasonable opportunity of being heard and oral hearing was unnecessary. (1974) 1 Malayan LJ 138.

(33) Employee of Electricity Board — Disciplinary proceedings — Personal hearing given by one of the members of the Board and not by the full Board — Enquiry proceedings not vitiated. (1979) 2 Mad LJ 310 : 1979 Lab IC (NOC) 170.

(34) Petitioner appointed in a position created temporarily up to a certain date — New permanent post created after expiry of the period — Another employee appointed — Order in consonance with seniority list — Under the circumstances issuing a direction to hear the affected petitioner would be an empty formality. 1980 Lab IC 271 (274) (Cal).

(35) The Government in maintaining the character roll is exercising administrative function in which it is to act justly and fairly. That is not a quasi-judicial function though certain elements in the exercise of both the functions are similar. The Government servant is not entitled to establish his case in any other manner except by way of making a representation against the adverse entry. Excepting this no other principle of natural justice is available. Behind him the Government as a benevolent master is to act bona fide in testing ex parte the correctness of the statements made in the representation. **1974 Lab IC 1192 (1207) (FB) (Orissa).**

74 (d). Right to be represented.— (1) It cannot be said that the denial to be represented by a lawyer will amount to a violation of the principles of natural justice. A 1963 Tripura 20 (31). ** (1973) 1 An WR 147

(2) Ordinarily, the right to a hearing has always included the right to the aid of counsel. The right does not apply to cases where agency is engaged in reaching a purely executive action. 1959 Ker LT 141 (146).

(3) Whether to allow or not a lawyer to represent the delinquent public servant is a matter discretionary with the authority concerned. 1966 BLJR 825 (829) (DB). ** (1979) 2 Serv LR 785 (786) (DB) (MP) ** 1973 Lab IC 1067 (1069) (Andh Pra). (Refusal to engage lawyer did not violate any principle of natural justice as the case against the delinquent was a simple one not involving complicated facts nor any complicated question of law.) ** 1978 Lab IC (NOC) 194 : 1978 Ker LT 928 ** (1972) 1 Andh R 1.

(4) Refusal of Government Servant's prayer for engaging a lawyer — Whether principles of natural justice were contravened would depend on whether observance of that rule was necessary for just decision of case — To be represented by lawyer is not absolute right of Government servant. (1971) 79 ITR 707 (Cal). ** ILR (1974) 1 Cal 514.

(5) Charges, pure questions of fact, and within knowledge of delinquent — Enquiry only by police officials — Refusal to allow engagement of lawyer not discriminatory. A 1968 Orissa 14 (15, 16) (DB). ** (1979) 2 Serv LR 785 (786) (DB) (Madh Pra).

(5A) Reasonable opportunity — Denial of legal assistance — No complexity of facts — Public servant capable to cross-examine witnesses and meet charges — No denial of reasonable opportunity. A 1964 Orissa 241 (244) (DB). ** (1971) 79 ITR 707 (Cal).

(6) Where there was hardly any scope of oral testimony and the delinquent himself was a sufficiently qualified person there was no denial of reasonable opportunity in refusing assistance of a lawyer to the delinquent. The question essentially is a question of fact. A 1972 Cal 27 (33) : 1972 Lab IC 221. ** 1973 Lab IC 1638 (Bom).

(7) Though in a departmental proceeding a delinquent public servant is not entitled to be represented by a lawyer, nevertheless, there may be special circumstances which may indicate that without legal assistance he may not be able to adequately cross-examine the witnesses or establish his innocence. A 1965 Orissa 183 (187) (DB) ** (1979) 3 Serv LR 592 (595) (J & K).

(8) In the absence of a specific rule requiring permission to be given to a civil servant to engage counsel to defend him, re-

Articles 310 & 311 — Note 74 (d) (contd.) fusal to grant such permission will not be a denial of reasonable opportunity to show cause. A 1956 Mad 460 (461): 1956 Cri LJ 1081 ** A 1954 Cal 335 (337) ** A 1948 Mad 379 (380) (DB) ** A 1966 Punj 175 (178) ** 1961 Raj LW 104 (106, 107) (DB) ** A 1966 Mys 220 (221, 222) (DB) ** A 1966 Mys 218 (219) (DB) ** A 1963 Punj 90 (91) ** 1964 MPLJ 765 (771) (DB) ** A 1960 Assam 141 (148, 149) (DB).

[See however A 1957 Andh Pra 414 (418).]

(9) Where in a disciplinary inquiry against an Income-tax Officer, he was not entitled under the rules to the assistance of an advocate at the enquiry and all he had to do in the course of the inquiry was to defend the correctness of his assessment orders and the enquiry was such that a trained lawyer could have hardly helped him in his defence it was held that the refusal of the Enquiry Officer to accede to his request to have the assistance of an advocate did not amount to a denial of reasonable opportunity to defend himself. **A 1974 SC 1589 (1594): 1974 Lab IC 1010.**

(10) Rule 7 of the U. P. Disciplinary Proceedings (Administrative Tribunal) Rules (1947) only prohibits a government servant from claiming assistance of a counsel as of right. It does not impose absolute restriction on the right of the Administrative Tribunal not to permit a counsel to appear before it. **1979 Lab IC 1028 (1031): A 1979 NOC 138 (All) (FB).**

[1974 Lab IC 1032 (All) **Overruled, 1978** Lab IC 500 (All) Impliedly **Overruled.**]

(11) Constituent elements of "reasonable opportunity" — Departmental proceedings — Delinquent's right to be represented by lawyer — Charges pure questions of facts and within knowledge of delinquent — Enquiry only by police officials — Refusal to allow engagement of lawyer not discriminatory. A 1968 Orissa 14 (15, 16) (DB).

(12) Reasonable opportunity — Personal hearing not necessary — Permission to be represented by counsel is discretionary with Enquiry Officer. A 1966 Punj 175 (178).

(13) Though a public servant has no absolute right to be represented by a lawyer in a departmental enquiry on charges levelled against himself, the denial of the assistance of a lawyer may in certain circumstances amount to denial of a reasonable opportunity within the meaning of Art. 311 (2). 1966 MPLJ 325 (328) (DB).

(14) The denial to a workman of his request of being represented through a lawyer in a disciplinary enquiry is not opposed to principle of natural justice. (1964) 1 Mys 333 (336) (DB).

(15) Article 311 which enjoins a reasonable opportunity for defence does not in terms speak of an opportunity personal to him Nor does it expressly forbid its exercise through counsel. A 1964 Mys 250 (254) (DB).

(16) There is no distinction between the expressions "reasonable opportunity" and "adequate opportunity." A thing which would not be adequate would not be reasonable and a thing which is reasonable would be adequate. 1969 Lab IC 1149 (1154) (All) ** A 1968 Ker 34 (35): 1968 Cri LJ 165 ** (1967) 2 An WR 253 (256, 257, 259, 260) (DB).

(17) If Government servant is not really capable of entering on his defence with any degree of efficiency, except with the assistance of lawyer, an opportunity given to him to defend case by himself cannot be regarded as opportunity in real sense of the term. (1967) 2 An WR 253 (260) (DB).

(18) Unless there are considerations of public policy overriding the claims of natural justice in any particular case, the assistance of counsel should be considered as necessary if a person is to have fair opportunity to meet the case against him. The Central Civil Services (Classification, Control and Appeal) Rules, 1965 do not prohibit absolutely engaging of an advocate in disciplinary proceedings by the delinquent officer. While exercising the discretion under Rule 14 (8) the disciplinary authority must have regard to the circumstances of the case. 1972 Lab IC 89 (91, 92, 94) (Andh Pra).

(19) Case being of unusual complexity — Petitioner having no experience of law — Refusal to permit him to be represented by lawyer held amounted to denial of reasonable opportunity of showing cause. A 1962 Orissa 78 (82, 83, 84) (DB). ** (1977) 2 Ser LR 293 (314, 315) (Cal) ** 1972 Lab IC 89 (Andh Pra).

(20) Denial of opportunity of representation through counsel of delinquent's choice — Art. 311 (2) is violated. 1978 Lab IC 1556 (1560) (All).

(21) Police Regulations, 1959, silent on question whether subordinate officers can be represented — Chairman of inquiry has discretion whether or not to allow incumbent to be represented — Incumbent not raising such question — Question of exercise of discretion does not arise. (1972) 2 Malayan LJ 175.

(22) Delinquent not having working knowledge of procedure relating to cross-examination of witnesses — Charges of serious nature and document bulky and many — Witnesses examined in support of charges were also too many — **Held,** disciplinary authority acted contrary to spirit of Article 311 (2) in denying representation by lawyer at enquiry, enquiry was thus vitiated. A 1970 Orissa 220 (224): 1970 Lab IC 1506.

(23) English case — Serious charge against police constable — Neither he is conferred with a right to legal representation nor disciplinary tribunal has discretion to permit it. 1977 (1) All ER 64.

(24) Disciplinary enquiry for misconduct — Enquiry conducted by an experienced prosecutor, a legally trained police officer — Refusal to allow assistance of a legal practitioner to accused officer amounts to denial of reasonable opportunity guaranteed under Art. 311. (1978) 37 Fac LR 290: 1979 Lab IC (NOC) 11 (Ker).

(25) Reasonable opportunity — Number of witnesses examined (9 on behalf of disciplinary authority and 3 by petitioner) and a number of documents exhibited in the case — These facts by themselves do not establish that the charges were of complicated nature so that the refusal of assistance of a lawyer to the petitioner resulted in denial of reasonable opportunity. 1975 Lab IC 552 (556, 557) (Cal).

Articles 310 & 311 — Note 74 (d) (contd.)
...(26) Departmental enquiry against delinquent railway officer attached to the office of India Stores Department at London — Not entitled to the services of a professional lawyer — Delinquent wanting a particular Officer in India to assist him — Accusations made against delinquent not such that required any expert or special skill — No principles of natural justice violated in not making available to the delinquent services of the particular officer for the conduct of his defence. **A 1976 SC 1686 (1695).**

(27) Capricious rejection of delinquent's choice of Government servant to assist him in his defence violates principles of natural justice. 1975 Lab IC 1140 (Ker).

(28) Natural Justice — Delinquent officer permitted to engage services of another person in service, for his assistance in departmental proceedings — The person assisting then resigned service and became an Advocate — **Held** that refusal to to engage such officer who had become an Advocate amounted to violation of the natural justice. **(1979) 1 Serv LR 133 (135)) (SC).**

74 (e). Right to call witnesses.— (1) Public servant neither given opportunity to adduce evidence in enquiry nor to cross-examine witnesses deposing against him — Enquiry vitiated due to violation of Art. 311 (2). A 1967 Pat 184 (185) (DB) ** **A 1958 SC 300.**

(2) The Government servant must be given an opportunity to defend himself against the charges, examine witnesses, and cross-examine witnesses, etc., A 1954 Vindh Pra 50 (51).

(3) By Art. 311 a public servant is entitled to show cause against the action proposed to be taken in regard to him, but exercise of the authority to pass an order to the prejudice of a public servant is not conditioned by the holding of an enquiry at which evidence of witnesses viva voce, notwithstanding an earlier fair and full enquiry before the Enquiry Commissioner is recorded. **A 1960 SC 493 (500).**

(4) Enquiry against police officer for misdemeanour — Enquiry held under special procedure prescribed by Rules — After Constitution he is entitled to examine himself and other witnesses in support of his defence. **A 1961 SC 1245 (1253, 1254).**

(5) Departmental enquiry — Enquiry held behind the back of delinquent — Delinquent not called upon to call his witnesses or to examine himself as witness or to cross-examine witnesses — Enquiry held vitiated. (1967) 2 An. WR 121 (130).

(6) Omission to give opportunity to officer to produce his witnesses and lead evidence in defence — Whole proceeding held vitiated. **A 1968 SC 158 (160, 161)** ** A 1962 Punj 355 (359, 360) ** A 1962 Raj 265 (269, 270) (DB). ** 1979 Lab IC 520 (522) (DB) (Cal) ** 1975 Lab IC 682 (684) (All).

(7) Opportunity of being heard — Refusal to examine principal defence witness though he was present when proceedings were in progress — Unjustified — Facts that witness had not appeared earlier and that proceedings were not fixed specifically for his statement — Cannot justify refusal to examine him. 1977 Lab IC (NOC) 26 (Delhi).

(8) In order that a civil servant may have an adequate opportunity of examining witnesses he will be entitled to ask the enquiring officer to summon witnesses cited by him. A 1956 Punj 58 (63) (DB) ** (1955) 68 Mad LW 683 (685).

(9) Whether the Inquiry Officer should in so many words, call upon the Government servant to produce his defence evidence or it will be for the Government servant himself to ask for an opporunity to produce his witnesses is a matter which cannot be put down with any rigidity. The question has to be decided in the light of circumstances of each case. 1974 Lab IC 111 (113, 115) (Raj).

(9A) Prior statements of witnesses against a servant facing domestic inquiry if not confirmed in his presence and are merely tendered for cross-examination, the procedure so adopted is in disregard of rules of natural justice and violates Art. 311 (2). 1971 Lab IC 1027 (Guj).

(10) If a witness, cited by a person facing disciplinary enquiry, is under the control of disciplinary authority and if the evidence of the witness is material for purposes of enquiry, then the authority should arrange for the production of that witness at enquiry. (1963) 6 FLR 214 (217) (Cal).

(11) It is not for enquiring officer to pick and choose witnesses on behalf of delinquent. (1963) 6 FLR 26 (34) (Cal).

(12) Where the evidence of a high official, is on the face of it relevant, there is no power in the enquiring tribunal to exclude such evidence. (1956) 60 Cal WN 692 (699).

(13) Enquiry Officer not allowing civil servant to produce witness to prove the nature of letter received by him (the officer) from his superior officer, on ground that witness could not be presumed to know the contents of official communication, the witness being a private person — **Held** that this amounted to pre-judging evidence of witness and that refusal to examine witness constituted serious irregularity. **A 1963** Madh Pra 115 (118) (DB).

(13A) Domestic Inquiry — Enquiry Officer having no power to enforce attendance of witnesses — Denial of opportunity of hearing — Failure of witnesses summoned to appear before Enquiry Officer and to depose — No denial of proper opportunity to defend. (1971) 2 Serv LR 240 (Delhi).

(14) Where the enquiry was conducted in the presence of petitioner who was given a right to cross-examine witnesses and right to file his written statement critising evidence led against him, held that there was no violation of principles of natural justice merely because enquiry officer did not voluntarily give petitioner opportunity to produce his witnesses. A 1966 J & K 43 (45).

(15) Often delinquent asks authorities to produce witnesses at the enquiry. There is no law which requires authorities to produce any witness when required by delinquent to do so. But when such a witness is within control of the authorities and when the delinquent cannot produce him and evidence appears to be relevant, the authorities must extend all help to delinquent to produce such evidence. (1963) 6 FLR 26 (34) (Cal). ** 1974 Lab IC 755 (762) (Punj).

(16) Employee in office of Accountant-General stating that he was absent from

Articles 310 & 311 — Note 74 (e) (contd.) duty without permission and had joined strike by employees — Employee admitting facts — **Held**, no grievance could be made of the fact that the petitioner was not given opportunity to cross-examine Senior Deputy Accountant-General and that opportunity could not be given as he was not examined in support of the charge. A 1963 Bom 121 (131, 132) (DB).

(17) Ordinarily, prior notice is given to the delinquent of the names of witnesses to be examined. Omission to give such a notice would not vitiate the proceeding as being illegal or without jurisdiction. 1968 Lab IC 1333 (1335) (DB) (Orissa).

(18) Dismissal of police constable from service — Departmental enquiry — Departmental authorities bound to examine at such enquiry only such witnesses as are under their control A 1967 Cal 381 (382).

(19) Enquiring officer himself examining defence witnesses in absence of delinquent officer and without noticing him — Enquiry is opposed to natural justice. **A 1966 Mad 203 (218, 219) (FB).**

(20) Probationer has right to be personally present before enquiry officer and cross-examine Government witnesses where allegations against him invoke stigma on his competence affecting future career. A 1967 Cal 461 (468) (DB).

(21) Departmental enquiry — Natural justice — Person charged, desiring to call and examine witnesses — He has liberty to call only relevant witnesses. A 1965 Cal 557 (560, 561).

(22) Non-production of a witness who is not a material witness cannot be non-observance of rules of natural justice. A 1964 Cal 184 (188) (DB).

(23) The petitioner must be considered to have been prejudiced by refusal of Enquiring Officer to call two of witnesses cited by him on the ground that the petitioner was not prepared to disclose the points on which he wanted to examine them. (1965) 10 Fac LR 263 (268) (Cal)

(24) There is violation of rules of natural justice where the officer charged was not afforded an opportunity to rebut the evidence of a witness who was examined after the close of the enquiry. A 1962 Madh Pra 15 (17) (DB).

(25) Delinquent officer cannot insist upon enquiring officer following any particular order for examination of witnesses cited by him. **A 1966 Mad 203 (217) (FB.)**

(26) Charged officer asked the nature of evidence of witness he proposes to examine — Officer intimating that witness is to be examined in respect of only one charge — Witness not allowed to be examined — Charge subsequenly held not proved — That fact would not warrant the holding the view in all cases that the officer was not prejudiced or that he had a reasonable opportunity for showing cause. A 1963 All 94 (100, 101) (DB).

(27) An opportunity to show cause is reasonable even if it does no contemplate a further opportunity to examine witnesses before the authority competent to impose punishment provided there has been a fair and full enquiry at an earlier stage before the Enquiry Officer. **A 1962 SC 1344 (1347, 1348).**

(28) In a departmental inquiry the Inquiry Officer has a discretion to decide if each and every witness called by the parties should be produced and he can for cogent and sufficient reasons refuse to call a defence witness on the ground that there was no necessity to examine him. 1975 Lab IC 1647 (1650) (DB) (Cal).

74 (f). Right to cross-examine.— (1) The Government servant who is charged must be given an opportunity to defend himself by examining the witnesses produced against him. **A 1958 SC 300 (309) ** A 1961 SC 1623 (1629) **** A 1954 Vindh Pra 50 (57).

(2) At the enquiry stage of the disciplinary proceedings the public officer is entitled to test the evidence led against him by cross-examination and also to lead his own evidence. **A 1963 SC 1612 (1614). **** 1980 Lab IC 290 (300) (All).

(3) Sub-rule (1) of Rule 55 of the Civil Services (Classification, Control and Appeal) Rules provides for a full-blooded enquiry which is the counter-part of a regular trial: witnesses have to be examined in support of the allegations, opportunity has to be given to the delinquent officer to cross-examine them and to lead evidence in his defence. **A 1968 SC 158 (160, 161).**

(4) The witnesses who give evidence in support of the charges at the enquiry must be examined in the presence of the civil servant and he must be allowed to cross-examine them. A 1957 All 634 (635, 636) ** 1975 Serv LJ 19 (Cal). ** ILR (1970) Cut 627 (DB) ** A 1957 All 217 (218) ** A 1957 Orissa 222 (223) (DB) ** A 1956 Cal 662 (665) ** A 1956 Sau 14 (16) (DB) ** A 1959 Raj 113 (114) (DB) ** A 1966 Him Pra 13 (16). **** 1972 Lab IC 627 (629) (SC).**

(5) The civil servant must have an adequate opportunity of examining witnesses and tendering documentary evidence in his defence. **A 1937 PC 31 (33) **** A 1958 Andh Pra 240 (244) (DB) ** A 1958 Cal 49 (51) ** A 1957 All 634 (635, 636). ** 1975 Lab IC 511 (512) (All).

(6) Demand for recalling witnesses and their cross-examination made long before amendment of Art. 311 (2) by Constitution (15th Amendment) Act. 1963 — Cross-examination cannot be denied by resorting to amendment — Refusal to permit cross-examination at the second stage after show cause notice amounted to a denial of reasonable opportunity. A 1970 Delhi 52 (56) (DB).

(7) Disciplinary tribunals should not adopt a technical attitude and refuse opportunity to delinquent to cross-examine a witness. (1966) 12 Fac LR 164 (168): (Cal).

(8) Where the delinquent was clearly guilty on his own basic admissions no question arose of affording him any opportunity to cross-examine or to produce witnesses in respect of pleas which could in no way alter his guilt. (1966) 12 FLR 49 (50) (All).

(9) The rules of natural justice require that a party should be given the opportunity of crose-examining the witnesses produced against him. A 1962 Madh Pra 15 (17) (DB). ** (1978) 2 Serv LR 364 (366) (Goa) ** 1978 Lab IC 146 (148) (Him Pra).

Articles 310 & 311 — Note 74 (f) (contd.)
(Order retiring Government servant based on report that entry relating to age in service record was interpolated — Employee not given an opportunity to cross-examine authority passing order — Order invalid.) ** ILR (1974) Him Pra 296 ** 1970 Serv LR 235 (Punj).

(10) Disciplinary proceedings — Denial of cross-examination of witness whose statement is relied upon for enhancement of penalty — Amounts to violation of principles of natural justice — Order of enhancement of punishment by Board of Revenue, Rajasthan held invalid and illegal. 1975 Lab IC 995 (997 to 1000) (Raj).

(11) Departmental enquiry — Delinquent informed that only one witness will be examined — Nine witnesses examined — Their statements at the preliminary enquiry not supplied though specifically asked for — Denial of opportunity to cross-examine — Principles of natural justice violated — Enquiry liable to be quashed. ILR (1979) Him Pra 250: 1979 Lab IC (NOC) 112.

(12) Reasonable opportunity — Inquiry against civil servant — Ex parte examination-in-chief — Opportunity to cross-examine given with access to evidence given in examination-in-chief — No irregularity. A 1960 Madh Pra 254 (255).

(13) The opportunity to show cause does not imply merely an opporunity to explain, but it must also be a reasonable opportunity and a substantial one such as to enable the delinquent to meet the charges and to know directly and in his own presence, especially when witnesses are examined to prove the charge, what is being substantially alleged against him by those witnesses. A 1961 Guj 63 (66, 67) (DB).

(14) Departmental inquiry — Statement of witness not examined before inquiry officer and in regard to whom civil servant concerned had no opportunity to cross-examine — Use of such statement as corroboration of evidence of main witness in inquiry — Vitiates proceedings. A 1961 Guj 130 (132, 133, 134) (DB).

(15) Witnesses not examined in presence of officer charged — Witnesses' earlier statements read out to the witnesses and on their acknowledgment of having made the statements charged officer asked to cross-examine — No adequate opportunity. A 1963 All 94 (100, 101) (DB). (A 1961 All 45, **Reversed.**)

(16) An opportunity to cross-examine or to adduce evidence is an occcasion that arises, and is to be availed of. A 1959 Madh Pra 404 (406) (DB) ** A 1967 Pat 184 (185) (DB).

(17) Enquiry Officer relying on evidence of subordinate officer, A and hand-writing expert to show that entries in Correspondence Register were fabricated and falsified by delinquent officer with the help of A — A and handwriting expert not examined at the enquiry — Delinquent officer should have been given opportunity to cross-examine them — Officer held had no opportunity of meeting charge of fabrication. A 1963 Madh Pra 115 (117, 118) (DB).

(18) A mere statement, whether it is by a relation of delinquent or stranger, if used as evidence against him must be proved and the delinquent must be given every opportunity of testing the evidence. (1963) 6 FLR 26 (35) (Cal).

(19) Where in a departmental enquiry witnesses not mentioned in the charge-sheet against the delinquent servant have been examined in his presence, he has been given opportunity to cross-examine them and he has not asked for time to cross-examine them it cannot said that the servant is prejudiced so as to vitiate the enquiry especially when the evidence of such witnesses relates only to one of the charges of which the servant has been found guilty. A 1965 Mys 283 (285) (DB).

(20) Where the Government servant had no opportunity of hearing the evidence given by these witnesses relating to the charges against him and had no opportunity to cross-examine them with reference to the evidence given by them in respect of the charges at the preliminary inquiry; **Held** that there had been very serious irregularity in the enquiry. A 1962 Tripura 15 (18, 19).

(21) Examination-in-chief conducted in absence of person charged — Witnesses however allowed to be cross-examined — Natural justice violated inasmuch as no effective cross-examination could be had, when examination-in-chief was held behind the back of the person charged. A 1962 Punj 496 (497, 498).

(22) Enquiry against railway employee — Enquiring officer importing personal recollection of what happened during fact finding inquiry held by him — No opportunity given to employee to cross-examining enquiring officer — Request for examining two railway servants refused — Whole procedure held defective. (1961) 3 Fac LR 112 (114) (Cal).

(23) Where no prejudice was shown to have been caused by non-cross-examination of a person who made the report, enquiry cannot be said to be vitiated. A 1965 Raj 140 (142) (DB).

(24) In spite of notice delinquent servant refusing to cross-examine witnesses except through an Advocate — Delinquent cannot complain of denial of opportunity to cross-examine. 1973 Lab IC 1067 (1068, 1069) (Andh Pra).

(25) Even on reasonable suspicion Government may be entitled to take departmental action against a public servant. But the grounds of suspicion should be communicated to him and he should be given an opportunity to cross-examine the witnesses on whose evidence those suspicions are based and to adduce evidence on his own behalf. A 1963 Orissa 73 (78) (DB).

(26) Once the employee charged expresses the desire not to take further part in the proceeding before the Enquiry Officer, that Officer is entitled to proceed ex parte and to act upon the materials placed before him. If reasonable opportunity has been given to an employee charged to substantiate his defence at the departmental enquiry, it is not necessary that there should be a repetition of the same after the notice as regards the proposed punishment is served on him. A 1964 Pat 102 (108) (DB).

(27) Reasonable opportunity to show cause — Notice calling upon servant to show cause

Articles 310 & 311 — Note 74 (f) (contd.) against proposed punishment and also granting oral enquiry, if desired by him — Notice not mentioning that punishment was also based on adverse remarks in his confidential character roll — Confidential roll found discussed with him in personal hearing — **Held,** servant was given reasonable opportunity to explain adverse remarks. A 1967 Orissa 49 (50) (DB).

(28) Departmental enquiry — Person proceeded against not entitled to cross-examine co-accused — Refusal by Enquiry Officer to allow him to so cross-examine — Not an illegality. (1962) 2 Lab LJ 586 (Andh Pra).

(29) Enquiry commenced against police officer for misdemeanour under special procedure before commencement of constitution — On the commencement of Constitution he is entitled to cross-examine witnesses produced against him. **A 1961 SC 1245 (1253, 1254).**

(30) Reasonable opportunity — Right of cross-examination — Delinquent not given opportunity of knowing contents of documents which were going to be utilised against him in enquiry — Realising this infirmity delinquent called upon after enquiry was over to offer another explanation against charges — But enquiry not reopened — **Held,** enquiry proceedings were liable to be quashed as delinquent was denied right of cross-examining witness in support of charges. A 1970 Orissa 220: 1970 Lab IC 1506.

74 (g). Reasonable opportunity given — Illustrative cases.— (1) Appellant's prayer for engaging counsel of his choice at enquiry rejected by tribunal and counsel representing other three civil servants allowed to represent appellant also — Counsel's inability to conduct defence properly not proved and no prejudice was alleged to have been caused to appellant — **Held** appellant had reasonable opportunity to defend himself and he had been lawfully dismissed. **A 1966 SC 951 (952, 953).**

(2) Departmental proceedings started against plaintiff — Ample opportunity to defend himself, cross-examine witnesses, given — Copy of report of Enquiring Officer supplied — Asked to show cause against proposed punishment — Plaintiff submitted elaborate statement — Plaintiffs suit against order of reversion to substantive post in lower rank — Held that plaintiff had been afforded opportunity to defend himself and the order could not be questioned. A 1966 Cal 42 (49) (DB).

(3) Petitioner asking for opportunity to cross-examine Deputy Development Commissioner through a lawyer on account of petitioner's diffidence as a subordinate to cross-examine his superior officer — Refusal of enquiry officer to allow assistance of lawyer, in circumstances, would not amount to denial of reasonable opportunity of being heard. A 1967 All 384 (389).

(4) In an enquiry into the charges preferred against him, the petitioner was supplied with copy of the charges. His attention was also drawn to the circumstances against him and he was given ample opportunity to disprove those allegations and to produce evidence and to cross-examine witnesses.

Held, that there was no denial of reasonable opportunity to him as envisaged under Art. 311 of the Constitution. A 1962 Assam 17 (19) (DB).

(5) All charges read over and explained to the railway servant by the Enquiry Officer and being informed that one of the charges was dropped — Fact that a fresh list of charges had not been given to the petitioner at the time of the commencement of the inquiry was hardly sufficient to vitiate the inquiry which was held against the petitioner. A 1962 Raj 265 (268) (DB).

(6) Where the petitioner had full opportunity to defend himself against the charges made against him before the enquiry committee, and the person on whose letter the proceedings were initiated against him was also examined before the enquiry committee in his presence it cannot be said that the refusal to permit the petitioner to look into that letter in any manner prejudiced his defence. A 1950 Assam 112 (114, 115).

(7) Full opportunity to defend himself given at enquiry — Second notice to show cause against removal given — Railway servant giving written explanation to second notice — Removal without giving personal hearing held not unconsitutional. — Meaning of. A 1964 Cal 68 (71, 73) (DB).

(8) Enquiry of charges against a Government servant by a Commissioner — Full opportunity given to the servant at the enquiry — No fresh opportunity to be given when Commissioner's report is accepted by Government. 1964 Ker LT 180 (186, 187) (DB).

(9) Where the charge against the applicant that he was not really ill but applied for leave on the ground of illness in order to attend law classes and the applicant had substantial opportunity to meet the charge which was established.

Held, that there was substantial compliance with Art. 311. A 1958 Raj 284 (286) (DB).

(10) Held on facts that although there was initial defect of service of notice under Art. 311 (2), yet the Government while considering the appeal of the petitioner directed the Registrar to give a fresh notice and thereafter to submit his recommendation. Thus the provisions of Art. 311 (2) had been substantially complied with. 1959 Raj LW 429 (431).

(11) Reasonable opportunity at inquiry stage — Charges against D. S. P. serious but not complicated — 6 days' time given before commencement of inquiry — Refusal to postpone inquiry to change place from town to city and engage pleader — **Held,** not sufficient to render opportunity unreasonable. A 1963 Guj 244 (248).

(12) Refusal to give inspetion of documents with contents of which petitioner was already conversant — No violation of principles of natural justice. ILR (1973) 2 All 362.

(13) Investigation by C. I. D. into charges of corruption against police officer — Investigation started at instance of pseudonymous petition — There would be no question of confronting any of prosecution witnesses

Articles 310 & 311 — Note 74 (g) (contd.)
with the statement in it and therefore refusal to supply copy of it to delinquent officer will not amount to not giving fair opportunity to defend. **A 1966 Mad 203 (215, 216, 217) (FB).**

(14) The order granting time for submitting explanation could not be served on the delinquent officer as he was absconding — The authorities waited long to enable the officer to submit his explanation if he wanted to make any — The Enquiry Officer proceeding ex parte — It could not be said that the officer was not afforded adequate opportunity. (1967) 15 Fac LR 320 (321) (All).

(15) Police Act (1861), Section 7 — Copy of enquiry report given to delinquent Police Officer along with show cause notice indicating that his past record was taken into consideration — Delinquent cannot say that he was not given opportunity to offer explanation on question of past record. **A 1969 SC 1020 (1022) : 1969 Lab IC 1402.** (S. A. No. 1271 of 1962, D/- 2-3-1965 (All), **Reversed.)**

(16) Enquiry into misconduct — Charge framed under R. 11 (2) by disciplinary authority — Powers of Board of Enquiry — Board cannot frame fresh charge and give finding thereon — Nor can it give finding on a charge which was never framed by it — Order of dismissal. A 1964 Mys 221 (224, 225) (DB).

(17) Non-production of witness, who, in spite of efforts of disciplinary authority does not appear, does not amount to denial of reasonable opportunity to delinquent. 1968 Raj LW 272 (281) : (1969) 1 Lab LJ 382 (DB).

(18) Non-availability to delinquent of report of enquiry officer holding preliminary enquiry does not amount to denial of reasonable opportunity, when that report is neither relied on nor exhibited in regular enquiry. 1968 Raj LW 272 (281).

(19) Second order, on representation by college giving petitioners time to acquire requisite qualification to act as principal, passed after giving full hearing to petitioners by University Service Commission, in pursuance of show cause notice — **Held** this order must be taken to be only order governing the case and there was no violation of principles of natural justice. A 1965 Pat 11 (14, 15) (DB).

(20) In the case of a probationer discharged in the circumstances described in Explanation II to R. 2 of the Bihar and Orissa Rules it will be sufficient if the probationer is given an opportunity to show cause in writing against the discharge. A 1961 Pat 339 (341) (DB).

(21) Whether a particular Government servant has been given a reasonable opportunity or not must be decided on the entire evidence in the case and the facts disclosed therein. A 1961 Andhra Pra 289 (295).

(22) Period of six months to show cause held reasonable — If petitioner did not avail himself of this opportunity and asked for time again and again competent authority was justified in refusing to grant him further time. A 1962 Orissa 78 (80) (DB).

(23) Reasonable statements of witnesses recorded on spot and attested by delinquent servant — Petitioner not asking for examination of witnesses at enquiry stage but merely stating that his attestation was taken under threat — Statements shown to him at enquiry — Petitioner not asking for copies — **Held** there was no denial of reasonable opportunity. (1960) 2 Lab LJ 165 (169) (Andh Pra) (DB).

(24) Only when a copy of previous statement of witnesses is asked for and refused the question of fair opportunity can arise — Petitioner was allowed to inspect the file and take down copies — No demand for copies of statements — Reasonable opportunity could not be said to have been denied. (1967) 69 Punj LR 56 (58).

(25) Delinquent officer allowed to peruse statements of witnesses made earlier in investigation by C. I. D. Inspector — Refusal to allow perusal again at subsequent stage — Delinquent cannot say that he was not given reasonable opportunity for defence. **A 1966 Mad 203 (215, 216, 217) (FB).**

(26) Disciplinary enquiry — Case not complicated or difficult — Government servant cross-examined the witnesses without any protest — Specific permission to be represented by lawyer not prayed for — Inability of the servant to express in English did not prejudice him — It could not be said that because he was not represented by a lawyer he had no opportunity to explain his case. (1964) 1 Mys LJ 333 (336) (DB).

(27) Departmental enquiry against petitioner — He was informed what was the charge against him — He was given opportunity to put his explanation, to cross-examine witnesses against him, to adduce his defence and to give further explanation and representation — Permission to be represented by lawyer refused — **Held** under the circumstances the refusal of permission did not amount to a denial of a reasonable opportunity for the purposes of Art. 311 (2). (1964) 2 Mys LJ 65 (75) (DB).

(28) The petitioner had an opportunity to refer to the opinion of the Special officer and to offer his explanation — **Held** petitioner was given reasonable opportunity. (1965) 1 Mys LJ 323 (328) (DB).

(29) Petitioner found guilty of charges in departmental enquiry — Penalty of withholding two increments imposed upon him — Appeal not preferred by petitioner — Subsequent notice issued by Government to show cause why penalty imposed should not be enhanced to that of dismissal — In reply to this notice petitioner assailing findings of Enquiry Officer on number of grounds — His submissions thoroughly examined and considered by Government before passing order of dismissal — Petitioner held was given opportunity to deny guilt and establish his innocence — There

Articles 310 & 311 — Note 74 (g) (contd.) was no violation of Article 311. A 1966 Punj 175 (178).

(30) Reasonable opportunity of being heard — Petitioner charge-sheeted for breach of Rules 45 and 46 of Posts and Telegraphs Manual Vol. IV and Rules 103 and 106 of Posts and Telegraphs Financial Handbook Vol. I — Departmental Enquiry — Copies of statements of witnesses examined in preliminary enquiry not supplied — No witness examined by Enquiry Officer to prove charges — Prejudice not caused to petitioner by non-supply of copies — Punishment passed by Authorities on admission of breach of Rules by petitioner — Punishment order based on evidence — Enquiry and order held proper. A 1966 Punj 409 (412).

(31) Reasonable opportunity — Enquiry conducted by a subordinate officer and findings submitted by him to the appointing authority — Appointing Officer issuing show cause notice and sending along with enquiry officer's report — Omission to mention by the appointing authority in the show cause notice his concurrence with the conclusions of the enquiring officer does not amount to denial of reasonable opportunity. A 1967 Madh Pra 91 (93) (DB).

(31A) Public servant relying upon his good service record before appellate authority and putting the same in issue for mitigation of punishment imposed — If the appellate authority while confirming the punishment order refers to the service record, it does not result in denial of reasonable opportunity provided by Art. 311 — But it would well be failing in its duty if it did not fairly notice and meet a material argument raised before it. 1974 Lab IC 1466 (1468, 1469) (Punj).

(32) Enquiry of civil servant by Administrative Tribunal — Recommendations regarding punishment — Late supply of such recommendation to delinquent — No prejudice caused, he having ample opportunity to reply them — No denial of reasonable opportunity of showing cause against punishment. 1974 Lab IC 1471 (1474) (All).

(33) Whether opportunity afforded to a Government servant in a particular case is reasonable depends upon the circumstances of each case. A right of appeal is not a necessary postulate of an opportunity of showing cause within the meaning of Article 311 (2). A 1964 Ker 87 (88) (DB).

(34) Selection of appropriate punishment under Civil Services Rules is discretionary — Any punishment for any misdemeanour not illegal — Imposition of lighter punishment than proposed — No violation of guarantee of reasonable opportunity. **A 1962 SC 1130 (1132, 1133, 1134).**

(35) Disciplinary proceedings — Combined notice to show cause against proposed penalty and charges levelled — No departmental enquiry held — Notice liable to be quashed but not the charges. 1968 Lab IC 1476 (All).

(36) Statement of witnesses not recorded in the presence of civil servant — Merely allowing exhaustive cross-examination is not sufficient. A 1958 All 532 (540, 541).

(37) Opportunity of hearing — Domestic enquiry — Only documentary evidence produced — Employee availing opportunity given to explain the documents on record — No undisclosed material was used — There is no denial of opportunity of hearing. 1975 Lab IC 1520 (1522) (All).

74 (h). Reasonable opportunity not given — Illustrative cases.— (1) Disciplinary proceedings against petitioner — Copies of previous statements of witnesses not supplied — Confessional statement not brought on record — Enquiry against petitioner held was in violation of principles of natural justice — Enquiry held contravened Art. 311 (2). A 1966 Him Pra 13 (16) ** ILR (1974) Guj 1042 (1075, 1076).

(2) Termination of service — Reasonable opportunity — Non-furnishing of copies of the complaint, summary of allegations, statement of witnesses in preliminary inquiry and the report of Inquiry Officer despite the request made by delinquent officers held amounted to denial of reasonable opportunity of defending themselves — Constitution of Jammu and Kashmir, Section 126. 1976 Lab IC 1056 (J & K).

(3) Explanation by employee to show cause notice, reaching enquiry officer late, for no fault of employee — Explanation not considered — **Held** that there was no proper opportunity to show cause. (1961) 3 Fac LR 112 (114) (Cal).

(4) Failure of Disciplinary Authority to consider explanation given by delinquent — Conclusions based on no evidence — No reasons given — Order held bad. 1974 Lab IC 99 (102) (Raj).

(5-6) Conclusions of Inquiry Officer and Disciplinary Authority based on statements recorded behind the back of delinquent officer are vitiated on the ground of denial of reasonable opportunity. 1971 Lab IC 1041 (1042, 1043) (Madh Pra).

(7) Reasonable opportunity of showing cause — Does not necessarily imply permission to engage lawyer — Question depends on facts and circumstances of each case. A 1962 Guj 197 (200, 201, 202) (DB).

(8) The refusal to afford a reasonable opportunity to take legal advice when viewed in the light of the other circumstances of the case may legitimately lead to the inference that he was not given a reasonable opportunity to defend himself. A 1958 All 532 (543).

(9) Railway employee given 7 days' time, applying for extension — Removal from service without even informing him of decision on application amounts to denial of reasonable opportunity. A 1964 Orissa 279 (280) (DB).

(10) The giving of notice to show cause against charges of misconduct in a disciplinary proceeding is not merely a matter of form, but of substance. Thus to give only one day's time to show cause to a person residing abroad is not giving him notice; it merely satisfies a formality. A 1961 Cal 626 (629) (DB). **(Overruled** on another point in A 1966 SC 951.) ** **A 1966 SC 1313 (1317)** ** 1966 Cur LJ 318 (340) (Punj) ** A 1965 Punj 342 (346) (DB) ** A 1964 Cal 503 (518, 519). **(Overruled** on another

Articles 310 & 311 — Note 74 (h) (contd.)
point in 1975 Lab IC 1647 (Cal).) ** (1963) 6 FLR 26 (36) : (1963) 1 Lab LJ 708 (Cal).

(11) A Government servant who is asked to show cause why he should not be dismissed for having accepted bribes but is not supplied with particulars of any specific acts of misconduct, will not be deemed to have been given a reasonable opportunity of showing cause as required by Art. 311 (2). A 1960 All 323 (330, 331, 332).

(12) Departmental enquiry — Dismissal of Police Sub-Inspector — Charges of inefficiency and dishonesty based on adverse reports of superior officers — Such officers, though available not examined to enable Police Sub-Inspector to cross-examine them — Refusal of the right to examine such witnesses amounted to denial of reasonable opportunity of showing cause against the action of dismissal — Dismissal not legal. **A 1970 SC 2086 (2090, 2091).** (A 1963 Punj 503, **Affirmed.**)

(13) Departmental Enquiry — Charge of embezzlement — Dismissal on the ground of inefficiency not proper. 1966 Cur LJ 19 (22) (Punj).

(14) The omission of the disciplinary authority to furnish the petitioner with a copy of its findings held vitiated the order removing the petitioner. A 1963 Punj 390 (391, 392).

(15) Removal from service — Enquiry without furnishing documents asked for and without proper opportunity to examine defence witnesses cannot be a basis for inflicting extreme penalty. 1971 Raj LW 177.

(16) Adjournment on ground that copies of necessary documents had not been supplied to delinquent officer to enable him to effectively cross-examine witness against him — Adjournment refused — **Held** there was denial of reasonable opportunity. (1967) 2 Mys LJ 632 (DB).

(17) Punjab Government Servants Conduct Rules (1955), Rules 19, 22 (1) (i) — Punjab Civil Services (Punishment and Appeal) Rules (1952), Rule 4 — Dismissal of petitioner on ground that he had taken part in activities of R. S. S. — Omission to mention in charge-sheet that R. S. S. was a political organisation and that petitioner's membership of R. S. S. amounted to his taking part in political movement within Rule 22 amounted to not giving reasonable opportunity in respect of charges and, therefore, order was liable to be set aside. (1968) 70 Pun LR 315 (318).

(18) Enquiry Officer relying on past record indicating that some punishment had been imposed on delinquent officer as shown in his confidential file — No chance given to officer concerned to explain his past record — **Held** it resulted in denial of reasonable opportunity. (1967) 2 Mys LJ 632 (DB) ** 1974 Lab IC 296 (302) ** 1973 Rajdhani LR 464.

(19) The Enquiry Officer should not refuse the reasonable request of the petitioner that he may be permitted to make use of the services of a colleague to defend him in the enquiry and the action of the Enquiry Officer in refusing the request amounted to denial of reasonable opportunity to petitioner. (1967) 2 Mys LJ 632 (DB).

(20) Charges framed against Government servant — Demand by him for holding oral enquiry — Oral enquiry as prescribed by Rule 55 of Civil Services (Classification, Control and Appeal) Rules not held — Order of reduction in rank of Government servant is ultra vires. 1962 BLJR 805 (808, 809) (DB).

(21) Provisions of Rule 55 of Civil Services (Classification, Control and Appeal) Rules were not strictly complied with — As the principles of Rule 55 have been bodily incorporated in Article 311 (2) of the Constitution the contravention of the provisions of Rule 55 held had violated a valuable constitutional protection given to a public servant. A 1966 Pat 244 (245) (DB).

(22) One Government servant promoted to higher post in preference to another — Appeal by latter against order — Former is entitled to notice and a reasonable opportunity of being heard before he is reverted — Order passed without notice is against principles of natural justice — Order is vitiated. 1969 Lab IC 712 (715) (DB) (Andh Pra).

(23) Reversion on grounds, involving a stigma and entailing penal consequences — Opportunity of showing cause not given — Order is invaild. (1967) 1 Mys LJ 455 (DB).

(24) Reasonable opportunity — Premature expression of opinion on charge amounts to a denial of a reasonable opportunity to the Civil servant to defend himself. A 1958 All 532 (543).

(25) Where notice to show cause against action proposed was contained in findings recorded by enquiring officer long before papers reached authority and no opportunity was given to delinquent after authority had made up his mind about the guilt of delinquent and the punishment which he proposed to inflict, there is clear infringement of Art. 311 (2). A 1961 All 122 (125).

(26) Copies of documents relevant for purposes of enquiry not given to delinquent officer — Documents found to be of great importance for effective cross-examination — **Held,** reasonable opportunity was not given. (1967) 2 Mys LJ 632 (DB) ** 1980 BBCJ 227 (230) (DB) (Pat).

(27) After completion of enquiry enquiring officer obtaining some information and utilising same in support of his findings against the petitioner — **Held,** the findings suffered from the infirmity of having been based on evidence taken behind the back of the petitioner and must be set aside. A 1962 Orissa 78 (80, 81) (DB) ** 1969 Cur LJ 17 (Punj).

(28) Enquiry Officer different from punishing authority — Report of enquiry officer not supplied with notice to show cause against dismissal — Order of punishing authority not stating whether he agreed with findings of enquiry officer or his own conclusion — **Held** reasonable opportunity to explain was not given. A 1960 Punj 8 (10, 11) (DB).

(29) Constitution of Jammu and Kashmir, Section 126 (2) and Proviso (b) — Discharge

Articles 310 & 311 — Note 74 (h) (contd.)
of employee after holding departmental inquiry — Opportunity was given to employee to defend his case at the stage of departmental inquiry — But the same was not given before order of discharge was issued — Order was void and inoperative. A 1965 J & K 53 (54, 55, 56) (DB).

(30) Where the plaintiff was called upon to appear and did appear before a 'Reviewing Committee' which Committee found the plaintiff to be unsuitable.

Held, that this did not satisfy the requirement of Art. 311. A 1958 Cal 551 (557).

(31) Where no Enquiry Committee or Enquiring Officer was ever appointed and all that happened was that the appellant was summoned for interview with his superior Officer, it cannot be said that having had an opportunity to call evidence, the appellant had not claimed it and that therefore, he is estopped. A 1959 Cal 100 (102, 103) (DB).

(32) Enquiry against railway employee — Explanation by employee to show cause notice reaching enquiring officer late, for no fault of employee — Explanation not considered — **Held** that there was no proper opportunity to show cause. (1961) 3 Fac LR 112 (114) (Cal).

(33) Where the competent authority came to a definite conclusion that the charge had been found proved after he asked the officer to show cause against punishment — **Held** that the officer had not been given reasonable opportunity to show cause against the punishment proposed to be inflicted on him. A 1960 Punj 8 (10) (DB).

(34) Failure to supply copies of statements of all witnesses examined at the investigation stage and of first information report and photo-stat copies of alleged forged signatures, and failure to allow petitioner to engage a counsel or having assistance of a hand writing expert to cross-examine the Government handwriting expert, amounted to denial of reasonable opportunity to petitioner to show cause as to why he should not be removed from service. (1965) Pun LR (Sup) 456 (460).

(35) Delinquent was asked to be present on a particular date when witnesses would be examined — Delinquent not told who would be examined and what they were going to state. **Held**: no reasonable opportunity was given. A 1968 Bom 290 (293).

(36) Authority taking action on the basis of secret instructions from superior authority — Government servant cannot be said to have reasonable opportunity of showing cause against action taken. A 1963 Bom 121 (133, 135) (DB).

(37) Where there was no evidence to show that the enquiring officer who framed the charges and issued show cause notice, was appointed by punishing authority or appointed under authority of punishing authority, enquiry was held vitiated. 1968 Lab IC 302 (317) (DB) (All).

(38) Failure to permit the delinquent to cross-examine witness amounts to denial of reasonable opportunity to defend himself. 1968 Lab IC 302 (315) : ILR (1967) 1 All 239 (DB) ** 1980 Bom CR 377 (379).

(39) Departmental enquiry — Allegation against railway servant of incivility to a passenger — Charge of using disgraceful language based on complaint complaining of awkward behaviour — Exact language used not stated — Findings based on contents of complaint — Copy of complaint not made available to petitioner — Overwhelming evidence establishing petitioner's innocence rejected — Opportunity to cross-examine the complainant not given — Charge held vague — Findings held, based on no evidence — Proceedings held vitiated. (1961) 3 Fac LR 25 (31) (All).

(40) Where the charge against the petitioner, who was the Assistant Permanent Way Inspector, N. E. F. Railway, was that the derailment of certain train was caused by the excessive creep in the rails and the existence of excessive creep was the most important factor in the case and the enquiry committee took that fact for granted on the basis of the report submitted by the Government Inspector of Railways.

Held, that reasonable opportunity was not given to the petitioner under Art. 311 (2) and the order of his removal could not be sustained. A 1960 Assam 51 (54, 55) (DB).

(41) Order of discharge based on new ground not mentioned in second notice — Past record taken into account while infilcting punishment — No opportunity given to employee to meet the new ground or offer explanation for past record — Held proceedings contravene Article 311 (2). 1968 BLJR 815 (823, 824) (DB).

(42) Charge-sheet containing 16 charges served on petitioner while still on hunger strike — Petitioner growing weak — Inspector's ex parte report on which charges were framed not supplied — Charge-sheet allowing only three days to show cause — Petitioner not having even piece of paper to make defence — No opportunity to study relevant documents — Time allowed to show cause held not sufficient — No reasonable opportunity held given to show cause. A 1969 Cal 397 (401): 1969 Lab IC 1094.

(43) Having regard to the manner in which the enquiry was held in this case, it was held that the petitioner was not given a reasonable opportunity of defending himself and thereby denied the protection afforded by Art. 311 (2). A 1964 Madh Pra 318 (320) (DB).

(44) Services of applicant, a temporary Government servant, transferred to newly established university — Post offered to applicant — Applicant writing to Head of Department for one year's leave without pay or accept resignation — No reply in spite of reminder — Acceptance of university post and confirmation — Government after considerable time refusing leave and refusing to accept resignation and asking university (Vice-chancellor) to restore services of applicant to original Government post — Appointment to university post held legal — Vice-chancellor's order returning services back to Government without hearing applicant held bad as being against natural justice — Order quashed. A 1965 Pat 417 (421 to 424) (DB).

Articles 310 & 311 —Note 74 (h) (contd.)

(45) Enquiry against employee of State Transport Authority — Under Rule 15 (4) & (6) of Orissa Civil Services (Classification, Control and Appeal) Rules 1962, it is the right of delinquent to know time and place of evidence to be led on behalf of employer Authority — **Held** that petitioner was not afforded reasonable opportunity in the instant case. A 1970 Orissa 1 (2): 1970 Lab IC 47 (DB).

(46) Government servant making certain statements in enquiry against others — Though statements did not amount to clear and unambiguous admissions of his own guilt authority wrongly treating them as such and removing him from service without a formal enquiry — **Held** the employee had no opportunity of showing cause against the charge framed against him. **A 1961 SC 1070 (1073, 1074).** (A 1957 Madh B 15, **Reversed.**)

(47) Statutory departmental inquiry into railway accident — Penalty of reduction in rank imposed on railway servant found responsible for accident — No separate departmental enquiry directed against him in respect of the charge — Order of reduction in rank held must be set aside on the ground that no reasonable opportunity was given to the servant. **A 1960 SC 992 (993, 994).**

(48) Withdrawal of higher grade salary — Giving opportunity of hearing is necessary. (1980) 1 Serv LR 639 (640) (Punj).

(49) Order treating period of suspension as period not spent on duty — No Opportunity of hearing afforded to the servant — Order violates the principles of natural justice. ILR (1976) 2 All 325: 1977 Lab IC (NOC) 9.

(50) Public servant — Permission granted to cross efficiency bar — Cancellation of permission without hearing him — Unjustified. 1979 Lab IC (NOC) 120 (Guj)

(51) An order dismissing a delinquent passed without holding an enquiry and thus not giving reasonable opportunity to him to defend himself against the charges is liable to be quashed. (1970) 1 Cut WR 301 (DB).

(52) Employee not given opportunity to show cause against termination — Order of termination violates principles of natural justice. A 1970 Mad 424 (425): 1970 Lab IC 330 ** (1976) 1 Serv LR 551 (552) (All) ** 1975 Lab IC 838 (DB) (Orissa). (Disciplinary Inquiry — Not giving categorical finding on defence plea and not examining material witness in spite of delinquent's application — Inquiry stands vitiated.)

(53) Various amounts paid to delinquent as subsistence allowance during disciplinary proceeding — Delinquent cannot complain of lack of reasonable opportunity. 1975 Lab IC 932 (932, 933) (Orissa).

(54) Employee suspended — Subsistence allowance not paid — Inquiry conducted at a place 400 Kms. away for fixed H. Q. — Travelling expenses not paid even on request — Ex parte order of dismissal — Invalid for want of opportunity of hearing. 1979 Lab IC 988 (989) (DB) (Orissa).

(55) Dismissal of Police Constable after Departmental enquiry under Sec. 7 — Copies of statements of witnesses taken in investigation under Section 161 Cr. P. C. not given to constable. (1976) 2 All LR 467: 1977 Lab IC (NOC) 96.

(56) Betterment of chances in service — Scheme prescribing training and a Departmental Examination — Passing resulting in advance increments — Selection by seniority — Participation in strike by candidates selected for training — Unauthorised absence treated as break in service — Deletion of name from list of eligible candidates for examination — No opportunity given to show cause — Action, held, was invalid. 1976 Lab IC 934 (Bom).

(57) Karnataka State Road Transport Corporation Employees Leave Rules (1964), Pt. III, Rule 6 — Absence for one year from duty — Termination of service without opportunity to show cause — Principles of natural justice contravened. (1974) 2 Kant LJ 431 (433).

(58) Termination of services in terms of F. R. 18 — Assam Fundamental and Subsidiary Rules — Opportunity to show cause not given — Termination illegal — 'Cessation' of service pursuant to the Rule, in substance and effect, stands on the same footing as "his removal" from service within the contemplation of Art. 311 (2). **A 1976 SC 37 (42).**

(59) Where a discretion is conferred on a statutory authority, however, wide may be the expression used, they do not envisage conferment of unrestricted power. A discretion has to be exercised lawfully and fairly. The words 'reviewing authority may pass such orders as it may deem fit' under Regulation 18 of Commercial Bank Officers Employees (Disciplinary and Appeal) Regulations, 1976, do not envisage the power of passing an order which is illegal or arbitrary. The General Manager while setting aside the reinstatement made under Reg. 15 and ordering fresh enquiry and continuance of suspension of the employee in exercise of suo motu power of review without giving him an opportunity to have his say vis-a-vis the proposed action has caused prejudice to him. The order has therefore to be set aside. (1979) 2 Serv LR 152 (163): 1979 Lab IC (NOC) 148 (DB) (Patna).

(60) Departmental inquiry of a Railway servant — Exoneration by Inquiry Officer — Punishing Authority imposing severer penalty — Reasonable opportunity not given to delinquent Order held violated Art. 311 and also principles of natural justice. 1975 SLWR 615 (Punj).

(61) Where a local body conducting departmental enquiry against its employee submitted a charge-sheet, against delinquent employee and he denied the same, yet no evidence was led to prove the charges against him, nor was he allowed to cross-examine the witnesses, it could not be said that he was given reasonable opportunity as contemplated by the notification. **A 1978 SC 1407: 1978 All LJ 757: 37 Fac LR 108: 1978 All WC 647: 1978 Serv LJ 707.**

(62) Issue of show cause, notice calling for reply to a charge of misconduct — Order terminating services passed before expiry of time allowed for submission of reply — **Held** was liable to be quashed it being in

Articles 310 & 311 — Note 74 (h) (contd.)
contravention of Art. 311 (2). 1971 All WR (HC) 378.

(63) Enquiry conducted as in contravention of mandatory provisions of Rule 3 M. P. local Government Disciplinary Rules and order imposing punishment of reduction in rank held, illegal and could not be sustained. 1968 MPLJ 754: 1968 Jab LJ 1059: 1969 MPWR 20: 1968 Serv LR 867 (869) (DB).

(64) Dismissal of employee under R. 19 (1) of Central Civil Services (Classification, Control and Appeal) Rules, 1965 because of his criminal conviction without complying with the provisions of the Rule — No summary enquiry held — No opportunity afforded to the employee — Order of dismissal liable to be quashed. 1980 Serv LJ 438 (443) (Andh Pra).

(65) Where in an inquiry against members of judicial services for ascertaining the truth of the allegation of misconduct against them, the Enquiry Officer recorded statement of witnesses behind the back of the members, neither report nor statements recorded were given to the members and the services of the members were terminated by the governor on recommendation of high court, the termination was declared void for want of opportunity as contemplated under Art. 311. **A 1974 SC 2192: 1974 Lab IC 1380.**

(66) Departmental enquiry — Non-supply of copies of statements of witnesses examined at fact finding enquiry — Delinquent not represented by lawyer — It cannot be said that reasonable opportunity to cross-examine those witnesses was given to delinquent merely because earlier statements were read out before him during departmental enquiry. ILR (1973) 2 Delhi 714.

(67) In a case where no enquiry was conducted and certain penalty was imposed on the Government servant on the basis of material contained in the show cause notice which was not based on any inquiry held that penalty imposed was illegal. Penalty to be imposed is to be determined only on the basis of the evidence adduced during the inquiry and not on any other material. 1969 Cur LJ 17 (Punj).

75. **Departmental enquiry — General.**— (1) Departmental disciplinary enquiry is not criminal proceeding. **A 1967 Punj 450 (463) (FB).**

(1-A) In industrial dispute against removal of a workman from service the plea of unfair labour practice or victimisation is normally raised. Therefore it is necessary to call for explanation of a workman prior to, starting domestic enquiry against him. There is a basic difference in the nature of domestic enquiry against a workman and disciplinary proceedings against a public servant and in the case of a workman greater protection is called for. (1974) 29 Fac LR 305 (309, 313) (All).

(2) Departmental enquiry — Departmental Tribunals are not real Courts of law — Their powers, procedure and duty are usually prescribed by rules under which they work. **A 1961 Cal 1 (12, 13) (SB).**

(3) A verbal enquiry is no inquiry and cannot be substituted for the enquiry under Article 311 because oral enquiry would record no facts and would give no indication whether the procedure prescribed by Article 311 was followed. (1970) 36 Cut LT 559 (DB).

(4) To record the findings on the several charges and to forward them together with a copy of the report of the inquiry to the civil servant is of course the obvious duty of the punishing authority under Rule 17 (5) of Kerala Rules. A 1960 Ker 279 (284) •• 1979 Lab IC (NOC) 119 (Cal). (Written brief by Department not furnished to delinquent — Non-compliance of Rule 14 (19) Central Civil Services (Classification, Control and Appeal) Rules (1965) — Amounts to violation of principles of natural justice.)

(5) The circumstances under which a disciplinary action for misconduct should be started against a public servant must be left to the sole discretion of the disciplinary authority. A disciplinary authority should exercise such discretion in a bona fide and responsible manner. A 1964 Cal 506 (516, 517). (Overruled on another point in 1975 Lab IC 1647 (Cal).)

(5-A) Proviso (a) — Order of punishment under — Essentials — Authority must apply its mind to facts and circumstances — Order must be speaking order.

Before inflicting any of the three punishments mentioned in Article 311 (2) of the Constitution, namely, dismissal, reduction in rank or removal, the competent authority has to apply its mind to the facts of the case to examine the conduct of the public servant concerned and to determine the nature or quantum of punishment which his conduct calls for. Further the order must be a speaking order. 1969 Cur LJ 821 : ILR (1971) 1 Punj 514 (DB).

(6) Administrative tribunal — Powers and duties of — Must act bona fide and with sense of responsibility. A 1964 Cal 503 (510).

(7) Departmental enquiry — Enquiry consistent with the prescribed rules — Some of the charges proved — Punishment — Reasons which induced the punishing authority are not justiciable. ILR (1974) 2 Cal 373.

(8) The two stages of a departmental enquiry, namely the enquiry involving the decision about the truth or otherwise of the allegations and later the taking of action are both equally judicial. **A 1963 SC 395 (397).**

(9) Charge-sheet containing allegations of fraud not giving particulars of it — Witnesses whose evidence was relied upon not produced at inquiry — Held that the departmental inquiry was conducted in a manner contrary to law and therefore the order of dismissal based on such inquiry should be set aside. **A 1961 Cal 40 (41, 42).**

(10) The departmental inquiry in a case which is fraught with grave consequence to the person sought to be proceeded against is a serious proceeding intended to give the officer concerned a chance to meet the charge and to prove his innocence. A 1963 Raj 57 (62).

(11) Proceedings under Article 311 — Scope — Common law principle that one cannot both be a prosecutor and judge cannot be applied fully to such proceedings. **A 1967 Madh Pra 81 (83) (DB).**

(12) Departmental superiors can initiate disciplinary proceedings against their subordinates. 1966 Ker LT 141 (147).

(13) The power of taking disciplinary action is vested in the disciplinary authority. The civil or criminal Court has no such powers. A

Articles 310 & 311 — Note 75 (contd.)
1969 SC 30 (32) : 1969 Cri LJ 267 : 1969 Lab IC 194.

(14) Departmental enquiry — Enquiry cannot be taken up by one not duly entrusted with it. A 1966 Madh Pra 58 (59, 60) (DB).

(15) Departmental enquiry — The actual conduct of an inquiry can be delegated by the head of the department concerned, though the power as such is not susceptible of delegation. A 1964 Andh Pra 407 (410, 411) (DB).

(16) There is nothing in Article 311 to show that disciplinary proceedings cannot be initiated by authority other than appointing authority. (1970) 1 Lab LJ 567 : ILR (1969) Cut 1003 ** 1971 MPLJ 363 : 1971 Lab IC (N) 5 (SC).

(17) The Civil Services (Classification, Control and Appeal) Rules of 1952 do not require the minister who is the appointing authority to make the enquiry himself. The power to appoint or dismiss an officer being an administrative one and not a judicial power which could be delegated only if there is an express or implied sanction, the enquiry by the Superintending Engineer under the delegation of the power by the minister and the subsequent order of dismissal passed by the minister acting on the report submitted by the Superintending Engineer, are not vitiated. A 1958 Andh Pra 112 (115, 116) (DB).

(18) Committee for enquiring into the misconduct of railway servants — Charges relating to conduct of railway employees in connection with strike of loco shed staff — Fact-finding enquiry committee appointed first — Member of fact-finding committee not disqualified from sitting on departmental enquiry. A 1963 Pat 38 (42) (DB).

(19) It is not every infringement of any rule in the conduct of the enquiry that would attract Article 311 (2). The Tribunal for Disciplinary Proceedings merely holds an enquiry and submits its report and that is not binding on the Government. It is a mere expression of the authority and it lacks both finality and authoritativeness which are essential tests of a judicial pronouncement. (1961) 2 Andh WR 4 (8) (DB).

(20) If an enquiry is held, at a particular stage, possibly to determine whether regular proceedings should be drawn up or started, it does not debar a departmental trial after framing a charge. **A 1976 SC 2037 (2039).**

(21) The High Court will not quash the order of Government on the basis of mere infringement of rules if a reasonable opportunity was given to the Government servant to defend himself and he is not otherwise prejudiced. (1967) 2 Andh WR 425 (434) (DB).

(22) The fact of holding an enquiry against a temporary Government servant is not by itself decisive of the question whether Art. 311 is attracted or not. An answer to this question depends on the facts and circumstances of each case and the type of the order passed. 1969 Serv LR 160 (Punj).

(23) In a departmental enquiry held against a Government servant, the enquiring officer has, when so required to appraise the evidence, to record its conclusion and, if he thinks proper, to suggest the appropriate punishment. (1963) 67 Cal WN 859 (866) (DB).

(24) Withholding of documents required by the petitioner before the Inquiry Officer may amount to denial of reasonable opportunity to defend. (1967) 2 An WR 253 (257, 258) (DB).

(25) The evidence of an accomplice can be made the basis of a disciplinary order in a departmental enquiry. (1965) 2 Lab LJ 519 (520) (DB).

(26) Matter finally disposed of by competent authority cannot be reopened by his successor unless expressly provided by law. Principle applies to all judicial cases, civil or criminal whether decision is in favour of one party or other. Same principle governs executive matters like departmental inquiries. A 1954 Pepsu 129 (131).

(27) Termination order did not cast any stigma on the character and integrity of the appellant — No disciplinary proceedings were required to be held under Rule 12 of Madhya Pradesh Government Servants (Temporary and Quasi-permanent Service) Rules 1960 — Informal enquiry against the appellant's conduct does not fall within the mischief of Art. 311. **(1969) 1 SCWR 1115.**

(28) A disciplinary proceeding against a Government servant comes to an end when he retires and there is no power in Government to retain him in service so that a punishment may be imposed on him in a pending disciplinary proceeding. A 1968 Mys 206 (207) (DB) ** A 1967 Raj 82 (84) (DB).

(29) The control which is vested in High Court over Courts is complete control, subject only to power of Governor in matter of appointment (including dismissal and removal), postings and promotions of District Judges. It can hold enquiries, impose punishments other than dismissal and removal, subject to conditions of service and right of appeal if granted thereby and to giving of an opportunity of showing cause. **A 1967 J & K 98 (103, 104, 105, 106) (FB).**

(30) A High Court in exercise of its powers of superintendence and control of the Courts subordinate to it and by virtue of the rules having the force of law under proviso to Article 309 read with Article 313 is vested with the power to hold an enquiry into the conduct of judicial officers and to determine provisionally the punishment which should be imposed upon them after affording them a reasonable opportunity of showing cause under Article 311. A 1959 Andh Pra 497 (503) (DB).

(31) Departmental Enquiry — Violation of merely departmental instructions — No ground for quashing order of dismissal. (1962) 2 Lab LJ 586 (Andh Pra).

(32) Procedure — Delinquent officer admitting charges and not desiring enquiry — Enquiry is not necessary either under Article 311 or under Civil Service Rules. A 1961 Tripura 1 (3).

(33) Where a public servant refuses to take part in the inquiry proceedings against him, the Enquiry Officer could, proceed ex parte, but the finding against the absentee employee could be recorded only after examining evidence oral or documentary, against him. A 1965 Raj 87 (90) (DB).

(34) Enquiry — Conduct of — Examination of delinquent officer at the commencement of the enquiry and several times thereafter — Examination of witnesses subsequently — Enquiry held not fair and that the delinquent

Articles 310 & 311 — Note 75 (contd.)

officer not afforded a reasonable opportunity. A 1967 Madh Pra 91 (93, 94) (DB).

(35) Master and Servant — Misconduct of civil servant — Right to proceed departmentally — Does not subsist after relationship of master and servant has come to an end. A 1963 Cal 359 (362, 363, 364).

(36) Under the provisions of R. 145 (1) and (3) of the Railway Establishment Code, the authorities are under no statutory obligation to effect an alteration in entry about date of birth (in service record) where they are not satisfied that any ground exists. It cannot be contended that orders of the authority turning down employee's representation about the correction regarding his date of birth without holding an enquiry or affording an opportunity to substantiate the real date of birth, are liable to strike down as invalid on the ground that they were in violation of principles of natural justice. 1968 Lab IC 1326 (DB) (Madh Pra).

(37) Where the reinstatement by the Government was made as a consequence of the setting aside of the order of dismissal alone, and not because the inquiry had been irregular, or the findings were not accepted, but because the dismissal was thought to be by an authority that was really not competent to order it, it could not be said that the setting aside of the order of dismissal and the reinstatement had the effect of quashing of the entire proceedings and the cancellation of the old charge-sheet. A 1959 Madh Pra 404 (405, 406) (DB).

(38) Dismissal from service — Petitioner, head constable, charged with neglect of duty — After preliminary enquiry explanation was called for as to why he allowed arrested persons to go away — Petitioner replied that the persons were not traced and prepared false panchanama — Notice under Art. 311 (2) served on him as to why he should not be dismissed — After evidence was led on both sides and after consideration of evidence charge was held to be proved — **Held** there was no contravention of provisions of the Constitution. ILR (1956) Hyd 326 (327) (DB).

(39) The mere fact that the District Superintendent of Police had acquitted the delinquent would not deprive the State Government of its power under Sec. 25 (1) of the Bombay Police Act (1951) to hold him guilty of the offence of having demanded a bribe and dismiss him. (1960) 62 Bom LR 1038 (1042, 1043) (DB).

(40) Two employees working in Road Transport Department of the erstwhile State of Hyderabad dismissed from service for misconduct — Business of road transport taken over by Corporation and hence the petitioners in petitions challenging their orders of dismissal substituted the Corporation in the place of Government. A 1964 Andh Pra 407 (410) (DB).

(41) The fact that a particular act attributed to the delinquent officer amounts to an offence under the Penal Code does not necessarily entail a duty on the part of Road Transport Corporation to take proceedings in a criminal Court. It is left to the choice of the Corporation either to prosecute the delinquent or to proceed against him departmentally. A 1964 Andh Pra 407 (412) (DB).

(42) It cannot be said that without recourse to criminal Court, the delinquent officer cannot be proceeded against in a departmental enquiry. (1964) 2 Mys LJ 65 (71) (DB).

(43) Where a departmental enquiry is started against a civil servant on the ground that with the instrumentality of his brother, he was taking bribe, the discharge of his brother, in a criminal proceeding on the charge under Section 162, I. P. Code, is not conclusive against the civil servant in the departmental inquiry against him. A 1959 Andh Pra 497 (504) (DB).

(44) Government servant — Departmental enquiry against — Servant acquitted of offence by High Court — Departmental enquiry started against same servant on same facts — It is not barred — There is no contempt of Court. A 1966 Guj 233 (235, 236) (DB).

(45) Choosing of the venue of an enquiry against an employee suo motu by the enquiring officer does not vitiate the enquiry and does not violate the principles of natural justice. There cannot be any hard and fast rule as to where the enquiry against an employee is to be held and the only thing to be seen is whether the employee is in any way denied the opportunity of defending himself because the enquiring officer suo motu chooses the venue of the enquiry. When such opportunity is not denied, the enquiry is not vitiated. A 1967 Cal 29 (30, 31).

(46) Officiating post — Reversion to substantive post — Government acting on advice of ad hoc committee — Order not bad on that account. A 1966 Cal 402 (408) (DB).

(47) Servant of District Board — Termination of service for long continued absence without leave and without any justification — Absence of conditions of service under District Board — Ordinary law of contract between master and servant applies — District Board entitled to terminate service under Section 39, Contract Act — Termination not by way of punishment for misconduct — Principles of natural justice not applicable. A 1962 Pat 452 (458) (DB).

(48) Admission of guilt by the Government servant — Such admission used only to corroborate independent evidence led to prove charges against such servant — Enquiry proceedings not vitiated. A 1967 Cal 381 (382).

(49) Departmental enquiry — Findings of inquiring officer — Finding based on admissions of petitioner — Inquiry and findings cannot be said to be based on no evidence. A 1976 Pat 158 (166) (DB).

(50) Disciplinary proceedings — Propriety — Charges against officer amounting to not mere error in respect of orders passed in suits but to abuse of authority as Mamlatdar consisting in bias in favour of one party — Executive action against officer not illegal. 1962 Mys LJ (Sup) 480 (487) (DB).

(51) Disciplinary proceedings — Propriety — Disciplinary proceedings and prosecution when can be taken stated. 1962 Mys LJ (Supp) 480 (484) (DB).

(52) Charges not borne out from statement of allegation — Dates of acts of omissions and commissions not given — Name of person making the allegations given — None of the above facts is indicative of the facts that framing of the charges was mala fide. A 1963 Punj 298 (318) : ILR (1962) 2 Punj 642 (DB).

(53) Dismissal on ground of disobedience — Finding of appellate authority based on admis-

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sion in petition of appeal itself — No inquiry is necessary. A 1967 Orissa 26 (28).

(54) Preliminary enquiry held to satisfy whether there is reason to dispense with services of temporary employee or to revert him to substantive post — Such enquiry is not a departmental enquiry and can be held even ex parte. **A 1964 SC 1854 (1862).**

(55) Rule 4 (2) of the U. P. Disciplinary Proceedings (Administrative Tribunal) Rules, 1947, imposes an obligation on the Governor to grant a request made by the gazetted Government servant that his case should be referred to the Tribunal under the Rules and not by an appropriate authority under R. 55. **A 1963 SC 1618 (1620) : 1963 All LJ 617.**

(56) Disciplinary proceeding — Fact that the employee was found guilty of commission of an offence would be enough to sustain the charges even if past record so far he is concerned are not taken into consideration — If one charge is sustained, whether the earlier conduct was taken into consideration or not, would not be of relevant consideration. 1980 Lab IC (NOC) 11 (Cal).

(57) Orissa Civil Service (Classification, Control and Appeal) Rules, 1962 — Enquiry by Administrative Tribunal under Rules — Award of punishments, ordered to be entered in confidential Character Roll of delinquent — Such order by itself is not punishment. 1974 All Serv Rep 137 : (1973) 2 Cut WR 1479.

(58) Non-compliance with Art. 311 — Order of dismissal nullity — Deemed continuance in service — No question of reinstatement. 1968 Jab LJ 1036 : 1969 MPLJ 54.

(59) Disallowing pension and/or death-cum-retirement gratuity — Departmental enquiry — Not necessary. 1972 Lab IC 516 (519, 520) (Delhi).

(60) Misconduct — Disciplinary proceedings — Mysore State Electricity Board — Complaints Supervisor (Petitioner) working during day shift at service station — Complaint received as to snapping of electric wires — Failure to attend to complaint (leading to electrocution of school boy) held dereliction of duty. (1972) 1 Mys LJ 483.

(61) Disciplinary proceedings — Misconduct — Charge that delinquent accepted bribe for renewing licence — Delinquent having no authority of renewal — Charge held, not proved — Action unwarranted. 1980 Lab IC (NOC) 21 (DB) (Mad).

(62) Departmental enquiry against an employee on the allegation of misconduct on ground of bigamy — Employee pleading dissolution of first marriage prior to contracting second marriage by custom — **Held** that the enquiry officer had no jurisdiction nor he was competent to determine, when the plea was a dissolution of marriage by custom. (1976) 1 Serv LR 350 (358, 359) (Delhi).

(63) Disciplinary proceedings — Delay in — Whether Government servant is kept under suspension or not, departmental proceedings started against him must be concluded as expeditiously as possible — Lapse of seven years without any acceptable explanation is inordinate and may lead to conclusion that entire proceedings were dropped. **A 1971 Mad 170 (173, 174) : 1971 Lab IC 452.**

(64) Disciplinary enquiry — Delinquent, a Magistrate alleged to have taken erroneous view of law — Absence of mala fides on the part of delinquent — Action of delinquent does not amount to misconduct — Enquiry invalid. 1977 Raj LW 445 : (1978) 1 Serv LR 835.

(65) A disciplinary authority is entitled to take a lenient view in passing an order on consideration of the mitigating factors e. g. long period of suspension, past clean record of service, financial and material suffering during the period of suspension. (1971) 1 Andh WR 211.

(66) Ex parte enquiry into misconduct — Civil servant unable to be present owing to non-payment of subsistence allowance during suspension — Dismissal order based on report by appointing authority — Cannot be sustained. **1971 SCD 272 : 1971 Ker LR 67 (SC).**

(67) Enquiry — Delinquent failing to attend enquiry due to paucity of funds resulting from non-payment of subsistence allowance — Enquiry is invalid. **A 1973 SC 1183 (1184, 1185) : 1973 Lab IC 778.**

(68) Orissa Civil Service (Classification, Control and Appeal) Rules (1962), R. 12 — Orissa Service Code, R. 91 — Disciplinary proceedings — Period of suspension — Direction to treat the period as such, even after passing order of dismissal — Direction does not amount to double punishment — It is supported by Rule 12 of (1962) Rules and R. 91 of the Code ILR (1977) 2 Cut 288.

(69) Absence from duty treated as leave without pay — Absence would be considered as condoned and regularised — Disciplinary proceedings on basis of such absence — Invalid. 1978 Lab IC 1424 (1425) (Goa).

(70) Disciplinary action for alleged intentional absence — Extraordinary leave granted to the delinquent for the period held nullified the basis of the charge. A 1976 Andh Pra 75.

75 (a). Findings of.— (1) Where law expressly recognises alternate forms of relief, it impliedly recognises exercise of discretion in choosing which form of relief should be granted where a Court or Tribunal is invested with discretion, exercise of it must be regulated by established principles of justice. (1965) 10 Fac LR 223 (226, 227) (Cal).

(2) Departmental enquiry — Dereliction of duties — Enquiry Officer and Disciplinary Authority bound to apply their mind scrupulously to the material on record and come to a definite finding — A halting and inconclusive finding serves no purpose — Central Civil Services (Classification, Control and Appeal) Rules (1965), R. 14. 1975 Lab IC 73 (Him Pra).

(3) Police Standing Order No. 95 (4) prescribes the procedure with regard to the recording of findings by the enquiry officer. Under this Order, the enquiry officer records his findings on the basis of the evidence produced by both sides. The finding of the enquiry officer is more in the nature of a report to the competent authority to enable it to pass final orders. A 1960 Andh Pra 473 (477, 478, 479) (DB).

(4) The Enquiring Officer to whom actual conduct of enquiry is delegated is not entrusted with the power of imposing the punishment.

Articles 310 & 311 — Note 75 (a) (contd.)
His duties commence and end with finding the facts. He is merely a fact finding authority. A 1964 Andh Pra 407 (411) (DB).

(5) It is the punishing authority who is to decide on the report of the enquiring officer as to what action is to be taken against the employee. How he arrives at the decision is no concern of the delinquent. Even if the punishing authority decides in consultation with any officer, the decision is not open to challenge and it cannot be said that the punishing authority did not apply his mind to the enquiring officer's report merely because he adopts the decision of another officer. A 1967 Cal 29 (30, 31) ** A 1980 SC 1170 : 1980 Lab IC 654 (656, 657). (Disciplinary proceedings — Disciplinary authority arriving at its own conclusion on material available to it — Its findings and decision cannot be said to be tainted with any illegality merely because it consulted Vigilance Commissioner and obtained his views on the very same material.) ** ILR (1974) 2 Cal 373.

(6) The finding of Enquiry Officer should not be too short and should contain discussion as to how he came to his conclusions. (1966) 12 Fac LR 80 (86) (Cal).

(7) Disciplinary authority — Duty of — Order removing delinquent from service — Should be a self-contained speaking order and not cryptic. **A 1978 SC 1277 : 1978 Lab IC 1106.**

(8) Disciplinary enquiry for misconduct — Enquiry Officer and the disciplinary authority in coming to the conclusion that the delinquent employee was guilty of the charge, acting illegally without proper evidence and in disregard of material evidence — Order of punishment cannot be sustained. (1978) 37 Fac LR 290 : 1979 Lab IC (NOC) 11 (Ker).

(9) The Enquiring Officer must come to a finding on proper evidence on the charges framed against the delinquent servant though such servant does not submit any explanation or appear at the enquiry proceeding. Even on mere admission of the servant, charges cannot be held to have been established. 1972 Lab IC 734 (735) (Cal).

(10) In a disciplinary proceeding the accuracy of proof must not be judged by the standard of criminal trial — Dismissal of servant for allowing misuse of privilege pass by his brother — Finding based on circumstantial evidence — Dismissal not improper on ground of absence of direct evidence to prove handling over of pass by servant to his brother. 1968 Lab IC 1535 (1539) (Cal).

(11) An Appeal Committee should record their own findings, apart from referring to findings in enquiry report. (1965) 10 Fac LR 223 (227) (Cal).

(12) Disciplinary proceedings — Inquiry Officer travelling beyond scope of charges and giving findings on material not forming part of record — Order of removal based on such report vitiated as not giving reasonable opportunity to Government servant. A 1962 Punj 289 (292). (A 1960 All 618, Dist.)

(13) Powers and duties of statutory bodies — Orders of authorities conducting departmental proceedings against delinquent public servants are not like judgments in law Courts and may not necessarily indicate nature of evidence in support of every finding. 1966 BLJR 825 (830) (DB).

(14) Charge of particular kind of misconduct on basis of certain facts — Consideration of extraneous facts and character of person charged in arriving at finding and imposing punishment — Findings cannot be maintained. A 1959 Cal 1 (6) (DB).

(15) A civil servant can question the correctness of the findings in showing cause against the penalty proposed to be inflicted on him. A 1960 Andh Pra 473 (477) (DB).

(16) Order of dismissal based on only one finding — Finding given in violation of rules of natural justice — Dismissal illegal. 1968 Lab IC 1345 (1348) : 1968 Cur LJ 417 (DB) (Punj).

(17) Departmental enquiry — Finding of guilt reached on evidence including a piece of inadmissible evidence — Conclusion reached cannot be set aside in the presence of other clear and specific evidence. 1980 Lab IC (NOC) 65 (Kant).

(18) Disciplinary proceedings against Sub-Inspector on certain charges involving breach of Rr. 20 and 23, Government Servants' Conduct Rules (1926) — Suspension — Charges not proved — Warning administered as a disciplinary penalty held was without any basis and could not be sustained — Government Servants' Conduct Rules (1926), R. 20. **A 1971 SC 156 (159) : 1971 Lab IC 23.**

(19) Enquiry against railway employee — Order of removal based on two charges — One of charges found to be unsustainable — Order can be sustained. **A 1969 SC 966 (969) : 1969 Lab IC 1368.** (A 1963 Punj 336, Reversed.) ** A 1976 Pat 158 (163) (DB) ** 1977 Serv LWR 321 (Punj).

(20) Dismissal of civil servant after departmental enquiry — Writ proceedings challenging dismissal order — Findings of tribunal on some charges vitiated — Dismissal order cannot be upheld on remaining findings. **A 1961 Cal 1 (15, 19, 21) (SB).**

(21) Removal of railway employee — Material evidence not considered by Inquiry Officer or Punishing Authority — Order of removal is liable to be set aside. 1969 Lab IC 773 (778) (Cal).

(22) Departmental enquiry against servant for misconduct — Charge that delinquent gave threat of assault to Officer — Mere obstruction may not amount to threat of assault. 1968 Lab IC 584 (586) (Cal).

(23) Enquiry Officer was wrong in giving a finding on a matter without any charge regarding it and without evidence in support of the finding. (1966) 12 Fac LR 213 (219) (Cal).

(24) Where in a departmental enquiry, charge against Head Constable was carelessness and negligence in losing an application, and the punishing authority also took into consideration another charge relating to creation of false and fabricated evidence, which did not form part of the enquiry. **Held**, delinquent could not be punished for which he was not charged. 1978 Serv LWR 278 (279) (Punj & Har).

(25) When a fictitious entry in general cash register made by the Accountant is initialled by the Delinquent Officer and the entry also shows that certain sum was recovered and not that it was advanced the Tribunal's finding that the officer was a party to the fraud or it

Articles 310 & 311 — Note 75 (a) (contd.)
was made at his instance is arbitrary and capricious. (1972) 1 Cut WR 568.

(26) Compulsory retirement of civil servant — Enquiry by Tribunal for disciplinary proceedings — Recommendations by Public Service Commission agreeing with findings of Tribunal and also mentioning that evidence in enquiry left suspicion about officer being corrupt — Order held, was passed not on mere suspicion. A 1966 SC 1827 (1830, 1831, 1832). (W. A. No. 78 of 1961, D/- 1-11-1962 (Mad), Reversed.)

(27) Enquiry against public servant on several charges of serious misconduct, negligence in duty, etc. — Main charges of serious misconduct proved — Dismissal of public servant is lawful. A 1967 Pat 43 (49) (DB) •• (1978) 1 Serv LR 761 (DB) (Raj).

(28) Moneys recovered from house of Government servant, disproportionate to his salary — Burden of proof is on the public servant. A 1963 Orissa 73 (77, 78) (DB).

(29) Findings in departmental enquiry is not binding on Government who are the final authority. A 1963 Orissa 73 (77, 78).

(30) Civil Court is not competent to sit in judgment over decision of competent authority provided the public servant has been afforded opportunity to defend himself consistent with the constitutional guarantee. A 1964 Pat 102 (109) (DB).

(31) In proceedings under Article 226 of the Constitution the High Court cannot sit in appeal over the findings recorded by a competent inquiry officer in a departmental enquiry and cannot reappreciate the evidence. But if it is shown that the impugned findings recorded by the inquiry officer are not supported by any evidence the High Court would be justified in setting aside the findings. (1978) 1 Serv LR 761 (DB) (Raj).

(32) Government servant — Disciplinary proceedings — Finding of guilt recorded — High Court will not reappreciate evidence to find out whether finding was based on sufficient evidence. 1980 Lab IC (NOC) 65 (Kant).

(33) Normally for one charge there should not be more than one punishment and if when there are more charges than one and more punishments are proposed to be inflicted than one, it is the duty of the disciplinary authority to state for which charge he proposed to inflict which punishment. A 1962 Tripura 15 (19, 20).

(34) Whether a particular act constitutes moral turpitude or not, does not depend upon the subjective satisfaction or discretion of the disciplinary authority. Every case has to be judged and decided on its own facts and circumstances in the context of the conduct of the delinquent. In a given set of facts a particular offence may not constitute moral turpitude but in another context it does. (1977) 2 Cal LJ 98 (107).

(35) Disciplinary proceedings — Findings of guilt based on preliminary statements of witnesses in preference to their depositions during enquiry — No illegality. 1978 Lab IC 1174 (1176) (DB) (Ker).

75 (b). Evidence.— (1) Technical rules of evidence are inapplicable to departmental enquiries under this Article. (1972) 2 Andh Pra LJ 127.

(2) Departmental proceedings are not in the same category as criminal prosecutions or even a civil proceeding in court and provisions of Evidence Act do not apply. Nevertheless, ordinary principles of proof and also rules of natural justice must be applied. Charges must be proved by prosecution and it is not duty of delinquent to prove any part of it. (1959) 63 Cal WN 702 (704) •• 1974 Lab IC 570 (572) (Orissa).

(3) Even in disciplinary proceedings, the charge framed against the public servant must be held to be proved before any punishment can be imposed on him. A 1966 SC 1827 (1832).

(4) The Enquiry Officer in stating that the judgment of the Magistrate in a criminal trial against the public servant could not always be regarded as binding in a departmental enquiry against that public servant does not commit any error. A 1963 SC 1723 (1726, 1727, 1728).

(5) Witness stating in his chief examination that his earlier statement during investigation was taken under duress and making it unnecessary for accused to cross-examine him — Even then rule of natural justice can be said to have been complied with if opportunity to cross-examine witness was given. (1966) 79 Mad LW 428 (433) •• A 1962 SC 1344 (1346, 1347). (When the public servant declined to take part in the proceedings and failed to remain present, it was open to the Enquiry Officer to proceed on the materials which were placed before him.) •• (1967) 15 Fac LR 80 (83) (All) •• A 1967 Madh Pra 81 (84) (DB).

(6) Rules of evidence which may be nothing but rules of justice may be relevant in deciding whether sufficient opportunity was or was not given to show cause against the charges. A 1958 All 532 (538).

(7) Standard of proof in criminal case is fundamentally different from that in departmental proceedings — In latter, authorities can accept previous report of accomplice which, according to them, was supported by other pieces of evidence. 1966 BLJR 825 (834) (DB) •• A 1967 Pat 43 (49) (DB) •• ILR (1974) 2 Cal 373.

(8) In departmental enquiries, the evidence of an accomplice is not necessarily unacceptable. Where the Tribunal was aware of the fact that it was dealing with the evidence of an accomplice and with that awareness the evidence was accepted and acted upon, an order made on the basis of that evidence cannot be regarded as not reasonably founded on acceptable evidence. (1979) 1 Serv LR 479 (483) : 1979 Lab IC (NOC) 125 (Ker).

(9) Witnesses' earlier statements read out and charged officer asked to cross-examine — No adequate opportunity. A 1963 All 94 (100, 101) (DB). (A 1961 All 45, Reversed.)

(10) Departmental disciplinary proceeding against public servant — Though technical rules of criminal trial do not apply yet mere suspicion should not take place of proof. 1969 Lab IC 896 (898) : 35 Cut LT 391 (DB).

(11) Criminal P. C. (1898), S. 162 — Not applicable to departmental enquiries against civil servants. (1960) 2 Lab LJ 464 (466) (DB) (Andh Pra).

(12) Confession not strictly in accordance with Section 164, Criminal P. C. — If can be

Articles 310 & 311 — Note 75 (b) (contd.)
used in departmental enquiry. A 1959 Tripura 51.

(13) The inquiry officer is not bound to see that the provisions of S. 173 (4), Criminal P. C., are observed before he proceeds to record evidence in the inquiry. A 1958 Punj 27 (29) : 1958 Cri LJ 94.

(14) If the circumstances established by the department in the departmental enquiry can be explained on a hypothesis which may be consistent with the innocence of the person charged, then the Court in the exercise of its writ jurisdiction can rectify the error committed by the disciplinary authority. 1968 Raj LW 272 (285) (DB).

(15) An enquiry by the Tribunal is of a quasi-judicial nature. And it is implicit in R. 7 of the Tribunal Rules that the findings of the Tribunal must be based on some evidence adduced before it. If there is no evidence then its findings are liable to be quashed by the High Court. ILR (1959) Cut 425 (434) (DB)

(16) Where the enquiring officer did not find any collusion of the delinquent official with the criminals as a result of which the theft from the wagon took place, the delinquent could not be punished. (1978) 1 Serv LR 755 (756) (Cal).

(17) The power of a Court and an enquiring officer to shut out evidence can only relate to relevancy or where there is a legal bar or even a moral bar to permitting the evidence being led. A 1963 All 94 (99) (DB).

(18) As a general rule, all the witnesses brought forward by a party ought to be examined. It is the bounden duty of the enquiry officer as well as the disciplinary authorities to receive all the evidence tendered unless the object of summoning a large number of witnesses clearly appears to be to impede the adjudication of that case or otherwise to obstruct the ends of justice. It is only in a case where the enquiry officer is satisfied, for reasons which he ought to record, that the request to refer such evidence is frivolous or vexatious or is made to unnecessarily prolong the enquiry that the enquiry officer can reject such request. 1973 Lab IC 1067 (1070, 1071) (Andh Pra).

(19) Refusal to record evidence of witnesses cited solely on the ground that in the opinion of the Enquiry Officer they were not present at the time of incident alleged against the delinquent amounted to violation of principles of natural justice. 1973 Lab IC 1067 (1070, 1071) (Andh Pra).

(20) There is no doubt that there must be adequate legal evidence in departmental inquiry, to support the finding of the tribunal concerned. But this rule does not permit Courts to appreciate the evidence at a departmental inquiry or before a domestic tribunal. A 1963 Guj 197 (200) (DB).

(21) The enquiring officer must not import his personal knowledge of the facts of the case while enquiring into the charges against the civil servant. A 1958 SC 86 (91) °° A 1956 Cal 278 (279) °° (1954) 58 Cal WN 988 (989).

(22) Witnesses who are under the control of the disciplinary authorities and whom the delinquent desires to examine should be produced for examination. The authorities, however, have a discretion in the matter. (1963) 67 Cal WN 966 (976) (Cal).

(23) According to U. P. Police Regulations, hearsay evidence inadmissible — Finding based on inadmissible evidence cannot be sustained — Dismissal of Police Officer. A 1959 All 223 (224) : 1959 Cri LJ 411 (DB).

(24) The delinquent officer cannot insist upon the enquiring officer following any particular order for the examination of the witnesses cited by him. A 1966 Mad 203 (217) (FB).

(25) No evidence to show that delinquent communicated information to Press — Correspondent and authority framing charge not examined on ground that they would not like to disclose the source — Held, delinquent was denied reasonable opportunity to defend himself. 1956 MPLJ 325 (329) (DB).

(26) In order to find a person guilty on circumstantial evidence the circumstance or the circumstances must be such as would irresistibly lead to an inference of the guilt of the person charged with the offence. A 1954 Cal 503 (512, 515, 519).

(27) Departmental enquiry — Disciplinary authority is not bound by conclusion reached by enquiry committee — Conclusion of Disciplinary Authority supported by evidence and one which could have been reached by reasonable man — High Court in certiorari jurisdiction would not interfere with that conclusion. A 1969 SC 966 (968) : 1969 Lab IC 1368. (A 1963 Punj 336, Reversed.)

(28) In simple and devoid of complexity cases where there is no likelihood or probability of the purport or the effect of evidence being misunderstood or forgotten by the enquiring officer, evidence to reduce to writing the evidence does not vitiate the enquiry unless recording of evidence is made obligatory by some statutory provision. (1966) 2 Mys LJ 97 (102) (DB).

(29) Order of dismissal based on finding in ex parte enquiry recorded without examining evidence — Article 311 (2) can be invoked and order quashed. A 1965 Raj 87 (90) (DB).

(30) All evidence in support of the charges against the officer should be recorded on the date of hearing and in the presence of the officer accused. Where the statements of some of the witnesses were not recorded in the presence of the officer and the inquiry officer, but were recorded by some other officer and the witnesses were produced only for being cross-examined, there is non-compliance with R. 245 of the General Circulars and Standing Orders. A 1960 Mys 159 (160, 161) (DB).

(31) Disciplinary proceedings against Government servant — Burden of proof — It is for the Government to prove the charges levelled against his servant and not for the servant to substantiate his defence. A 1962 Tripura 15 (17, 18).

(32) Departmental enquiry — Hearsay evidence is admissible provided the essential condition that an opportunity was afforded to the parties to comment and contradict such evidence was fulfilled. It is, however, open to a tribunal of fact not to render it any probative value. 1972 Lab IC 457 (462) (Orissa).

(33) Departmental enquiry — Hearsay evidence — Probative value — Question not considered in view of the fact that even accepting

Articles 310 & 311 — Note 75 (b) (contd.)
the hearsay evidence charge was not established. (1974) 2 Cut WR 764.

(34) Evidence Act (1872), S. 60 — On checking Inspector's report Bus Conductor charged with embezzlement by charging fares from passengers without issuing tickets — Passengers not produced as witnesses before Enquiry Officer — Inspector's statement being hearsay is not admissible — Termination order based on Inspector's statement is invalid. 1975 Lab IC 986 (989) (DB) (Punj). (Overruled in A 1976 Punj 381 (FB).)

(35) Prosecuting agency leading no evidence — Delinquent Officer not required to lead any evidence. A 1963 Raj 57 (62)..

(36) If State relies only on documentary evidence, no oral enquiry is necessary — If without oral evidence finding cannot be given, then oral enquiry must necessarily be held before a finding can be given against the officer. A 1968 Bom 290 (293).

(37) It cannot be laid down as a general rule that an enquiring officer has the power to fix a day by which the charged officer must summon his defence witnesses and if they are not summoned by that date then the enquiring officer has the right to refuse to let the charged officer examine those witnesses in his defences at the enquiry. A 1963 All 94 (99) (DB).

(38) Charged officer, though given adequate opportunity for calling witnesses, found guilty of laches or of resorting to dilatory tactics — Enquiry Officer may refuse to examine defence witnesses. A 1963 All 94 (99) (DB).

(39) Delinquent charged for removing important documents from Government files — Punished for removal of documents on receipt of illegal gratification — Copy of relevant letter alleging removal of documents on receipt of illegal gratification not given to delinquent — Dismissal illegal — Loss of documents from Government files due to negligence of Record-Keeper — Not sufficient ground for dismissal — Proof that he deliberately removed papers on receipt of illegal gratification is necessary. 1979 Lab IC 1102 (1111) (All).

75 (c). Natural justice, rules of.— (1) Natural justice — Opportunity to show cause against action proposed must be given to the employee. A 1968 SC 240 (243) ** A 1959 Punj 402 (412) (DB) ** 1973 BLJR 558. (Dismissal by using statements made behind his back and without holding enquiry in his presence.) ** (1973) 1 Serv LR 283 (Punj) ** (1973) 1 Serv LR 744 (Pat) ** (1978) 19 Guj LR 535 : 1977 Lab IC (NOC) 88 (Guj). (Leave granted — Revocation of leave and direction to recover leave salary — Pecuniary loss — Opportunity of hearing to employee must be given.) ** Assam LR (1971) Assam 281 (DB). (Principles of natural justice — Non-observance — Inquiry is vitiated.)

(2) Every Tribunal has its own procedure. Whatever the construction or composition of a tribunal may be, it is expected to follow the principles of natural justice. 1968 Lab IC 743 (745, 746) (Mad).

(3) What is guaranteed by Article 311 of the Constitution is not a mere enquiry, regardless of fairness, but one which is fair and adequate. 1976 Lab IC 1263 (1273) : (1975) 2 Serv LR 683 (Delhi).

(4) Natural justice is a very elastic term. Its rules vary from Tribunal to Tribunal and one cannot universally apply the same principles in all cases or to determine the question with reference to any preconceived notions. A 1968 Delhi 269 (272) : 1968 Lab IC 1402 ** (1971) 2 Serv LR 240 (Delhi). (Part of statement of petitioner recorded by another officer of same cadre and similarly authorised — On facts held that there was no violation of any rule of natural justice involved in his being examined in part by another officer.)

(5) By making it obligatory on enquiring authority to observe rules of natural justice, it cannot be said that protection under Article 311 is made applicable to those not entitled to it (1967) 2 Lab LJ 782 : (1966) 70 Cal WN 925 (937, 948) (DB).

(6) The fact that the Government servant concerned did not ask for an enquiry as for an opportunity of showing cause vis-a-vis the proposed action is no excuse for non-compliance with the provision of Art. 311 (2). (1979) 3 Serv LR 198 (200) (Ker).

(7) Though Art. 311 (2) simply speaks of 'reasonable opportunity' being offered to delinquent employee, substance of constitutional guarantee is nothing but compliance with principles of natural justice. 1968 Lab IC 584 (585) (Cal).

(8) By natural justice is meant that which is founded in equity, in honesty and right and its principles are : (1) a person must not be a judge of his own cause; (2) a person must not be condemned unheard and (3) the decision must be made in good faith. (1957) 2 Lab LJ 668 : 70 Mad LW 965 (971, 972).

(9) Tribunals conducting departmental enquiries should observe rules of natural justice such as, (i) party should have opportunity of adducing all relevant evidence on which he relies; (ii) evidence of the opponent should be taken in his presence; (iii) he should be given the opportunity to cross-examine the witnesses and (iv) no material should be relied on against him without his being given an opportunity of explaining them. A 1969 Manipur 36 (39) : 1969 Lab IC 561 ** A 1963 Orissa 73 (77) (DB) ** 1977 Lab IC (NOC) 45 (DB) (Gauhati) ** 1975 Lab IC 1647 (1650) (Cal) ** (1972) 1 Cut WR 998 ** (1972) 1 Andh WR 1 : (1971) 1 Serv LR 507 ** 1972 Lab IC 119 (122) (Pat).

(10) Two of the principles of natural justice which generally apply to all departmental enquiries are (1) a person must be clearly and specifically told the offences with which he is to be charged and (2) he must not be condemned unheard. A 1958 All 532 (539).

(11) Rule 55 of the Civil Services (Classification, Control and Appeal) Rules (1930) lays down that if it is desired by the charge-sheeted officer,or if the authority concerned so directs, an oral enquiry shall be held. The requirement that such an oral enquiry shall be held is mandatory and it is based upon consideration of natural justice and fairplay. A 1966 SC 269 (273, 274, 275).

(12) It is only in cases falling within Art. 311 that the Government as an employer is bound to conform to certain rules of natural justice indicated in that Article. 1957 Ker LT 772 (773, 774).

(13) It is true that the proceedings of a departmental enquiry are not strictly speaking

Articles 310 & 311 — Note 75 (c) (contd.)
judicial proceedings but the rules of natural justice do apply to these proceedings with as much force as they apply to all judicial proceedings. A 1958 Punj 327 (329, 330) (DB).

(14) Any procedure indicated in a departmental rule which, after the Constitution of India came into force was continued to be followed in enquiry proceedings against a defaulter resulting in an order of dismissal from service should not be justifiable if it is found violative of principles of natural justice and has operated to deprive a delinquent of a reasonable opportunity of defence. A 1961 Guj 63 (66) (DB).

(15) The duty to act judicially is implicit in the exercise of power to dismiss an employee on charges of misconduct even though the statute which confers such power is silent about procedure to be adopted. A 1969 Cal 397 (404, 405) : 1969 Lab IC 1094. (Dismissal under Bengal Primary Education Act (4 of 1919) — No rules for enquiry or dismissal under Act or rules thereunder — Rules of natural justice should be followed. **A 1950 SC 222. (Held no longer good law in view of A 1967 SC 1269.)**

(16) Doctrine of natural justice, known as audi alteram partem, requires that before reliance can be placed on any document, (complaint in this case) the same must be placed before the person charged for his information, comment and criticism and also for rebuttal by him. (1966) 12 Fac LR 80 (86) (Cal).

(17) The ambit of natural justice is not limited by Art. 311 (2) but rather demonstrated by exceptions which had to be engrafted in order to exclude it on paramount considerations of collective security. (1966) 70 Cal WN 786 (804).

(18) The requirements of natural justice must depend upon the circumstances of the case, the nature of the enquiry, the rules under which the Tribunal is acting, the subject-matter that is being adjudged. (1964) 2 Mys LJ 65 (71) (DB).

(19) The application of the doctrine of natural justice depends upon the nature and the jurisdiction conferred on the concerned authority, upon the character of the rights of the person attacked the scheme and policy of the statute and other circumstances disclosed in the particular case. 1969 Lab IC 893 (894) (Mys).

(20) Strictly speaking, neither the provisions of the Evidence Act nor those of the Criminal Procedure Code apply to departmental enquiries, but some of those provisions which are based on rules of natural justice may be held to apply. If statements had been recorded in a regular police investigation under Chap. XIV of the Criminal Procedure Code, the delinquent officer should be given copies of those statements even though there was no regular criminal case, inasmuch as the spirit of Sec. 162 of that Code should be followed. Similarly, it there was a preliminary enquiry (not of a confidential nature) preceding the holding of a regular departmental enquiry, the delinquent officer should be given copies of statements made by witnesses during that preliminary enquiry. A 1959 Orissa 152 (155) (DB).

(21) The rules of evidence are not applicable to inquiries conducted by the Tribunal for disciplinary proceedings. Such Tribunals are required to follow only rules of natural justice in the conduct of inquiries. (1960) 2 Lab LJ 464 (466) (DB) (Andh Pra).

(22) Strict laws of evidence are not applicable to departmental proceedings. Violation of ancillary, incidental and unessential rules are not material. (1957) 2 Lab LJ 668 (Mad).

(23) Department not bound to supply copies of documents to accused officer in departmental enquiry, when inspection and extracts are permitted. A 1968 Delhi 85 (87) : 1968 Lab IC 495.

(24) Departmental enquiry — Denial of opportunity to public servant to cross-examine witnesses who gave evidence against him — Copies of documents to which public servant was entitled not supplied — Enquiry not in accordance with principles of natural justice and Article 311 (2) violated. **A 1961 SC 1623 (1628, 1629).**

(25) Appeal against dismissal from service — Personal hearing at appellate stage not required by Police Regulations or Rules of natural justice. A 1967 Cal 321 (323) : 1967 Cri LJ 738.

(26) Departmental enquiry against servant for misconduct — When delinquent servant is served with second notice to show cause against proposed punishment, delinquent has right to challenge not only question of punishment but also the finding of guilt — Hence to show that the finding does not follow from the evidence he has right to have access to the evidence if it has not already been supplied to him. 1968 Lab IC 584 (587) (Cal).

(27) It is the punishing authority who is to decide on the report of enquiring officer as to what action is to be taken against employee. How he arrives at the decision is no concern of delinquent. A 1965 Cal 557 (561).

(28) Departmental enquiry — Petitioner's witnesses not examined and certain records which he wanted enquiry officer to obtain were not summoned — Held, order being against principle of natural justice was void. 1968 Cur LJ 476 •• A 1967 Cal 29 (31).

(29) Admission by railway servant of illegal use of his privilege pass by his brother — Similar statement by brother to Ticket Examiner when detected — Brother's statement can be relied on without examining him — No violation of principles of natural justice. 1968 Lab IC 1535 (1538) (Cal).

(30) In the oral enquiry held under Rule 55, Civil Services (Classification, Control and Appeal) Rules, 1930 it is obligatory on the authority to record oral evidence led by the charge-sheeted officer if he so wants it. **A 1966 SC 269 (273, 274).**

(31) Right of public servant to be represented by counsel — Denial of opportunity to inspect documents — Rights of adjournment for cross-examining material witnesses — Breach of principles of natural justice. **A 1961 Cal 1 (13, 14, 15, 18, 19, 21) (SB).**

(32) Enquiry Officer should not rely on the statement of a person not examined at the enquiry, even though the delinquent officer has no strained relationship with the person giving the statement. A 1967 Madh Pra 91 (94) (DB).

(33) It is against all rules of natural justice to draw adverse inferences against a delinquent officer in a departmental enquiry on the basis of certain letters by withholding the writer of those letters from the witness box and thus denying the officer an opportunity to cross-

Articles 310 & 311 — Note 75 (c) (contd.)
examine the writer. ILR (1959) Cut 425 (435) (DB).

(34) Order of punishment is vitiated by taking into consideration the past punishment given to the servant when it was not intimated to him in the show cause notice that the said punishment will be taken into consideration in deciding the punishment against him thus not allowing him an opportunity to submit his explanation about it. A 1962 Tripura 15 (20).

(35) Show cause notice against proposed punishment — Previous conduct of officer taken into consideration — No notice given to petitioner that his previous conduct would be taken into consideration in inflicting punishment — Principle of natural justice held violated — Order of punishment held should be quashed. A 1960 Mys 159 (162) (DB) •• 1976 WLN (UC) 369 : 1977 SLJ 241 (Raj).

(36) If no enquiry had been held either under Rule 55 or under the provisions of the Public Servants (Inquiries) Act, 1850 or if the enquiry which was held was not held in consonance with the rules of natural justice delinquent is entitled to claim a thorough and sifting enquiry into the charges to enable him to clear himself. A 1956 Punj 58 (64) (DB).

(37) Charge of accepting illegal gratification from a firm — Petitioner not demanding production of books of accounts of firm — Held though books were not produced, there was no violation of principles of natural justice. A 1968 Delhi 26 (28) : 1968 Lab IC 24 (DB).

(38) Preliminary enquiry held ex parte — Enquiry officer not placing any reliance on preliminary enquiry — Held, there was no violation of principles of natural justice. A 1968 Delhi 26 (28) : 1968 Lab IC 24 (DB).

(39) Departmental enquiry — Complaint of misconduct against servant — Copy of complaint though demanded not furnished to servant — Assertion that complaint of personal misconduct was confidential document cannot stand in law. 1968 Lab IC 584 (586) (Cal).

(40) Departmental enquiry — Confidential reports — Use of — Government servant — Removal from service — Appeal to President of India — President reducing punishment — Amongst documents perused by President there being Confidential reports — Plea of use of adverse material without reasonable opportunity to explain — Confidential reports always communicated to Government servant who also has a chance to represent against adverse remarks — Use of confidential reports by President held was not adverse to Government servant and was proper. 1968 Lab IC 1116 (1121) (Delhi).

(41) Document on basis of which charges of misconduct were framed against servant not supplied to him for inspection — Plea that substance of complaint had been incorporated in statement of allegations is not tenable. 1968 Lab IC 584 (586) (Cal).

(42) Where Rule 1712 (2) of Railway Establishment Code, expressly prohibits the appearance of a professional lawyer before Enquiry Officer, action of Railway Department refusing accused officer such assistance cannot be said to vitiate the enquiry. A 1968 Delhi 85 (88) : 1968 Lab IC 495.

(43) In spite of several adjournments granted to delinquent to produce evidence in his defence, he failed to do so — Enquiry closed — No violation of rules of natural justice. 1966 Cur LJ 981 (982, 983) (DB) (Punj).

(44) Departmental enquiry against Railway servant — Proposal for punishment though not accompanied with findings of enquiry committee, is not defective when such findings are subsequently served upon the servant — There is no violation of either Article 311 (2) of natural justice. (1966) 12 Fac LR 169 (172) : (1966) 2 Lab LJ 290 (Cal).

(45) By proceeding on the basis of undisclosed personal knowledge on material point. Enquiring officer must be held to have prejudiced petitioner. (1965) 10 Fac LR 263 (269) (Cal).

(46) Departmental Enquiry — At no stage of inquiry delinquent was supplied by Government authorities with documents he had asked for and in respect of which inquiring officer had ordered production — Not contended by Government that documents are irrelevant — Evidence concluded without production of documents — Held, principles of natural justice were not observed and order of dismissal passed by inquiring officer was quashed. (1963) 1 Lab LJ 708 (Cal).

(47) It is obligatory on the authority concerned to record evidence in support of charges as well as evidence which charge-sheeted officer may lead in support of his plea and failure to hold such an oral enquiry is a serious infirmity depriving charge-sheeted officer of a reasonable and adequate opportunity of defending himself against charges. 1968 MPLJ 754 (756) (DB). (Held enquiry conducted was in contravention of mandatory provisions of Rule 3 of the rules framed under M. P. Local Government Act and order imposing punishment of reduction in rank was illegal and could not be sustained.)

(48) Departmental enquiries into charges of misconduct against Civil Servants — Principle that prosecutor cannot be judge is not applicable to departmental enquiries. A 1962 Madh Pra 372 (374).

(49) Departmental proceedings are subject to rules of natural justice. In departmental proceedings it is unnecessary to import the strict procedure applicable to judicial trials. But the procedure adopted is to a certain extent like a judicial trial. A 1958 Cal 470 (472) •• (1963) 67 Cal WN 966 (977).

(50) Superior official of delinquent acting as Chairman of Board of inquiry — Such official present during police investigation against delinquent — No personal animosity of official against delinquent nor pecuniary interest alleged — Held, from mere fact of official's presence at police investigation, he could not be held to have prejudged the issues or of having any personal interest in case and that there was no bias. A 1967 Madh Pra 81 (83) (DB).

(51) When an Enquiring Committee has the duty to come to a conclusion as to the guilt of delinquent upon an evaluation or assessment of evidence, it is absolutely necessary that the members of the committee should hear evidence of witnesses. (1964) 68 Cal WN 1112 (1115).

(52) Departmental Enquiry — Officer who ultimately decided the case did so on evidence recorded by his predecessor — No infringement of rules of natural justice, so long as such evidence was taken in the presence of person charged after giving him a fair opportunity to cross-examine those witnesses. A 1965 Mad 316 (317, 318) (DB) •• A 1970 Orissa 213 (214,

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215) : 1970 Lab IC 1504. (A 1961 Guj 63, Dissented from.)

(53) The fact that a particular officer held a preliminary enquiry before it was decided to hold a departmental enquiry against the delinquent officer does not debar him from conducting the departmental enquiry; nor can it be regarded as in any way indicative of bias against the delinquent officer. A 1963 Madh Pra 115 (117) (DB).

(54) An objection on the ground of prejudice to the holding of the departmental enquiry by an officer who first directs the alleged misconduct or irregularity must be raised as soon as the public servant receives the notice about enquiry. A 1963 Madh Pra 216 (218) (DB).

(55) Fact finding committee finding prima facie case against servant — Member of fact finding committee appointed chairman of enquiry committee — Held that from this it could not be held that the chairman had a closed mind — The charge of bias must not be too readily assumed but must be proved by the person alleging the same. (1964) 68 Cal WN 1112 (1114).

(56) Departmental enquiry — Dismissing authority figuring as witness — There is violation of natural justice. 1963 MPLJ 28 (31) : 1963 Jab LJ 94 (DB).

(57) When the report of the enquiry officer is itself made as one of the pieces of evidence on the basis of which the charge is sought to be proved, the enquiry officer may not be expected to hold the scales even or keep an independent and open mind. If the enquiry officer is to be examined as a witness, then there would be a gross violation of natural justice. (1967) 1 Lab LJ 455 (461, 462) (DB) (Guj).

(58) Collector acting as authority competent to award punishment — Collector subsequently appearing as witness in enquiry on basis of facts which had come to his knowledge before commencement of enquiry — There is violation of the rules of natural justice and disregard of all canons of fair play. A 1962 Madh Pra 15 (16, 17) (DB).

(59) It is one of the essential requirements of natural justice that no enquiry should be made behind the back of a petitioner and the evidence which is relied upon by the enquiring officer ought to be made available to the petitioner and a reasonable opportunity must be provided to him to say what he has to say in that regard. ILR (1967) Andh Pra 215 (222) (DB) °° 1972 Lab IC 478 (483, 484) (All) °° 1972 Lab IC 123 (124, 126) : 1972 Serv LR 718 (All).

(60) Natural justice — Enquiring officer himself examining defence witnesses in absence of delinquent officer and without issuing notice to him — Enquiry is opposed to natural justice and must be quashed. A 1966 Mad 203 (218, 219) : (1965) 2 Mad LJ 421 (FB) °° A 1960 Ker 294 (294).

(61) Dismissal of servant — Co-operative association — Managing Committee invested under bye-laws with power to dismiss Manager — Charges of misconduct against Manager — Enquiry into charges by Secretary, who had previously filed criminal complaint against Manager, in his official capacity — Enquiry is not biassed — Ultimate decision of dismissing Manager taken by Managing Committee and not by Secretary — Managing Committee cannot be said to have delegated its functions merely by deputing Secretary to enquire and report. A 1960 Madh Pra 273 (277) (DB).

(62) Punishment awarded to public servant in departmental proceeding — High Court setting aside punishment after investigating into charges on merits and not upon jurisdictional or other ground — Commencement of fresh proceeding against the public servant upon same allegations offends the principles of natural justice. A 1964 Madh Pra 155 (156) (DB).

(63) Mode of enquiry in appeal — Central Civil Services Rules, 1957 not contemplating personal hearing of appellant — Omission to hear appellant, held, did not violate rules of natural justice. A 1968 Delhi 269 (271, 272) : 1968 Lab IC 1402.

(64) Where the enquiry officer exhibited lack of impartiality, the enquiry was vitiated by a disregard of one of essential elements of natural justice. A 1966 Madh Pra 58 (60).

(65) Procedure of quasi-judicial body — Principles of natural justice — Requirements of, stated. A 1962 Ker 43 (47) (DB).

(65-A) Disciplinary enquiry — Delinquent found guilty — Reasons for the finding must be communicated to him. 1977 Raj LW 445 : (1978) 1 Serv LR 835.

(66) Reasonable opportunity to show cause does not necessarily include the right of personal hearing at every stage. A 1960 All 551 (556, 557).

(67) Order changing date of birth, of person in service — Is an administrative order involving civil consequences and has to be passed consistently with rules of natural justice. 1975 Lab IC 842 (Raj).

(68) Date of birth accepted and entered in service register according to horoscope — Correction in date of birth on basis of school register without giving opportunity to employer to show cause — Principles of natural justice have to be observed by holding an enquiry. A 1969 Ker 317 (319) : 1969 Lab IC 1476 (FB).

(69) Termination of services — Order involving punishment not depriving Government servant of any vested right to office — No question of following principles of natural justice arises. A 1970 SC 158 (161).

(70) Disciplinary proceeding — Prosecution not examining certain cited witnesses — Delinquent's prayer for attendance of such witnesses for examination as defence witnesses — Trial vitiates if prayer is not granted even if prayer is made at the hearing only. 1969 Lab IC 773 (776, 777) (Cal).

(71) Charge-sheet not mentioning the evidence on which it wishes to rely to show the stopping of work amounted to a strike — That the employee participated in strike assumed without giving him an opportunity to rebut the assumption — Principle of natural justice is violated. A 1959 All 614 (617).

(72) Where, without holding an enquiry, charges against the delinquent were decided as established mainly on the basis of evidence collected in a preliminary enquiry prior to framing of charges Article 311 was held to have been infringed. 1968 Lab IC 720 (721, 722) °° 1977 SLWR 487 : (1977) 4 Cal HC (N) 1014.

Articles 310 & 311 — Note 75 (c) (contd.)

(73) The officers whose cases are to be screened by the Committee constituted under Rule 8 of Punjab Service of Engineers Class I, P. W. D. (Irrigation Branch) Service Rules are entitled to an opportunity of hearing and if the same is not given, to them then the rules of natural justice and fair play are infringed. 1969 Lab IC 795 (799) : 1969 Cur LJ 30 (DB) (Punj).

(74) In a statutory appeal, the parties must be given a hearing and the order passed must be a speaking order. Where the appellate order is a cryptic one and the appeal is disposed of summarily, the order is liable to be set aside. A 1968 Assam 52 (53) : 1968 Lab IC 1396 (DB).

(75) Railway Establishment Code, Rule 1721 — Departmental enquiry — Delinquent officer has right to be assisted by another railway employee or official of trade union who is not a professional lawyer — Refusal on ground that he was not member of recognised trade union — Delinquent officer is prejudiced. A 1965 Cal 557 (561).

(76) Petitioner charged with receiving illegal gratification from a firm in Germany — Request to allow him to visit Germany to collect evidence for his defence refused — Dates fixed for enquiry not intimated — Defence and prosecution witnesses examined in his absence — Request to allow him to engage counsel to cross-examine prosecution witness who was a lawyer refused — Chairman of Board of Enquiry was already biased. **Held** : there was denial of natural justice. 1966 Cri LJ 353 (358) (Punj).

(77) The question whether principles of natural justice had been violated in not giving due and proper weight to findings of Criminal Court can only depend on the facts of each case. (1967) 1 Mad LJ 146 °° 1968 Lab IC 63 (65) (Mad).

(77-A) Dismissal of employee by Board of Secondary Education — Dismissal based on his conviction on a criminal charge in Court of law. Neither any disciplinary proceedings drawn up against him nor he was given opportunity of hearing against charges — Dismissal held, was violative of principles of natural justice and was illegal. 1970 Lab IC 325 (Cal).

(78) Where under the bye laws of Co-operative Bank registered under Co-operative Societies Act, the employees held their offices "at pleasure" and not during "good behaviour", the employees were clearly subject to dismissal at sole discretion of appointing authority and rules of natural justice had no applicability. A 1963 Madh Pra 298 (300) (DB).

(79) Railway Establishment Code R. 1712 (2) — Refusal of Inquiry Officer to adjourn inquiry to enable accused employee to have assistance of another railway servant as defence counsel, constituted denial of effective opportunity to employee to defend himself — Vitiated inquiry. A 1968 Delhi 85 (89) : 1968 Lab IC 495.

(80) Where the petitioner who was serving as a temporary Moharir was promoted to the post of temporary revenue clerk by the Commissioner but subsequently after two years the order of promotion was set aside behind the back of the petitioner by the Commissioner himself on representation made by the other persons who were not so promoted, the order of the Commissioner deserves to be quashed. (1966) 12 Fac LR 264 (270) (Cal).

(81) Junior given promotion overlooking his senior — Senior should be told grounds therefor. A 1965 Ker 108 (109) (DB).

(82) Dismissal of appellant, a Police constable — Findings of enquiry officer not communicated to him, orally told that it was proposed to dismiss him — No real attempt made to explain on what grounds findings proceeded and what the findings themselves were — **Held** : no due compliance with requirements of Article 311 (2). **1968 SLR 131 (134) (SC).**

(83) Disciplinary proceedings against delinquent for making allegations against superior authority — Enquiry by superior authority through one of his subordinates — Opportunity to be heard given not reasonable — Principles of natural justice violated. A 1964 Guj 139 (143 to 145) (DB).

(84) When the delinquent, in his reply to show cause notice, complained that there was no enquiry and he had no opportunity of defending himself, the authority (Government) ought to order a fresh enquiry and offer him reasonable opportunity. A 1964 Madh Pra 318 (320) (DB).

(85) Punishment awarded to public servant in departmental proceedings — High Court setting aside punishment after investigating into charges on merits and not upon jurisdictional or other ground — Commencement of fresh proceeding against the public servant upon same allegations offends the principles of natural justice. A 1964 Madh Pra 155 (156) (DB).

(86) Reversion of Government servant — Show cause notice as to reversion served on him after actual reversion — Principles of natural justice violated. A 1968 Punj 255 (264).

(87) It is a principle of natural justice that once a public servant is exonerated of a charge levelled against him after an enquiry, he should not, in the absence of any statutory rules to that effect be allowed to be vexed and harassed again on the same charges by an officer who is not even superior in rank to the one who originally exonerated him. 1967 Cur LJ 156 (164).

(88) Doctrine of double jeopardy has no application — Exercise of administrative power of taking disciplinary action even though it may have to be done judicially, could not be considered as exercise of judicial power of the State. ILR (1966) Guj 1030 (DB).

(89) Dismissal order set aside by Court not on merits but on ground that principles of natural justice were not observed — Fresh enquiry in respect of same allegations not illegal — No question of double jeopardy. A 1963 Manipur 28 (31, 32).

(90) Departmental enquiry against P. — Superior officer issuing instructions to Enquiry Officer to proceed in particular way — Held, that instructions to enquiry officer indicated that enquiry was not fair and officer was not unbiased. ILR (1963) Andh Pra 308 (315) (DB).

(91) Enquiring officer placing burden of establishing his innocence on the public servant

Articles 310 & 311 — Note 75 (c) (contd.)
concerned — Action of officer held was opposed to rules of natural justice. A 1962 Orissa 78 (80, 81) (DB).

(92) Where the petitioner was at no stage called upon to explain why punishment of suspension should not be imposed upon him on the ground that his antecedent record was adverse to him, order of suspension partly based on that ground could not be sustained as it amounted to contravention of rule of natural justice. A 1962 Mys 84 (86) (DB).

(93) Inquiry against Government Servant — Finding against him based on evidence recorded in enquiry against other delinquents — Opportunity to meet evidence denied — Violation of natural justice — Dismissal is illegal. 1968 Lab IC 1485 (1486) (Ori) (DB).

(94) Enquiry by Domestic Tribunal of Life Insurance Corporation against its employee — Principles of natural justice not followed — Enquiry vitiated — Dismissal pursuant to such enquiry illegal. 1968 Lab IC 1421 (1424, 1425) (Mad).

(95) To charge a man with a definite misconduct, to ask him to show cause against that definite misconduct, and thereafter to find him guilty of another misconduct which the delinquent was not called upon to explain is violative of principles of natural justice. (1966) 12 Fac LR 66 (69) (Cal).

(96) Departmental enquiry against servant for misconduct — Court would never encourage a servant or anybody else to commit act of indiscipline or other misconduct but there must be fair enquiry consonant with natural justice before delinquent may be punished on finding that such charge has been established. 1968 Lab IC 584 (586) (Cal).

(97) Delinquent not called upon to meet specific charges — No opportunity given to look into copies of documents and records — Held: principles of natural justice were violated. 1968 BLJR 815 (823) (DB).

(98) Departmental enquiry against police officers — Departmental finding against officers on basis of their admissions made prior to commencement of inquiry — Copies of admissions and report submitted after preliminary in quiry, not supplied to officers. Held, there was violation of principles of natural justice. A 1962 Assam 34 (36, 37) : 1962 (1) Cri LJ 265 (DB).

(99) Apart from Article 311, the rules of natural justice require that before reducing an employee to a lower scale of pay and ordering him to refund the alleged overpayment with retrospective effect, an opportunity ought to be afforded to him to show cause against the proposed reduction or cut in his pay. 1969 Cur LJ 4 (7) (Punj).

(100) Petitioner, a Headmaster, appointed by the then Managing Committee of School — Managing Committee has jurisdiction to dismiss him — Petitioner is only a private employee of an aided Institution and not a Government employee — Article 311 not attracted — Managing Committee not a statutory body and has no statutory duties — No obligation to act judicially in dismissing him. ILR (1966) 18 Assam 98 (108, 110) (DB).

(101) Petitioner neither answering charges levelled against him nor participating in enquiry against him — But after completion of enquiry asking for copies of certain documents relied on in enquiry — Held there was no violation of principles of natural justice in not complying with request for copies of documents made after completion of enquiry. A 1966 Cal 485 (486).

(102) Misconduct by Police Officer in investigation of crime — Enquiry into, entrusted to D. S. P. — No allegation that D. S. P. was in anyway biased or prejudiced — No violation of principles of natural justice. A 1965 Mad 103 (107) (DB).

(103) Petitioner boycotted enquiry and the enquiry proceeded ex parte — Notice to show cause against proposed penalty issued — Too late a stage to seek opportunity to show cause against charges themselves. (1966) 12 Fac LR 169 (179) : (1966) 2 Lab LJ 290 (Cal).

(104) Departmental Enquiry — Time of 48 hours given to delinquent to submit his explanation to charges — Petitioner not asking for more time nor complaining about it — It is too late for him to contend in writ proceedings that rules of natural justice were violated. A 1963 Cal 116 (121).

(105) The mere fact that an enquiry was conducted by an officer subordinate to punishing authority, held did not violate the enquiry — Existence of bias or prejudice against employee not alleged. A 1968 Delhi 269 (271) : 1968 Lab IC 1402.

(106) Where in answer to a notice to a public servant to show cause why he should not be dismissed from service the public servant himself puts forward his past record of service with specific instances and asked them to be considered by the dismissing authority, it is not open to him to turn round and say subsequently that the authority should not have considered them. A 1958 Cal 356 (360).

(107) Quasi-judicial body — Departmental inquiry against Government servant — Servant not asking for opportunity to cross-examine witnesses — No violation of natural justice. A 1962 Ker 43 (47) : 1961 KLT 486 (DB).

(108) Removal of railway employee for violating Rules 329 and 79 of General Rules — Petitioner supplied with all documents before submitting his representation — Fact-finding body arriving at certain findings — Reasons therefor not supplied to delinquent, finding being tentative — No denial of natural justice. 1969 Lab IC 773 (776) (Cal).

(109) Appellant a temporary Civil Judge — Informal enquiry against his conduct in having relations with a young girl — High Court recommending termination — Rule 12 of M. P. Government Servants (Temporary and Quasi-permanent Service) Rules 1960, did not require that a show cause notice should be given to the appellant — No violation of rules of natural justice. (1969) 1 SCWR 1115.

(110) Services of temporary servants or for a fixed period can be terminated at the end of period or at the pleasure of the master without assigning any reason. The rules of natural justice therefore do not apply to the case of a temporary servant. 59 Pun LR 185 (187).

(111) Fresh enquiry for same offence — Order of removal without giving opportunity to defend — Order withdrawn reserving right to direct enquiry — Fresh enquiry on same grounds not hit by principle of double jeopardy. 66 Pun LR 1227 (1229).

(112) Enquiring officer himself getting and gathering all material against the accused officer — All proceedings held in the presence of

Articles 310 & 311 — Note 75 (c) (contd.)
the accused official in conformity with judicial norms — Accused officer informed what material is likely to be used against him — No violation of rules of natural justice. (1966) 68 Punj LR 174 (178).

(113) Departmental inquiry — Natural justice — Fair opportunity — Observations by High Court on report of Enquiry Officer or on reply to show cause notice, are privileged and need not be disclosed to Officer proceeded against. A 1965 Bom 156 (167, 168) (DB).

(114) Rules of natural justice do not require that an enquiry against a person necessarily be held at spot. A 1967 Pat 160 (165) (DB).

(115) Departmental inquiry against public servant on charge of general reputation for dishonesty — Evidence of touring officer relied upon — Civil Court will not interfere — Principle of natural justice not violated. A 1963 Orissa 73 (81, 82) (DB).

(116) Natural Justice — Non-observance of rules — Every non-observance will not constitute violation of natural justice — Only when non-observance prejudices the officer in his defence, then it can be said that principle of natural justice was not observed. A 1963 Manipur 51 (56) ** A 1976 SC 2037 (2039).

(117) Where no prejudice having been caused by not allowing the Government servant to lead his evidence in the enquiry and no material having been collected behind his back the order of dismissal could not be quashed. (1969) 3 SCC 392 ** (1970) 1 Lab LJ 356.

(118) Appointment of nominees of and subordinate to Managing Director of Bank as enquiry officers is not in violation of rules of natural justice. A 1962 Punj 355 (358).

(118A) Refusal of petitioner to co-operate and fully participate in departmental inquiry would not show denial of proper opportunity to defend or violation of rules of natural justice. A 1960 Punj 646 (652).

(119) Charge-sheet — Indication of proposed punishment in charge sheet does not vitiate departmental enquiry or indicate any bias against the delinquent officer — Enquiry Officer, after departmental enquiry is entitled to reach any conclusions. A 1967 Madh Pra 91 (93) (DB) ** 1976 Lab IC 1183 (Cal).

[See however (1974) 2 Serv LR 466 (Cal). (It it appears even on the basis of the charge-sheet itself that the disciplinary authority has failed to keep its mind open in regard to the alleged offence committed by the delinquent employee and that such employee is liable to a particular punishment, the principles of natural justice are violated and the charge-sheet becomes invalid.) ** 1969 Cur LJ 484 (Punj). (Show cause notice stating punishment — Such a combined notice is in violation of principles of natural justice and cannot form basis of departmental enquiries or punishment as a result thereof — In such cases, the show cause notice, the enquiry and the order of dismissal are invalid.)]

(120) Departmental instructions not strictly complied with — Inference is not necessarily that action taken by Government against petitioner is mala fide. A 1963 Punj 298 (317, 318) (DB).

(121) Departmental enquiry against — Civil servant — Right to be represented by lawyer — Denial of legal help is no violation of Art. 14 nor was it denial of natural justice. A 1959 Orissa 152 (154) (DB).

(122) The statement that if orders made in regard to the Government servant are otherwise legal, the fact that the same have been passed because of ill will or malevolence of executive authority will not vitiate or render the same illegal appears to be an opinion in relation to civil injuries or torts. A 1963 Punj 298 (318, 319) (DB).

(123) Anything that the government servant did to create circumstances themselves from which an inference is sought to be drawn that thereby the Chief Minister has become hostile to him cannot be available to the government servant because if that was so any Government servant anticipating an enquiry against himself will start making allegations, in this manner, founded or unfounded just to escape an enquiry. A 1963 Punj 298 (317) (DB).

(124) Railway servant not objecting to enquiry against him conducted by particular officer though he was aware of his right — He cannot in writ petition contend that enquiry was biased. 1965 Ker LT 554 (557).

(125) Removal of Pradhan of Gaon Sabha under Section 95 (1) (g) (iii) of U. P. Panchayat Raj Act (26 of 1947) — Regular enquiry not contemplated in Act — Petitioner had not demanded opportunity to be heard and to defend himself — Explaining to petitioner, charge framed against him was sufficient compliance with principles of natural justice and provisions of Act. A 1965 All 370 (371, 372) (DB).

(126) An appointment secured by furnishing false information is invalid. Termination of such appointment is merely a declaration that there has been no appointment of the person concerned in the past, observance of natural justice is not necessary. (1979) 2 Serv LR 408 (411, 412) (DB) (Ker).

(127) Reasonable opportunity of showing cause against dismissal — Enquiry Officer, disciplinary authority and appellate authority independently considering material on record and holding officer guilty — No principle of natural justice violated. **A 1970 SC 1255 (1259 to 1261) : 1970 Lab IC 1056.**

(128) Domestic enquiry — Accusations of misappropriation and misdemeanour against the Vice-President of Co-operative Society — Appointment of such officer as Inquiry Officer to inquire into charges offends principles of natural justice. 1970 Serv LR 7 (DB) (Mys).

(129) Departmental enquiry into misconduct of bus-conductor in accepting fare from the passenger and not issuing a ticket. Finding of the Enquiry Officer about misconduct of the bus conductor based on other evidence and not merely the statement of the passenger. Passenger not called for examination — No violation of rules of natural justice. (1980) 1 Serv LR 246 (251) (Delhi).

(130) Opportunity given to explain conduct not availed of — Principles of natural justice not violated. **A 1974 SC 1896 (1897) ; 1974 Lab IC 1276.**

(131) Principles of natural justice — Adverse remarks with an interdict that no correspondance would be entertained on the subject — Interdict is a violation of principles of natural justice. (1973) 1 Serv LR 989 : 1973 Cur LJ 437 (Punj).

(132) Rules of natural justice — Violation of — Person holding the office of dafadar under Village Chowkidari Act — Dismissal without

Articles 310 & 311 — Note 75 (c) (contd.)
holding an enquiry in his presence — Use of statements recorded behind his back — Rule of natural justice is violated. ILR (1974) 53 Pat 443 : 1973 BLJR 558 (Pat).

(133) Natural justice — Order of discharge of a primary school teacher by Chairman of Zilla Parishad — Order passed without enquiry and without observing principles of natural justice — Order is vitiated and is liable to be quashed under Article 226. 1970 Lab IC 472 (473, 474) : 35 Cut LT 1276 (DB).

(134) When there is a dispute as to what transpired during the departmental enquiry such as whether the delinquent Government servant was given opportunity to examine documents asked for by him the report of the Enquiry Officer should generally be taken to be correct. 1975 Lab IC 1647 (1650) (DB) (Cal).

(135) All that Regulation 113 of the Regulations framed under the Electricity (Supply) Act (1948) does is to make an employee liable to be discharged summarily without following the elaborate procedure laid down in the Gujarat Electricity Board (Conditions, Discipline and Appeal) Rules but that does not completely take away the minimum compliance with the principles of natural justice. Even in summary proceedings it is possible to follow the rules of natural justice. (1978) 2 Serv LR 709 (712, 713, 714) (Guj).

(136) Departmental inquiry — Record of enquiry gutted in fire — Disciplinary authority issuing show cause notice only on basis of enquiry report — No other material available — Record not reconstructed — Notice held invalid. 1978 Lab IC 1032 (1033, 1034) (Him Pra).

(137) Order of recalling the petitioner from the training course passed without giving show cause notice to petitioner, held violated principles of natural justice. (1977) 2 Serv LR 433 (442, 443) (IIP) : 1978 Sim LC 66.

(138) A duty to observe rules of natural justice and to comply with rules and regulations will be presumed to exist in the case of statutory bodies and the failure to observe principles of natural justice or to comply with the relevant regulations whilst passing an order of dismissal will entail a declaration by a court that the order of dismissal is null and void. (1977) 1 Serv LR 30 (35) (Guj) (DB).

(139) Pendency of disciplinary proceeding — Withholding of promotion or by non-consideration of delinquent's case for promotion would amount to imposition of punishment violating both the letter and spirit of Art. 311. 1978 Serv LJ 295 (296) : (1979) 1 Serv LR 50 (AP).

(140) Reasonable opportunity — Delinquent's contention that he should first be paid at certain pay scale before he could attend enquiry — Request rejected — Failure of delinquent to attend and participate at all hearings — Enquiry held ex parte — Difference in salary asked for and paid only Rs. 30/- — Not enough ground to abstain from enquiry — Delinquent cannot contend that enquiry was vitiated for want of reasonable opportunity to defend. (1977) 1 Serv LR 696 : 1977 SLJ 182 (Raj).

(141) Dismissal of Police constable, order passed by State Government on the basis of unstated charge, without giving any opportunity to defend him, order held violative of the principles of natural justice. 1979 Raj LW 469 (477).

(142) Delay in initiating disciplinary proceedings — May itself constitute denial of reasonable opportunity to defend. 1980 Lab IC 89 (91) : (1979) 20 Guj LR 497 : (1979) 55 FJR 140.

(143) Duty of Disciplinary authority under Rule 14 (2) Railway Servants (Discipline and Appeal) Rules (1968) — Order of removal of employee passed by Disciplinary Authority without considering circumstances is bad in law. (1977) 2 Serv LR 81 : 1977 Lab IC (NOC) 75 (All) (DB).

(144) Natural justice, principles of — Administrative Tribunal, after enquiry into charges, must submit its report with entire record to State Government — Withholding of delinquent's explanation therefrom, held, improper and caused prejudice to his case. 1975 Lab IC 511 (512) (All).

(145) Rajasthan Civil Service (Classification, Control and Appeal) Rules 1958, Rule 176 (10) — Show cause notice against proposed penalty issued directing delinquent to submit reply within period given — Reply submitted within given period but through proper channel not reaching authority within time given — Authority passing order without considering representation made — Order, held was vitiated. (1977) 1 Serv LR 696 : 1977 SLJ 182 (Raj).

75 (d). Bias and bona fides. — See also Note 73 — (1) The authorities entrusted with departmental enquiry are bound by the principles governing the "doctrine of bias." The principles are: (i) no man shall be judge in his own cause: (ii) justice should not only be done but manifestly and undoubtedly seem to be done. A 1969 Assam 1 (3).

(2) The rule that the bias vitiates the finding is a rule of natural justice. A 1960 Assam 141 (149) (DB).

(3) The officer making the departmental enquiry into the charges against the civil servant or passing final order against him must be free from bias. A 1961 All 45 (47, 48) (**Reversed** on another point in A 1963 All 94.) ** A 1957 Andh Pra 414 (417) (DB) ** A 1956 Cal 662 (666) ** A 1956 Punj 58 (63) (DB) ** A 1956 Vind Pra 14 (15) ** A 1955 Pepsu 172 (176) ** A 1954 Vindh Pra 50 (53).

(4) Members of fact-finding committee also acting as members of departmental enquiry committee — **Held** amounted to prejudging the issue. ILR (1973) 2 Delhi 714.

(5) Departmental enquiry — Appointment of Enquiry Officer — Appointment of the person who had made initial complaint against delinquent is not proper. 1975 Lab IC 682 (684) (All).

(6) The enquiring officer must not be one who has already formed an opinion about the guilt of the civil servant. A 1956 Punj 102 (105) ** A 1956 Vindh Pra 14 (15, 16) ** A 1954 Cal 335 (337). ** 1971 Lab IC 1019 (1022) (Delhi).

(7) Mere fact that delinquent has been charge-sheeted does not mean that officer framing charge has expressed any adverse opinion against delinquent. 1977 Lab 1254 (1258) (J and K).

(8) Disciplinary proceedings on basis of proceedings of Court of enquiry under Army Act — Likelihood of bias of Enquiry Officer — Disciplinary proceedings held void being contrary to principles of natural justice.

Articles 310 & 311 Note 75 (d) (contd.)
(1978) 2 Kant LJ 66 : 1978 Lab IC (NOC) 145.

(9) Simply because the enquiring officer is in subordinate position to officer framing charge, it cannot be said that he would be influenced by the latter and sit with a bias. A 1967 All 384 (389) : (1968) 2 Lab IC 586.

(10) Bias of the enquiring authority is, fatal to its decision and the position is not different where only one of those constituting the tribunal is shown to have prejudged the issue. A 1958 Andh Pra 636 (637) : (1958) 2 An WR 281.

(11) The mention of the proposed punishment in the charge-sheet itself is not per se indicative of bias of the enquiry officer — The enquiry will be vitiated if bias is established from other facts de hors the indication of the proposed punishment in the charge-sheet. 1974 Lab IC 296 (301) : ILR (1972) Cut 294. (A 1964 Mad 375 and (1967) 2 Andh WR 121 and 1968 Lab IC 735 (Cal) and 1970 Lab IC 1090 (Punj), **Dissented from.)** ** 1976 Lab IC 1183 (1186) (Cal) ** 1974 Lab IC 1262 (1265) : (1974) 1 Ser LR 461 (Pat). ** A 1970 Andh Pra 114 (118). (In order to obviate any allegation of bias or prejudgment, it is always best for the Enquiry Officers to avoid indicating punishment in the charge.)

[**See However** 1970 Lab IC 1090 (1092) (Punj). (The punishing authority while serving a charge-sheet, cannot propose the punishment as if the charges had been proved. The charge-sheet is liable to be quashed in such a case).]

(12) Disciplinary proceedings against public servant on charges of serious misconduct, misappropriation of Government money, neglect of duty etc. — Prior knowledge of enquiring officer of facts about such charges — Bias cannot be alleged. A 1967 Pat 43 (46) (DB).

(13) Administrative order of suspension passed by authority — No question of bias arises in regard to such order. A 1963 Punj 298 (318, 319) (DB).

(14) Departmental Enquiry — Decision to revert taken first — Enquiry for the purpose held next — Bias of Enquiry Officer — Reversion not valid. A 1976 Kant 144 (145).

(15) Biased — Not desirable that papers concerning enquiry should be dealt with by Secretary to Government against whom accused Officer has made personal allegations. 1975 Lab IC 76 (83) : (1974) 2 An WR 1.

(16) Where an enquiry is conducted by a person who was a witness in the case and against whom the delinquent employee had made a complaint in writing the enquiry cannot be said to be free from bias and it would be against the principle of natural justice inasmuch as the person cannot be a judge in his own cause. (1973) 3 Sim LJ 184 (Him Pra).

(17) If an Enquiry Officer does not make use of the material in a private enquiry in the case without putting it to the Officer charged, the enquiry proceedings cannot be said to be vitiated on ground of violation of principles of natural justice. (1971) 2 APLJ 82.

(18) Preliminary Enquiry — Report of Enquiry Officer — Consideration by Governor himself desirable in case of apprehension of bias on part of Minister. (1974) 2 Serv LR 279 : 1975 Lab IC 76 (83) : (1974) 2 An WR 1.

(19) Bias — Expression of opinion by enquiry officer in charge-memo that delinquent had abused his position and brought discredit to department indicates bias or at any rate fear or apprehension in mind of delinquent that he had no hope or chance of fair trial — Proceedings, held, were vitiated. A 1970 Andh Pra 114 (116, 117) : (1970) 2 Andh LT 314.

(20) Where extension of time to file defence was not granted even though the reason for request was genuine, held, there was no dispassionate and impartial enquiry. 1974 Serv LWR 506 : ILR (1974) 296 (Him Pra).

(21) Bias to vitiate the inquiry must have existed prior to the inquiry. (1971) 2 Serv LR 240 (Delhi).

(22) The fact that the punishing authority considers the report and comes to his own conclusion would not cure the defect attached to the enquiry if the enquiry has been conducted by an officer having bias against the charged officer, for the punishing authority acts upon the report of the enquiry conducted by such an officer, and the entire proceeding would be vitiated as its foundation is itself vitiated by the bias of the enquiry officer. (1972) 2 Mad LJ 103 : (1972) 85 Mad LW 177.

75 (e). Procedure.— (1) The procedure contemplated in an enquiry against a public servant under Article 311 of the Constitution of India is (1) to inform the delinquent of the charges levelled against him and the allegations on which the charges, are based, and (2) to provide an opportuniy for the delinquent to cross-examine, to examine himself and to adduce defence evidence, and (3) to afford an opportunity to make representations as to why the proposed punishment should not be inflicted on him. The delinquent should be given a reasonable opportunity to show cause twice before a punishment is inflicted. When the charges are enquired into he should be given a reasonable opportunity to defend himself and again when after an enquiring authority has come to its conclusion on the charges and when the question of proper punishment to be awarded is being considered. (1966) 79 Mad LW 422 (423) (DB) ** A 1963 Orissa 73 (76, 77) (DB). ** (1974) 2 Cut WR 764. (Notice of enquiry not served as delinquent was overstaying leave — No excuse for conducting enquiry ex parte.)

(2) There is no set form for disciplinary enquiries. In some cases oral evidence may have to be led when witnesses are called to give evidence and are offered for cross-examination. But in other cases that may not be the appropriate mode of enquiry. The inquiry officer is however not entitled to make a private inquiry behind the back of the delinquent officer on a charge framed against him and arrive at his finding on the basis of that private inquiry. **A 1974 SC 1589 (1594, 1595) : 1974 Lab IC 1010 ** 1977 Lab IC 1125 (Bom) (Held, a fair**

Articles 310 & 311 Note 75 (e) (contd.)
opportunity was given to him and therefore the enquiry was not vitiated.)

(3) As a general rule, the delinquent should not be interrogated before some witness or witnesses are examined in support of the charge. The reason is that, in order to be consonant with natural justice, a disciplinary inquiry should not be in the nature of an inquisition. To the above general rule, an exception has been engrafted namely where an interrogation of the delinquent at the beginning of the inquiry may be to his advantage, by way of explaining an admission made by him or when the accusation is based on matters of record. Railway Establishment Code does not lay down anything contrary to the foregoing principle. A 1970 Cal 131 (133): 1970 Lab IC 389.

(4) Disciplinary proceedings against a civil servant cannot be equated completely to judicial trials and rules of procedure applicable to judicial trials need not be applied in toto to such proceedings. A 1962 Tripura 15 (16).

(5) Although it is a very proper thing for an enquiring authority to record the evidence produced in support of the charges or at least its substance so that the effect of the evidence or its purport cannot be either forgotten or misunderstood and although in a proper case the omission or neglect to record such evidence might vitiate the enquiry and make it ineffective it cannot be asserted that no punishment can be imposed upon a person holding a civil post unless the imposition of that punishment is preceded by an enquiry in which the evidence or its substance is reduced to writing. (1966) 2 Mys LJ 97: (1966) 7 Law Rep 302.

(6) Central Civil Services (Classification, Control and Appeal). Rules (1965), Rule 14 (2) — Power of disciplinary authority to make enquiries or appoint Enquiry officer — Disciplinary authority apprehending grounds for enquiring into the charges — Appointment of enquiry officer immediately after issuance of charge-sheet — Not improper — Disciplinary authority need not wait till charge-sheet is delivered to delinquent servant and his reply is received — But from practical point of view, it is desirable to wait as there is possibility that charges may be disposed on satisfactory reply to them. (1979) 3 Serv LR 523 (525) (Delhi).

[**See However** 1978 Lab IC 1530 (1531) (Orissa). (Disciplinary proceedings — Appointment of enquiry officer — Cannot be made without affording the delinquent opportunity to submit his statement of defence, in view of Rule 15 (4) of Orissa Civil Services (Classification, Control and Appeal) Rules (1964).)]

(7) A regular departmental enquiry takes place only after the charge-sheet is drawn up and served upon the delinquent and the latter's explanation is obtained. **A 1980 SC 840 (843, 844): 1980 All LJ 358.**

(8) Where in an enquiry against the conduct of a police officer, witness was examined after the close of the case but the officer was given an opportunity to cross-examine him, there cannot be any grievance on this ground. A 1960 All 618 (620): 1960 Cr LJ 1290 (DB).

(9) In preliminary enquiry the explanation of the Government servant may be taken and documentary and even oral evidence may be considered. **(1967) 1 Lab LJ 718 (721) (SC).**

(10) Once specific charges, involving such a serious punishment as dismissal, are framed against a public servant and he is called upon to submit his explanation the enquiring officer must first hold an enquiry if the delinquent servant denies the charges. (1960) 28 Cut LT 133 (134, 135, 136) (DB).

(11) Under Rule 23 of the Madras Civil Services (Classification, Control and Appeal) Rules, the State Government, as an appellate authority, has no power in appeal against the punishment imposed on a delinquent officer to revive the charges abandoned by the authority competent to punish the delinquent officer, as not held proved and to find the officer guilty thereof and to award him heavier punishment. A 1963 Mad 14 (16) (DB)

(12) Departmental enquiry against Government servant — Kerala Civil Services (Classification, Control and Appeal) Rules, 1957, coming into force after close of enquiry but before final order in enquiry — Rule promulgated after close of enquiry does not apply to enquiry. A 1962 Ker 43 (47) (DB).

(13) Departmental enquiry — Charges relating to 1963-64 — Enquiry entrusted to Mysore State Vigilance Commissioner — Vigilance Rules framed subsequently in 1965 — Enquiry under Vigilance Rules, 1965, held valid — No vested right to procedure. A 1968 Mys 296 (301) (DB).

(14) A departmental enquiry should be in accordance with rules of natural justice and if such rules are substantially followed and no prejudice is caused to the concerned officer a mere failure to observe a particular rule should not be enough to quash the enquiry. (1961) Raj LW 104 (106) (DB).

(15) Civil Service — Bihar Government Servants' Conduct Rules (1956), Rule 15 (5) — Rule applied to transactions prior to coming into force of the Rules — There is no illegality. A 1967 Pat 43 (48) (DB).

(16) The fact that the Collector of Baroda did not follow the instructions given in the Manual prepared by the Government of Bombay containing instructions for officers holding departmental inquiries, is not material as the Manual does not consist of statutory rules but merely consists of departmental instructions. A 1962 Guj 197 (200): 3 Guj LR 492 (DB).

(17) In cases governed by Art. 311 the question of indicating the punishment does not arise when charges are to be enquired into. The procedure adopted in indicating the penalty in the memorandum of charges therefore offends Art. 311 and also contravenes G. O. Ms. No. 4730, Home, dated 6th November, 1950. (1967) 1 An WR 156 (158).

(18) Madras Services Manual, Vol. 1. 1954, Rule 17 — Disciplinary Action — Only punishing authority can initiate and conduct enquiry proceedings — **Held**, District Agricultural officer had no authority to initiate

Articles 310 & 311 — Note 75 (e) (contd.)
proceedings against Agricultural assistant. (1967) 2 An WR 253 (256) (DB).

(19) Under Rule 31-A of Fundamental Rules any error or mistake in the appointment or promotion could only be corrected before the authority decides to confirm the incumbent in the particular post in question — Once a confirmation order is made that confirmation could only be interfered with by applying the procedure indicated in Article 311. A 1968 Assam 18 (19): 1968 Lab IC 919 (DB).

(20) Disciplinary Proceedings (Administrative Tribunal) Rules (1951), Rule 3 (4) (before its amendment in 1955) — Sub-r. (4) is mandatory — Amendment in 1955 making sub-r. (4) discretionary is not retrospective — Dispensation of assistance of assessor during enquiry against civil servant is without jurisdiction — Findings against and dismissal of civil servant deserve to be set aside. A 1960 Orissa 58 (60, 61) (DB).

(21) Disciplinary Proceedings (Administrative Tribunal) Rules, 1951, Rule 3 (4) (as amended in 1955) — Tribunal conducting proceedings without aid of assessor — No direction to contrary by Governor — Proceedings not invalid. A 1965 Orissa 183 (186, 187) (DB).

(22) Enquiry officer orally hearing parties and giving findings without recording any evidence — Government setting aside his report and appointing another officer unconnected with the office of the delinquent servant and accepting his findings — Order of Government held was within its powers and no mala fides could be attributed. A 1969 Manipur 36 (40): 1969 Lab IC 561.

(23) When notice to show cause against the proposed punishment is given to the delinquent in accordance with the requirements of Rule 10 (1) and Article 311 (2) of the Constitution, Rule 10 (2) enables the Governor to consult the Tribunal, if necessary, in such manner as he may deem fit before passing the final order. It is not mandatory on the part of the Governor to always consult the Tribunal before passing the final order. Where the Governor did consult the Tribunal there is no provision in the rules which makes it necessary for the Governor to supply a copy of the opinion of the Tribunal to the delinquent. 1974 Lab IC 1471 (1475) (All).

(24) Although in a case of departmental enquiry if the enquiring authority has the duty to come to a conclusion as to the guilt of the delinquent upon an evaluation or assessment of the evidence it is entirely necessary that he should be the person who should hear the evidence of the witnesses but the correct test to be adopted is whether the procedure adopted by the Inquiry Officer has led to any prejudice or not. A 1963 Raj 203 (207).

(25) The right given to a charge-sheeted officer to cross-examine the departmental witnesses or examine his own witnesses can be legitimately examined and controlled by the enquiry officer. So as to prevent its proceedings being unduly or deliberately prolonged. **A 1966 SC 269 (274).**

(26) An enquiry cannot be considered to be open to challenge on the ground that procedure laid down in Evidence Act for recording evidence or in Code of Criminal Procedure for trial of offences has not been strictly followed. A 1969 Delhi 145 (147) : 1969 Lab IC 539 (DB).

(27) Government servant — Departmental enquiry — Proceeding to be followed — Evidence taken in absence of servant — Procedure not violative of natural justice. A 1962 Ker 43 (45) (DB). (A 1960 Ker 63, **Dissent. from.**)

(28) Procedure — Where a departmental enquiry is after recording of evidence of a few witnesses, conducted by another officer, refusal by the officer to start the enquiry de novo does not vitiate the enquiry. A 1963 Punj 90 (91, 92).

(29) Procedure — U. P. Police Regulations, Regn. 490 (5) — Departmental enquiry — Discretion to refuse to call defence witness — High Court will not interfere with the exercise of that discretion so long as it is not exercised arbitrarily or in an unjudical manner. A 1958 All 607 (608) (DB).

(30) Article 311 does not in terms require that the authority empowered under the provision to dismiss or remove an official should itself initiate or conduct enquiry proceeding for dismissal or removal of the officer. The only guarantee given to a civil servant is that he shall not be dismissed or removed by an authority subordinate to that by which he was appointed. Thus the powers to hold an enquiry conferred on the Superintendent of Police under Regns. 228 and 229 of the Central Provinces and Berar Police Regulations are not violative of Article 311. **1971 MPLJ 363 : 1971 Lab IC (N) 5 (SC).**

(31) Enquiry against delinquent officer — Change of personnel of enquiring officer due to transfer — Delinquent officer is not entitled to de novo enquiry as of right in absence of rule. **A 1966 Mad 203 (215, 216, 217) (FB).**

[**See however** (1971) 1 Serv LR 507 : (1972) 1 Andh WR 1. (The advantage of the observation of the demeanour of the witnesses is lost when the report of enquiry is compiled by another officer (successor in office), who had no occasion to see the witnesses concerned and watch them when they were giving evidence. It is an irregularity that prejudices the interests of the delinquent servant.) ** 1971 Lab IC 393 (394). **(Overruled** on another point in A 1977 SC 629). (Enquiry against public servant started by Commissioner of Ambala Division before Punjab Reorganisation Act — Punishment imposed by Commissioner of Jullundur Division after Punjab Reorganisation Act came into force is without jurisdiction and void — Commissioner at Jullundur could not act on report of previous Enquiry Officer — Fresh enquiry was necessary — **Held** further that Order of Financial Commissioner, Revenue, Punjab confirming on appeal the order of Commissioner of Jullundur Division also fell through.)]

(32) Under the Constitution it is the High Court that could direct an enquiry against a subordinate judicial officer and appoint one of the Judges as the enquiry officer, but according to the law in force in

Articles 310 & 311 — Note 75 (e) (contd.)
Hyderabad on the relevant date, it was the Administrative Bench that could hold the enquiry or direct it to be held, by one of the Judges. Since the appointment of the enquiry officer in the instant case, was admittedly not by the Administrative Bench the enquiry is wholly unauthorised, and the report which formed the basis is without jurisdiction. (1969) 2 Andh WR 79 (92) (DB).

(33) Though the Tribunal Rules by their own force, may not apply to officers of the Judicial Service because they are officers under the administrative control of the High Court by virtue of Article 235, nevertheless as they are also entitled to the protection of Article 311, there could be no legal bar if the High Court applies the provisions of the Tribunal Rules to the delinquent officer while deciding to hold the departmental enquiry. A 1965 Orissa 183 (186) (DB).

(34) Enquiry officer has to decide the case independently without being influenced in any manner by the remarks of some other officer. It is not permissible for the Government to send the charge-sheet and the explanation to the Collector and ask for the remarks and act thereon. It is the Government which alone must apply its mind to the facts and circumstances of the case. ILR (1967) Andh Pra 215 (219, 220) (DB).

(35) Procedure followed in respect of main charges but not in respect of minor additional charges — Entire proceedings are not vitiated. A 1963 Orissa 73 (82) (DB).

(36) Even where the Government does not intend to take action by way of punishment against a temporary servant on a report of bad work or misconduct, a preliminary enquiry is usually held to satisfy Government that there is reason to dispense with the services of the temporary employee. **(1967) 1 Lab LJ 718 (721, 722) (SC).**

(37) Even in a case where a formal departmental inquiry is initiated against a temporary Government servant it is open to the authority to drop further proceedings in the departmental enquiry and to make an order for discharge simpliciter against the temporary Government servant. **(1967) 1 Lab LJ 718 (722) : 15 Fac LR 347 (SC).**

(38) Authority to act quasi-judicially — No provision regarding procedure in the statute concerned — Authority can devise its own procedure — Procedure should not be inconsistent with the principles of judicial procedure. A 1968 Mys 296 (300) (DB).

(39) An order passed by a quasi-judicial tribunal should contain in itself, the necessary material to assure the superior Courts that the Tribunal had satisfied the requirement of the relevant provisions pertaining to the exercise of its jurisdiction whether appellate or otherwise. (1966) 2 Mys LJ 70 (73, 74) (DB).

(40) Two separate notices and separate enquiries are not necessary and one notice at the time of punishment is enough. A 1957 All 439 (447) (DB) ** A 1955 Assam 171 (172, 173) (DB) ** A 1955 Hyd 240 (241) (DB).

(41) Even if the charges and the witnesses to be examined are common against two delinquent servants, the proper course for the enquiry officer, unless the servant has consented to joint enquiry, is to hold separate enquiries and record evidence separately as otherwise there is danger of the servants getting confused. (1972) 1 Andh WR 1 : (1971) 1 Serv LR 507.

(42) Two Police Sub-Inspectors charged for misconduct — Joint disciplinary proceedings initiated without obtaining the appropriate orders from the Lt. Governor, who was the competent authority — **Held,** joinder vitiated proceedings from its inception as prejudice was implied and entire proceedings were quashed. (1978) 2 Serv LR 679 (680, 681) (Goa).

[See also (1979) 2 Kant LJ 303 (307) : 1979 Lab IC (NOC) 174. (Joint departmental enquiry under Rule 8 Karnataka State Police (Disciplinary Proceedings) Rules (1965) against constable and Sub-Inspector by Superintendent of Police — Not proper — Dismissal of constable not maintainable as based on findings recorded in joint enquiry.)]

(43) Consideration of explanation — Disciplinary authority must consider cause shown by delinquent employee and it should be so stated in punishment order — Where record shows that he had done so, mere careless omission to state so in punishment order cannot be a ground to quash it. 1971 Lab IC 1478 (1480) (Orissa) (DB).

(44) Enquiry Officer selecting four out of 21 witnesses — Refusing party to produce all his witnesses in defence and also not allowing party to select a lesser number of witnesses of his choice — Enquiry vitiated. 1972 Serv LR 492 : 1972 Cur LJ 479.

(45) Departmental enquiry against Police Sub-Inspector who was allowed to cross efficiency bar — Charges of inefficiency and dishonesty, based on adverse confidential reports of superior Officers — Reports relating to period earlier than the year in which he was allowed to cross efficiency bar should not be considered in enquiry. **A 1970 SC 2086 (2089).**

(46) Enquiry against delinquent public servant — Non-payment of subsistence allowance for part period of suspension — Government assuring to make payment if found outstanding — Enquiry not vitiated. 1980 Lab IC 681 (682) (DB) (Raj).

(47) Show cause notice for dismissal on allegations of certain charges — Petitioner furnished with report of Tribunal and vigilance commission — Petitioner submitting explanation thereon — Violation of any statutory rule in conducting enquiry not pointed out — Article 311 (2) is not attracted. 1975 Andh LT 159 (DB).

(48) Termination after full-scale enquiry — Enquiry not shown to have been launched only to ascertain whether public servant should be retained in service — Order is one of punishment — Procedure under Article 311 must be followed. 1971 UPTC 401 : 1971 All WR (HC) 378.

(49) Departmental proceedings against police constable initiated on report of Dafadar — To arrive at findings five witnesses

Articles 310 & 311 — Note 75 (e) (contd.) examined and delinquent afforded opportunity to cross-examine them — Report of Dafadar not acted upon — Delinquent held could not have any grievance for non-examination of Dafadar. 1975 Lab IC 1470 (1472) : 1976 BLJR 66 (DB).

(50) Departmental enquiry against Police Constable — Adverse remarks against him in station diaries — Relevant entries not produced in inquiry — Previous statements of witnesses in absence of delinquent should be read out in the delinquent's presence. (1978) 2 Serv LR 385 : 1978 Lab IC (NOC) 120 (Goa).

(51) When the disciplinary authority affirmed the findings of the Enquiry Officer it is not necessary for him to repeat once again all those reasons which the Enquiry Officer had given and which he also approved. (1979) 3 Serv LR 592 (595, 597, 598) (J & K).

(52) Disciplinary enquiry — Production of documents which were not referred to in charge-sheet — Ordinarily not permissible. ILR (1973) 2 All 362.

(53) Civil Services (Classification, Control and Appeal) Rules (1965), Rule 14 (19) — Annexure containing the copy of the written brief of arguments not supplied to the Government servant along with the copy of the enquiry report — Non-supply would render further disciplinary proceeding invalid. 1972 Lab IC 1505 (1510) (Cal).

(54) Departmental proceedings — Conduct of enquiry by two officers though charge-sheet was forwarded to one of them only does not violate principles of natural justice. 1972 Lab IC 713 (718) (Punj).

(55) Suspension — No subsistence allowance paid — Incumbent not attending departmental enquiry for that reason — **Held** that disciplinary proceedings were vitiated. 1975 WLN (UC) 33 (Raj).

75 (f). Departmental enquiry after acquittal in criminal prosecution — See also Note 126.— (1) Even if a criminal prosecution has commenced and is continuing against an officer, a disciplinary proceeding in respect of the accusation which forms the subject-matter of the charge in the Criminal Court is not forbidden and it can be commenced and concluded so long as the prosecution has not ended in an acquittal. A 1967 Mys 220 (221) (DB) ** 1979 Lab IC 664 (668) (All) ** 1979 Lab IC 258 (265) (Ker) ** 1978 J & K LR 189 : 1978 Lab IC (NOC) 143 ** **(1975) 2 Lab LJ 513 : ILR (1975) Kant 895 (FB)** ** (1971) 1 Cut WR 1 ** 1970 Serv LR 632 (J & K). (Standard of proof required for establishing a charge judicially against an accused is different from that required while holding departmental enquiry against a delinquent.)

(2) Graft charge — Acquittal by Criminal Court — Departmental enquiry not barred thereby — Right to exercise disciplinary jurisdiction always exists when charge of sufficient gravity is alleged against an employee. A 1967 Mad 315 (316, 317) (DB).

(3) It is not a true position of law to state that whenever it is possible to prosecute a Government servant in Court of law, authorities would be precluded from proceeding against him departmentally under any conceivable circumstances. A 1967 Mad 315 : (1966) 1 Mad LJ 306 (308) (DB).

(4) Criminal case — Delinquent given benefit of doubt and acquitted — Departmental enquiry on same charge not barred — Had the acquittal been on merits bar to enquiry would have operated. 1977 Lab IC 1471 (1473) (Mad) (DB) ** (1969) 71 Pun LR 725.

(5) Services under the Union and the States — Fresh proceedings in respect of same matter — Civil Court's decision on merits in favour of employee, affects jurisdiction to order fresh enquiry. A 1970 Raj 210 (214, 215) : 1970 Lab IC 1319.

(6) Civil servant committing offence under Penal Code — It is at the discretion of Government to start departmental enquiry without initiating criminal prosecution. A 1958 Madh Pra 326 (328, 329) : 1959 MPLJ 128.

(7) Where a person was convicted by Court-martial of an offence, he must be deemed to have been convicted on a criminal charge by a competent tribunal and falls within the mischief of proviso (A) of Article 311 (2) of Constitution. (1963) 6 Fac LR 134 (135) (Cal).

(8) U. P. Disciplinary Proceedings (Administrative Tribunal) Rules (1947), Rule 8 — Procedure for trial under — Not more onerous or less favourable than that under Civil Service Rules. A 1960 All 754 (759).

(9) Acquittal of police officer in a criminal Court on technical ground — Departmental enquiry under Police Rule 16.3 is not barred. A 1969 Punj 131 (135): 1969 Lab IC 573.

(10) Criminal proceedings started against employee without launching a Departmental enquiry, resulting in acquittal — Not proper for the Department to proceed against on the same charges. A 1968 Pat 300 (301) : 1968 Lab IC 1074 ** A 1963 Orissa 73 (78) (DB) ** (1977) 2 Serv LR 623 (628) (Guj).

(11) The principle of autrefois acquit is contained in Section 403, Cr. P. C. It applies only to a second prosecution for the same offence in a criminal Court. It cannot apply to a departmental enquiry on the same charge after acquittal in a criminal court. A 1959 Tripura 51 (54) ** (1975) 1 Malayan LJ 1 (2).

(12) Statement by the enquiry officer that the judgment of the magistrate in a criminal trial against the public servant could not be always regarded as binding in a departmental enquiry is not erroneous. **A 1963 SC 1723 (1727).**

(13) Police Constable acquitted of offence under Section 161, I. P. C. — Subsequent departmental enquiry on same facts — Findings of Criminal Court are not binding

Articles 310 & 311 — Note 75 (f) (contd.)

on dismissing authority. 1972 Lab IC 1453 (Bom).

(14) Prosecution on charges for embezzlement — Evidence found insufficient to warrant conviction — Subsequent Departmental proceeding based on same allegations resulting in discharge of the Government servant — Order if based on some evidence and not mere conjectures cannot be set aside merely because the evidence was found to be insufficient to warrant conviction. A 1967 Pat 133 (135, 137) (DB).

(15) Employee dismissed after departmental enquiry — Fact that criminal complaint was subsequently dropped is no ground for reinstatement. 1968 Lab IC 1145 (1148) (Manipur).

(16) Dismissal order set aside in writ petition — Delinquent reinstated — Fresh enquiry into old charges without keeping delinquent under suspension — Second enquiry held not illegal on ground that there was exoneration and condonation of misconduct — Order of dismissal following such enquiry not invalid. A 1964 Manipur 8 (9).

(17-18) Acquittal by criminal Court — Disciplinary proceedings on same charge improper in the circumstances. A 1962 Mys 84 (85, 86) (DB).

(19) Central Reserve Police Rules (1955), Rule 27 — Police charged under Section 10 (m), Central Reserve Police Force Act, 1949, acquitted by Appellate Court not on merits of case but on ground that trial was vitiated — Acquittal is no bar for institution of departmental enquiry. A 1965 Raj 140 (141) (DB).

(20) A Civil Court can pass a decree setting aside a dismissal order on the ground of non-compliance with the provisions of the Constitution of India or Rules relating to Service Conditions. Such a decree cannot in any case be treated as an exoneration of the person from the charges levelled against him. 1960 Raj LW 385 (388).

(21) Adverse remarks given on account of shortage of material in reserve stock — Criminal Case — Acquittal — Adverse remark should not have been taken into account by Screening Committee and the Public Service Commission for consideration of the case of the incumbent — Incumbent should be allowed to show cause — Recommendation of the Committee and Commission without allowing incumbent to show cause liable to be quashed. 1973 Cur LJ 437 : 1973 All Serv LJ 679 (Punj).

(22) Even where civil servant has been acquitted of a charge arising out of certain facts in the criminal proceedings in the Court, he can be proceeded departmentally on other charge arising out of same set of facts. A 1971 All 323 (324, 325).

75 (g). Powers of appellate authority.— (1) Departmental appeal against punishment — Only the Central Civil Services (Classification, Control and Appeal) Rules will apply — The appellate authority has only got to study the records and see whether the rules have been complied with and if not, whether the non-compliance has resulted in violation of the provisions of the Constitution or in failure of justice and whether the findings are justified and whether the penalty imposed is proper. A 1961 Tripura 1 (4).

(2) Personal hearing to delinquent during stage of appeal — Delinquent has no right to such hearing — Police constable dismissed — Personal hearing refused during appeal — Dismissal not bad on ground of such refusal. A 1969 Guj 260 (267) : 1969 Lab IC 1103. (A 1963 Assam 183, Dissented.)

(3) Termination of Services — Appeal against termination not competent, being not provided under the rules — Dismissal of appeal in limine without hearing the petitioner, is not illegal and bad. 1973 Cur LJ 660 : 1973 All Serv Rep 947 (Punj).

(4) Decision based on misreading of documents and erroneous view of Art. 311 — Decision not binding in second appeal. A 1969 All 542 (544) : 1969 Lab IC 1318.

(5) When in a departmental matter a higher authority just dittos, usually by using the words 'as proposed' or 'approved' and the like, it should be deemed that the operative portion alone has been approved. 1960 MPLJ 1063 (1073) (DB).

(6) Departmental enquiry — Appeal against — Appellate authority upholding decision of subordinate authority — Detailed order not given — Does not make it a non-speaking order. 1978 Lab IC 1132 (1137) (All).

(7) Words "further enquiry" appearing in Rule 15 (c) of Bombay Police (Punishments and Appeals) Rules (1956), do not mean de novo enquiry or fresh enquiry. The word "further" is significant and limits the powers of the appellate authority to calling for additional fresh material, but does not confer on the authority the power to annihilate the entire proceedings and start a de novo trial, which in such circumstances is sure to prove itself to be a real torturing trial. 1979 Lab IC NOC 120 (Guj).

(8) Railway Servants (Discipline and Appeal) Rules (1968), Rules 14 (ii), 22 (2) — The Appellate authority has no power to examine the propriety or otherwise of the decision of the disciplinary authority dispensing with the holding of the inquiry, as the decision of the disciplinary authority in this respect is final under clause (3) of Article 311 and no power can be conferred on the appellate authority by the Rules to reopen or reconsider the same. 1975 Lab IC 1288 (1300) (Cal).

(9) When the appellate authority does not agree with the order appealed against, then reasons must be given by it for varying or reversing the order. But if such order is in favour of the appellant then even if the appellate authority does not give reasons, the appellant is not prejudiced and therefore he cannot complain. ILR (1972) 2 Delhi 84.

Articles 310 & 311 (contd.)

76. Waiver of enquiry and objections to defects in it.— (1) Appeal to Prime Minister against order of reduction in rank and communication of Prime Minister's decision is not procedure contemplated by Art. 311 (2). The fact that petitioner appealed to Prime Minister cannot be treated as waiver of his constitutional rights in the absence of any evidence of intentional relinquishment of a known right. A 1969 Cal 180 (193) : 1969 Lab IC 409 (DB).

(2) Where infirmities in the enquiry go to the root of the matter, they cannot be deemed to have been waived by omitting to show cause against the notice with regard to proposed punishment. 1968 Lab IC 302 (317) (DB) (All).

(3) Where the public servant accepted, without raising any objection to the defects in the notice terminating his services, the arrears of his pay plus three months' pay in lieu of discharge notice, it would show that he waived all objections regarding notice and enquiry and it would not be open to him to challenge the order of termination cn ground of such defects. A 1956 Tripura 33 (34).

(4) Departmental enquiry — Acquiescence and submission to jurisdiction of Enquiry Officer without raising any objection — Petitioner cannot be allowed to challenge jurisdiction of Enquiry Officer after the enquiry is over and the officer found against him. A 1965 Mys 283 (285) (DB) ** A 1962 All 114 (116, 117) (DB).

(5) Misconduct — Inquiry — Government servant given choice to resign or face enquiry — Servant tendering resignation and Government accepting — Government cannot start enquiry into misconduct. A 1955 Trav-Co 245 (247) (DB).

77. Opportunity given but not availed of.— (1) The provisions of Cl. (2) of Article 311 though mandatory are meant for the benefit of civil servant concerned and, therefore, can be waived by him. A 1957 Assam 77 (81) (DB).

(2) Where a civil servant who has attained the age of 55, for some reason or other, confesses his inability to continue in service and seeks permission to retire, it would be a useless formality to ask him to show cause as to why his services should not be terminated. A 1954 SC 584 (586).

(3) Where reasonable opportunity against the proposed action has been given to a civil servant but has not been availed of by him, the order of dismissal, removal or reduction in rank passed against him will not be rendered invalid. A 1955 SC 160 (164) ** 1977 Serv LJ 175 (Raj) ** A 1953 Him Pra 125 (126) ** ILR (1957) Punj 1695 (1701) ** A 1953 Punj 137 (141) (DB) ** A 1960 Orissa 26 (28) : (1959) 1 Orissa JD 550 (DB) ** A 1968 Madh Pra 132 (133) : 1968 Lab IC 939 (DB) ** 1978 Serv LJ 500 : 1978 Lab IC (NOC) 134 (All).

[See however A 1958 Bom 204 (205) : ILR (1958) Bom 343 (DB).]

(4) Reasonable opportunity — Government servant pleading guilty to charge-sheet given — Enquiry to prove charges against him becomes unnecessary — Government servant deliberately refusing to accept second show cause notice against proposed punishment — Reasonable opportunity cannot be said to have been denied. ILR (1961) 2 All 90 (93, 94) (DB).

(5) Copies of documents relied on by Enquiry Officer given to the employee before report of enquiry is made — Employee not availing of the opportunity to file additional statement of defence — No denial of opportunity. (1966) 1 Lab LJ 190 (Cal).

(6) After closure of inquiry, certificate by delinquent to enquiry committee to the effect that he had been given all reasonable facilities to defend himself and consult records — No explanation as to how that certificate came to be given — Certificate did not amount to waiver of objection against reconstitution of enquiry committee. (1964) 68 Cal WN 1112 (1116) : (1964) 9 Fac LR 208.

(7) Punjab Civil Services (Punishment and Appeal) Rules (1952), Rule 7 (2) — Departmental enquiry under — Plaintiff afforded opportunity to challenge evidence adduced by Department — Plaintiff not availing of it cannot find fault with Enquiry Officer's report on ground that it was not based on evidence but on affidavits. (1963) 65 Punj LR 945 (951).

(8) Where a person does not deem it necessary to make use of the opportunity or refuses to take part in the enquiry, he cannot as of right demand the enquiry to be held over again at the final stage. (1963) 65 Punj LR 945 ** 59 Punj LR 472 (475).

(9) Departmental inquiry against delinquent public servant — Opportunity given to him to cross-examine witnesses — Opportunity not availed of — Principle of natural justice is not violated. A 1963 Orissa 73 (79, 80) (DB).

(10) If a person has been given complete opportunity of cross-examining the prosecution witnesses and of adducing his defence at the stage of the inquiry held against him and he voluntarily refuses to do so he cannot be entitled to another opportunity at a later stage when notice is issued to him to show cause against the punishment proposed. A 1960 Punj 646 (651, 652) (DB).

(11) Head Clerk of university — Dismissal of — Opportunity given to servant to produce defence — Opportunity not availed of — No violation of natural justice. A 1960 J & K 80 (82, 83) (DB).

78. Apology by civil servant — Effect.— (1) When a Government servant in a departmental inquiry tenders an unqualified apology, there is no necessity of holding an oral inquiry into the allegations made against him. A 1963 Raj 57 (61, 62) ** A 1956 Raj 28 (30) (DB).

(2) The fact that the apology of some of the Government servants charged with the same misconduct is accepted but is not accepted in the case of others does not amount to a breach of the equal protection clause of the Constitution. A 1956 Raj 28 (30) (DB).

(3) Notice of discharge not given to employee — Employee offering apology when departmental enquiry against him concluded — Tendering apology could not dispense with notice contemplated by S. 126 (2) — Giving notice is constitutional provision and has to be complied with. A 1965 J & K 53 (56) (DB) ** A 1956 Raj 28 (30) (DB).

79. Public Service Commission, reference to — See also Note 136 and Art. 320.— (1) Where the Government passes an order of reversion exclusively on the basis of the opinion given to that effect by the Public Service Commission, without applying its own independent

Articles 310 & 311 — Note 79 (contd.)
mind to the merits of the case, that order can be validly challenged as vitiated by mala fides and not binding in law. A 1966 Orissa 173 (183) (DB).

(2) Promotion — C. C. R. of concerned Government servant in Orissa Industries Service, incomplete — Absence of rule — Main criteria for judging suitability for promotion are merit, seniority, competence, qualification and experience of eligible candidates at relevant time — Public Service Commission considering suitability on basis of incomplete C. C. R. — State Government directed to reconsider case of promotion of aforesaid Government servant. 1976 Lab IC 1760 (1761) (Orissa).

80. Show cause notice, by whom to be given.— (1) Show cause notice under R. 1707 of Rly. Est. Code should be in the name of punishing authority or with its authority, consent or approval. A 1958 Cal 633 (634) : 62 Cal WN 169.

(2) Notice issued by authority not competent to dismiss public servant — Subsequent approval of competent authority cannot cure defect. A 1960 Orissa 37 (38, 39) (DB). (Overruled on another point in A 1963 SC 1612.)

(3) Initiation of proceedings under R. 7 (1) of All India Service (Discipline and Appeal) Rules (1955) — Can be initiated against a police officer by the State Government under which he is serving — Union Government can issue a show cause notice to him under Article 311 of Constitution. (1974) 1 Serv LR 744 (Pat).

81. Authority who can frame charges.— (1) The framing of charges, the holding of an enquiry into them, the suspension of the civil servant during the enquiry, the notice to show cause, are all steps in the exercise of the disciplinary powers. All these steps are required to be taken by the disciplinary authority and not by a delegate of that authority. A 1969 Assam 1 (2) : 1969 Lab IC 4 (DB).

(2) Though Rule 15, C. C. S. (C. C. A.) Rules says that the disciplinary authority has to frame the charges it will amount to the same thing if he directs the persons who conducted the preliminary enquiry to draft the charges and after the drafting approves of the same. A 1962 Tripura 15 (16).

(3) Sastry Award Para 521 (a) — Domestic enquiry officer not designated under Para 521 (a) issuing charge-sheets and taking decision to hold enquiry — Not an infirmity as to render whole proceedings illegal and void — Enquiry proceedings held by the disciplinary authority itself — Personal hearing given — Proceedings are not void merely on ground that charge-sheets were issued by officer not designated under Para 521 (12). (1972) 42 FJR 374 (382) (Delhi).

(4) Domestic inquiry — Power to hold inquiries already delegated to Enquiry Officer under the law — Specific authority for the purpose of particular case not necessary. (1971) 2 Serv LR 240 (Delhi).

(5) Authority issuing show cause notice — Only the same authority is competent to impose the punishment. 1973 Lab IC 136 (All).

(6) Enquiry into conduct of public servant — Officer empowered to issue charge-sheet on leave — Person looking after the work of absentee officer, held not competent to issue charge-sheet. (1978) 2 Cal LJ 316 (322).

(7) There is no absolute bar under Art. 311 of the Constitution that charges could not be framed by the Enquiry Officer and had to be framed only by the punishing authority. It will depend on the statutory rules governing particular service. In every case power for framing charges and holding enquiry is to be delegated to such Enquiring Officer by the appointing or punishing authority. No officer can sue motu initiate the disciplinary proceedings by framing charges and holding enquiry and then reporting the matter to the disciplinary authority without having been appointed an Enquiring Officer initially by that authority. 1977 Lab IC 581 (All).

(8) By virtue of R. 6 (2) and (3) of Kerala Police Departmental (Enquiries, Punishment and Appeal) Rules (1958), charges against delinquent are to be framed by the enquiry officer himself and not by the disciplinary authority. 1979 Lab IC 903 (905) : (1979) 1 Serv LR 691 (DB) (Ker).

82. Order must show that authority applied its mind.— (1) Appointing authority wrongly stating that the evidence of a particular witness was recorded while he was not examined by the enquiry officer — Appointing authority placing reliance on the statements recorded in the presence of the delinquent officer alone — Factors sufficient to indicate that appointing authority has failed to apply his mind to the material on record. A 1967 Madh Pra 91 (94) (DB).

(2) Railway Establishment Code, Rule 1721 — Departmental inquiry — Appeal against punishment order — Order of appellate authority cryptic in extreme not showing that it considered facts on which order was based — Order held did not fit in requirements of R. 1721. A 1965 Cal 557 (560, 561).

(3) Appellate order which does not show that the appellate authority applied his mind to the points envisaged in the R. 1731 (2) of Discipline and Appeal Rules for Non-Gazetted Railway Servants cannot be sustained. (1965) 10 Fac LR 8 (12) (Cal).

(4) Railway Establishment Code, Rules 1716 (e) and 1731 — Imposition of minor punishment — Order imposing punishment and appellate order confirming it omitting to state reason for holding charges proved — Orders are vitiated and have to be quashed. A 1968 All 91 (93).

(5) Under the Himachal Pradesh Municipalities Servants (Punishment, Removal, Suspension and Appeal) Rules, 1971 there lies only one appeal to the Secretary Local Self Government. Where however the Secretary (L. S. G.) did not pass any order except initiating the notes put up by the officer after the opinion from the Law Department had been obtained it was held that it was not an independent order after application of his mind by the Secretary, who is a persona designata and a quasi-judicial authority. He was expected to have exercised his independent application of mind without depending wholly and solely on the advice of the Law Department and the notes put up by the office. On this basis the order cannot be sustained. (1979) 2 Serv LR 171 (175) : 1979 Lab IC (NOC) 101 (Him Pra).

Articles 310 & 311 — Note 82 (contd.)

(6) Order of termination of services passed without taking into consideration the explanation of the delinquent — Held, enquiring officer did not apply his mind to the case and the order could not be sustained. 1966 Cur LJ 87 (91) (Punj).

(7) Principal of a recognised private school — Termination of services under the Delhi Education Act — Managing Committee being appointing authority competent to terminate the services — Authority to take final decision on the overall assessment and performance of petitioner as probationer entrusted to chairman — Chairman finding petitioner's performance unsatisfactory — Managing Committee terminating services without applying its independent mind about the performance of the petitioner — Held, there was no valid termination. (1978) 2 Serv LR 98 (105) : 1979 Serv LJ 140 (Delhi).

(8) Where neither the Disciplinary Authority nor the Appellate Authority has given any reasons for the order of dismissal nor is there any indication in the order that there has been application of mind to the facts of the case or that they had adopted some of the reasons for their findings given by the Enquiry Officer, the order is bad for failure to give reasons and has to be quashed. (1978) 2 Serv LR 385 : 1978 Lab IC (NOC) 120 (Goa) •• (1979) 2 Serv LR 55 (56) (Punj) •• 1972 Lab IC 713 (Punj).

(9) Where the order of dismissal agreed with the finding of the Inquiring Officer that the charges were proved, that part of the order would not be vitiated for absence of reasons, but the order of dismissal itself would be bad in law for want of reasons if the Inquiring Officer had not made any recommendations as to quantum of punishment. 1978 Lab IC 1424 (1428) (Goa).

(10) When an order of an Administrative Tribunal is set aside on a technical ground, namely, that the order did not show an application of mind by the punishing authority, it does not wipe out the enquiry conducted by it completely. It only enjoins upon the Administrative Tribunal to reconsider the matter from the stage from which it was held to be bad. The decree passed by the Court would be fully complied with when the competent authority wrote out a fresh well-reasoned order. 1976 SLWR 586 (588) (Punj).

(11) Rule 1713 of Railway Establishment Code Vol. I, is mandatory. It goes beyond the requirements of Art. 311 (2) and requires the punishing authority to apply its mind to the materials on record over again even where he may agree with the findings of the Inquiry Officer — Non-compliance with R. 1713 — Order vitiated. A 1970 Cal 545 (546) (DB).

(12) An order of removal of a railway servant under Rule 1719 on the ground of his conviction on a criminal charge is illegal if there is nothing in the order to indicate that the penalty had been imposed on the ground of conduct of the delinquent which led to his conviction or that the Disciplinary Authority had taken into consideration the circumstances of the case. The contents of the order must lead to an inference that the authority had applied its mind to the conduct of the person leading to his conviction and had also taken the circumstances of the case into consideration while imposing the penalty. 1972 Lab IC 736 (Delhi), Dissented from. 1975 Lab IC 992 (994) (Raj).

83. Reinstatement — Effect of.— (1) Order of reversion during pendency of departmental enquiry — Criminal proceedings ending in acquittal of delinquent — Departmental enquiry dropped — Delinquent officer entitled to full pay and allowances pending his reinstatement by virtue of R. 10 (7) of Central Civil Services (Classification, Control and Appeal) Rules. (1967) 1 Mys LJ 455 (DB).

(2) On the ending of the suspension, the officer is simply allotted his job and there is no question of any "re-instatement" in the proper sense of the term, as the question of "re-instatement" can only arise in case of dismissal or removal from service, or termination of service in any other manner. A 1958 Cal 239 (241).

(3) Khadi and Village Industries Commission Employees (Conduct, Discipline and Appeal) Regulations, 1961 Regulations 30 and 31 — Suspension under Rule 30 — Ends on the convicted employee's release under Section 3 of Probation of Offenders Act — Employee, held entitled to reinstatement. (1973) 1 Andh LT 161.

(4) Contention that civil servants who were reverted should have asked for their reinstatement in particular post and removal of another occupying that post instead of asking to quash order of reversion — Held, contention was not acceptable. A 1967 Mys 225 (231) (DB).

(5) Suit for salary by Government servant — Consequences of setting aside order of dismissal of Government servant were that he could have been reinstated on the date of the suit and could have asked for arrears of salary. A 1960 Cal 278 (282).

(6) Reinstatement of employee — By order of Court after declaration of termination as illegal — He is entitled to full salary. 1978 Lab IC (NOC) 157 (DB) (All). (Non-payment of arrears for certain period on ground of limitation is invalid.)

(7) Disciplinary Enquiry — Order of dismissal — Set aside and reinstatement ordered — Claim to salary for the period between dismissal and reinstatement — The cause of action to claim the salary arises at the end of every month in which he was wrongfully prevented from earning his salary and a suit for such salary is governed by Article 7 Schedule 1 of the Limitation Act (1963). (1972) 85 Mad LW 329.

(8) Where promotion was delayed only on account of pending departmental enquiry, which resulted in exoneration of the petitioner, it was held that he ought to have been promoted with effect from the date other officers were promoted and ought to have been placed at the top of the list according to his seniority. A 1967 Mys 136 (138) (DB).

(9) Disciplinary proceedings — Complete exoneration of servant proceeded against — Servant must be taken, in the eye of law, as continuing in service during period when he was under suspension till he was reinstated — Held that he was entitled to all normal benefits of service, including consideration of his case for promotion. (1972) 1 Cut WR 789 (793, 794).

Articles 310 & 311 — Note 83 (contd.)

(10) Since no punishment at all was imposed on the petitioner on the basis of a finding that he was guilty of the charges which were framed against him, the direction that the petitioner should be treated as being on leave without allowance for the interim period held could not be sustained, and the petitioner was right in claiming his salary for that period. A 1962 Mys 43 (44) (DB).

(11) It is only the safeguards provided in Article 311 or in the service rules of various Services under the Union Government or the Government of a State that their employees are entitled to take benefit of and can urge with justification that if those safeguards are not respected or the procedure prescribed is not followed, their dismissal is illegal. But, in the case of any other master and servant, the ordinary rule of contract applies and the employee cannot approach High Court for reinstatement under Article 226.

The employee of Punjab University removed from service under relevant rule of university held could not ask for reinstatement by filing writ petition. A 1969 Punj 391 (393 to 395) : 1969 Lab IC 1406.

(12) Employee of private college affiliated to University — Reinstatement under emergency powers of Vice-Chancellor — Order of reinstatement passed on imaginary and non-existing grounds — Unsustainable. (1979) 1 Cal LJ 77 : 1979 Lab IC (NOC) 38.

(13) Bank employee — Alleged acts of indiscipline and his suspension from service — Subsequent issue of charge-sheet — Writ petition to recall order of suspension and other reliefs — Suspension order withdrawn pending writ petition — Employee asked to join duties and get full pay and allowances from date of joining — In view of reinstatement, held, reliefs prayed for could not be granted. 1980 Lab IC 538 (540) : 1980 (1) Cal HN 176.

(14) If an order of termination simpliciter of the service of an employee under the terms of contract of service or standing orders has its basis in alleged misconduct, it is really illegal. The real intention in such cases being to penalise the workman, it is a colourable exercise of power and the Industrial Tribunal would have jurisdiction to intervene and set aside the termination. The form of the order in which the order is couched is never conclusive and the Tribunal can always enquire into the reasons which lead to the termination. 1976 Lab IC 684 (Ker) .

(15) Suspended employee — Reinstatement — Joining his post — Officiating juniormost employee reverted — Such reversions are not always "reduction in rank" within the meaning of Art. 311. 1978 (2) Cal LJ 184.

84. Domestic enquiry.— (1) Domestic enquiry cannot be equated to enquiries under Art. 311. A 1968 SC 236. (238).

(2) A domestic inquiry against a Government servant is in a way of a quasi-criminal nature. It is for the prosecution to produce evidence to establish the guilt of the person charged. 1965 Punj LR (Supp) 66 (78).

(3) Disciplinary proceedings before domestic tribunal are of a quasi-judicial character; therefore, the minimum requirement of the rules of natural justice is that the tribunal should arrive at its conclusion on the basis of some evidence, i. e. evidential material which with some degree of definiteness points to the guilt of the delinquent in respect of the charge against him. Suspicion cannot be allowed to take the place of proof even in domestic inquiries. A 1978 SC 1277 : 1978 Lab IC 1106.

(4) Domestic enquiry — Dismissal of civil servants — Charge cannot be sustained if not based on any evidence, or if proved facts cannot possibly lead to conclusion of proof of charge or if the charge sought to be established against employee at the bar is not the one he has been called upon to meet. 1968 Lab IC 259 (263) (Delhi).

(5) In a domestic enquiry, Evidence Act does not apply and the Enquiry Officer is entitled to collect evidence not hedged in any way by limitations prescribed under Evidence Act (e. g. leading questions.) (1966) 12 Fac LR 80 (84) (Cal).

(5A) Strict and sophisticated rules of evidence do not apply to domestic enquiry. (1978) 2 Mad LJ 583.

(6) Where charges, in the domestic enquiry are composite, it would not be proper to ignore the defective part of the charge to sustain the order of punishment when the punishing authority had taken all those factors into consideration while proposing the punishment. (1978) 2 Serv LR 868 (876) (Kant).

(7) In a domestic enquiry the strict and sophisticated rules of evidence under the Evidence Act may not apply. All materials which are logically probative for a prudent mind are permissible. There is no allergy to hearsay evidence provided it has reasonable nexus and credibility. The departmental authorities and administrative tribunals must be careful in evaluating such material and should not glibly swallow what is strictly speaking not relevant under the Evidence Act. A 1977 SC 1512 : 1977 Lab IC 845.

(8) Natural justice — Domestic enquiry — Examination of witness — Reading out his statement already recorded behind the back of delinquent servant — Procedure, though irregular, doos not vitiate enquiry. 1969 Lab IC 1441 (1447) (Goa).

(9) Domestic Enquiry — Prior statements of witnesses not confirmed in presence of servant facing domestic enquiry but merely tendered for cross-examination — Procedure is against rules of natural justice as also of Article 311 (2) of Constitution and of Rule 1712 of Conduct and Discipline Rules for Railway Servants. 1971 Lab IC 1027 (1029) (Guj) °° (1971) 2 Lab LJ 466 (Guj).

(10) Domestic enquiry — Statements need not be recorded as questions and answers — There is no rule that statement recorded in narrative form would prejudice worker in such enquiry. (1967) 2 Mad LJ 199 : 32 FJR 214 (216).

(11) Domestic inquiry — Prineiples of natural justice — Enquiry Officer not bound to tell employee about his right to lead evidence in defence or ask him whether he wants to adduce evidence — Failure on the part of Enquiry Officer to do so, not violative of principles of natural justice. A 1967 Bom 147 (152) (DB).

(12) Civil Services (Classification, Control and Appeal) Rules, 1930, Rules 55 and 55-A —

Articles 310 & 311 — Note 84 (contd.)
Domestic enquiry — Delinquent non-co-operating throughout — Non-supply of copies as required under Rules 55 and 55-A — No violation of principles of natural justice. 1978 Lab IC (NOC) 130 (All).

(13) Domestic enquiry — Matters of record — Leading questions about them, put to delinquent — Not improper. A 1968 SC 236 (239).

(14) Domestic enquiry — It is wise to ask the delinquent whether he would like to make a statement first or wait till the evidence is over; but failure to question him in this way does not ipso facto vitiate the enquiry unless prejudice is caused. A 1968 SC 236 (239).

(15) It is not an invariable rule that in a domestic enquiry all the evidence against a delinquent must be led before he is asked anything. A 1968 SC 236 (239).

(16) It is not fair in domestic enquiries against a Government servant just as against industrial employees that the said servant should be closely cross-examined at the very commencement of the enquiry, even before any other evidence is led against him. 1965 Pun LR (Sup) 66 (77, 78).

(17) Domestic enquiry — Report by Enquiry Officer regarding findings and recommending mode of punishment — Supply of report along with show cause notice to delinquent — Part of report relating to punishment cannot be withheld. A 1969 SC 1294 (1296) : 1969 Lab IC 1547 : (1969) 2 SCJ 740.

(18) Double Jeopardy — "Misconduct" — 'Misconduct' is wider than that of criminal offence e. g., theft — Mere fact that case was sent to criminal Court could not bar domestic enquiry. A 1970 All 210 : 1970 Cri LJ 436 : 1970 Lab IC 428.

(19) Domestic inquiry into misconduct of employee during pendency of a parallel inquiry before Court in the absence of stay order does not amount to contempt. A 1969 SC 30 (32, 33) : 1969 Cri LJ 267 : 1969 Lab IC 194.

(20) Domestic enquiry — Charge against petitioner of accepting illegal gratification — Defence that the amount was subsequently reimbursed but no receipt for reimbursement produced — Held, though party paying gratification was not required to produce receipt for payment of gratification, punishment of petitioner relying on non-production of receipt for reimbursement, could not be interfered with on the ground that different standard of proof was adopted. A 1968 Delhi 26 (28) : 1968 Lab IC 24 (DB).

(21) Per Sen J. :— Civil Court cannot sit in appeal over decision of an Enquiring Officer, a domestic tribunal. Enquiring Officer is not bound to follow strict rules of law of evidence. The scope of reasonable enquiry cannot be extended in the manner suggesting that reasonable opportunity implies correct decision by enquiring officer. A 1966 Cal 42 (49) (DB).

(22) Domestic enquiry — Power to regulate disciplinary proceeding cannot be misused for refusing to examine altogether the witnesses of delinquent employee. 1973 Lab IC 1267 (1269) (All).

(23) Enquiry officer orally hearing parties and giving findings without recording any evidence — Government setting aside his report and appointing another officer unconnected with the office of the delinquent servant and accepting his findings — Order of Government held was within its powers and no mala fides could be attributed. A 1969 Manipur 36 (40) : 1969 Lab IC 561.

(24) Domestic Tribunal — Delegation of its essential functions by designated authority will render its decision invalid. A 1968 Delhi 26 (28) : 1968 Lab IC 24 (DB).

(25) Domestic enquiry — Validity — Communication to petitioner subsequently charged with misconduct, by Inquiry Officer before his appointment, in relation to inquiry proposed — Held it was not a vitiating circumstance at all where the substance of the matter (finding as to dereliction of duty) was contained in the record of the departmental enquiry held actually in the presence of the petitioner. (1972) 1 Mys LJ 483.

(26) Domestic enquiry — Executive instructions for expeditious disposal of inquiries do not confer any right on the servant which can be enforced through a court of law — Breach of such instructions is for the Government to take notice of and subject cannot base his legal rights on those instructions. (1971) 2 Serv LR 683 (Punj).

(27) The Civil Court does not sit as a Court of appeal and decide whether the conclusions arrived at by an enquiring officer were erroneous on fact or in law. All that the Court has to see in such cases is as to whether the constitutional requirements had been satisfied. If on account of the default of the public servant concerned, witnesses are not examined by the enquiry officer, the finding arrived at by him cannot be set aside by the Civil Court. 1971 BLJR 358.

(28) The Disciplinary Authority is to enquire into the charges as a quasi-judicial body. An enquiry for establishment of such charges by another officer is permissible but it is open to the Disciplinary Authority either to agree or to differ from the findings that may be made by the Enquiring Officer. In case of disagreement, only thing required is that he would give an opportunity to the delinquent servant before he finally takes a decision that such of the charges as were found not to have been established by the Enquiring Officer were also proved. Before the Government servant is punished, he must not only know what the charges are but must also get an opportunity to show that such charges are not proved. This seems to be implicit in Article 311 (2). A 1970 Cal 179 (180 to 183).

(29) Non-observance of principles of natural justice by Domestic Tribunal — Court in judging its effect must see whether it results in deflecting course of justice. A 1970 SC 679 (683).

(30) In the case of a public employment such as an employment in a Statutory Corporation, the employee cannot be denied appropriate remedies of administrative law and if the dismissal is contrary to the mandatory provisions of the statute or in disregard of the principles of natural justice the dismissal can be declared void, for, a dismissal without good reasons may vitally affect a man's career or his pension. 1978 Lab IC (NOC) 22 (Delhi).

85. Fresh proceedings in respect of same matter.— (1) If a disciplinary proceeding is

Articles 310 & 311 — Note 85 (contd.)
commenced with respect to an accusation and that disciplinary proceeding has reached the stage when an enquiry has been completed that disciplinary proceeding must end either in the imposition of a punishment or in exoneration. If that disciplinary proceeding has not been terminated in that way, the commencement of another disciplinary proceedings with respect to these charges is plainly incompetent. (1969) 1 Mys LJ 405 (406) (DB) ** 1975 All Serv Rep 625 (Pat) (DB) ** 1971 Lab IC 778 (782) (Andh Pra).

(1A) The cardinal principle of natural justice that no one should be vexed twice for the same charge applies even to departmental enquiries. Proceedings in a departmental enquiry are quasi-judicial in nature. Once a decision on the basis of such an enquiry is taken by application of mind by the competent authority, it is final and cannot be reviewed unless permitted by an express statutory provision. 1973 Serv LC 180 : 1972 Cur LJ 531 (542) (DB) (Punj).

(2) Departmental enquiry once dropped could be reopened on charges originally framed even if delinquent was exonerated. (1974) 2 Serv LR 10 (Delhi).

(3) Where the circumstances in which the first disciplinary proceeding was discontinued support no other inference than that the discontinuance was the outcome of the acceptance of the explanation offered by the petitioner, it is not within the competence of the disciplinary authority to exhume those charges and to make them the subject-matter of another disciplinary proceeding. 1968 Lab IC 756 (757) (Mys).

(4) Where a Government servant is censured departmentally for a certain matter, the punishment may be enhanced by a higher authority in revision even assuming that a fresh departmental proceeding cannot be drawn up against a Government servant on the same material. A 1955 Assam 240 (242) : 1955 Cri LJ 1474 (DB).

(4A) There is no impediment in law on the part of the Government to call upon the delinquent to answer practically identical charges in the second enquiry when in fact the earlier charges were merely dropped without any trial and there was thus no exoneration of the delinquent from the charges against him. 1976 Lab IC 1183 (Cal).

(5) It is well settled that proceedings in a departmental enquiry and the decision taken on its basis, are quasi-judicial in character. These functions are to be performed by the Enquiry Officer or the competent authority, as the case may be, in a judicial manner. Once a decision on the basis of such an enquiry is taken by application of his own mind by the competent authority, it is final and cannot be reviewed unless permitted by an express statutory provision. That is to say, the cardinal principle of natural justice viz., no one should be vexed twice for the same charge applies even to departmental enquiries. 1973 Serv LC 180 (Punj).

(6) Where a certain decision has been taken with regard to a Government servant by a competent authority and it has been acted upon and is in effective operation, the successor-in-office of the authority cannot reopen the matter and give a totally different decision. A 1937 PC 27 (29) : 64 Ind App 40 ** A 1958 Raj 38 (39) (DB) ** A 1955 Assam 240 (242) : 1955 Cri LJ 1474 (DB).

(6A) Disciplinary proceedings — Disciplinary authority finding public servant guilty of minor lapses — Authority choosing not to punish nor to keep proceeding alive — No scope to re-open. 1979 Lab IC 744 (746) (DB) (Orissa).

(7) Where the Government servant was penalised for his misconduct and was promoted subsequently from the post of Preventive Officer Grade II to the post of Preventive Officer Grade I his slate had been wiped clean and there could not be any enhancement of the penalty which he had suffered. The show cause notice to enhance the penalty for past misconduct held illegal and quashed. (1978) 1 Serv LR 748 (749) (Cal).

(7A) Disciplinary enquiry — Delinquent exculpated after enquiry and reinstated — Government can reopen the proceedings only if the rules vest some such revisory power. A 1975 SC 2277 (2278, 2279).

(8) Where the authorities considered the service record of the Government servant including the fact of the disciplinary proceedings and the punishment which had been imposed upon him and in spite of all this promoted him the authorities could not turn round asking him to show cause why the punishment already imposed upon him should not be enhanced. (1978) 1 Serv LR 637 (638) (Cal).

(9) Where, on a full inquiry on earlier occasion a delinquent was found not guilty and, therefore, was exonerated and re-instated at his post, subsequent inquiry on substantially the same allegations is not maintainable on the principle of equity and fair play. Assam LR (1971) Assam 281 (DB).

(10) Double jeopardy — Reversion and forfeiture of pay of delinquent employee — Approval of punishment by appointing authority — Reopening of fresh proceedings on self-same charges and awarding punishment of discharge is illegal. 1970 Lab IC 1086 (Orissa).

(11) Central Civil Services (Conduct) Rules (1964), Rule 25 — Central Civil Services (Conduct) Rules (1955), Rule 3 — Removal of petitioner after disciplinary proceedings — Order withdrawn and petitioner re-instated unconditionally — Second inquiry on identical allegations — Not permissible in law — Principle of estoppel applies. 1975 Lab IC 1580 (1581, 1583, 1584) (Cal).

(12) Dismissal order in disciplinary enquiry — Appellate authority remitting case for de novo proceedings for procedural lapse — Held it could not be said that pending finalisation of de novo proceedings order of dismissal remained operative. 1980 Lab IC (NOC) 32 : (1979) 2 Kant LJ 393.

(13) Departmental enquiry — Proceedings quashed by Civil Court on ground of irregularity in procedure — Fresh departmental enquiry can be held on same facts. A 1962 SC 1334 (1336).

(14) Public servant — Misconduct — Preliminary enquiry — Disciplinary authority not satisfied by enquiry report — It can ask another officer to conduct fresh preliminary enquiry. 1980 Lab IC (NOC) 65 (Kant).

(15) Domestic enquiry — Natural justice — Principles of — Cross-examination of delinquent Officer with a view to prove the charge which

Articles 310 & 311 — Note 85 (contd.)
is otherwise unsubstantiated vitiates the enquiry. 1973 Lab IC 591 (595, 597) (Ker).

(16) Where a Government servant is demoted on the basis of recommendations of the Anti Corruption Commission but the order is set aside in a writ petition and the Government thereafter passes an order reinstating the servant with retrospective effect, the effect of the reinstatement order is that the servant is exonerated and hence an order for de novo inquiry by the Government would be against law. Even on the principle of double jeopardy it is not warranted. 1976 Lab IC 992 (J & K).

(17) Disciplinary proceeding — Suspension — Delinquent was found guilty and dismissed — Dismissal set aside by High Court — Delinquent reinstated — Again fresh enquiry started against him and he was again dismissed — Period of suspension during pendency of earlier disciplinary proceedings cannot be treated as such by invoking Rule 12 (4), of Orissa Civil Services (Classification, Control and Appeal) Rules (1962). ILR (1977) 2 Cut 288.

(18) Public servant — Enquiry officer exonerating him from charges — Departmental head directing fresh enquiry without any show cause notice — Employee ungrudgingly participating in the enquiry — Held it was too late to challenge order directing fresh enquiry. 1979 Lab IC (NOC) 120 (Guj).

86. Article 311 (2), Second Proviso

Proviso (a)—

(1) Under Proviso (a), where a Government servant has been convicted on a criminal charge and is subsequently dismissed from service on the same accusation it is not necessary that he must be again given an opportunity to defend himself before he is so dismissed. A 1957 Orissa 51 (54) (DB) ** A 1957 Punj 97 (98) ** A 1966 Andh Pra 72 (76) ** A 1977 Madh Pra 13 : 1977 Lab IC 341.

(1-A) If any of the three conditions spelt out in the second proviso to Article 311 (2) stands satisfied then the protection of Article 311 (2) is altogether lifted. 1980 Lab IC 489 (495) (Punj) (DB).

(2) Exemption from holding inquiry and giving opportunity under Article 311 (2) — Exemption is for benefit of administration and is conducive to public interests — Government not estopped from claiming such exemption even after inquiry. A 1970 Cal 384 (387) : 1970 Lab IC 1243 : 1970 Cri LJ 1225.

(3) The Proviso to Article 311 (2) will apply only when a person while in Government service was convicted on a criminal charge and he was dismissed on the ground of conduct which led to such conviction. A 1960 Tripura 31 (34). (Reversed on another point in A 1960 SC 601.)

(4) The emphasis in Proviso (a) of Art. 311 (2) is on the conduct of a person and not on his conviction. Section 12 of the Probation of Offenders Act (1958) removes disqualification attaching to conviction of person dealt with under Section 3 or 4 of the Act but does not remove disqualification attaching to his conduct resulting in his conviction. Section 12, therefore, does not conflict with the aforesaid Article. Proviso (a) is fully applicable even to the person who has been dealt with under Section 4 (1) and who is not to suffer disqualification under Section 12 of the aforesaid Act. No enquiry is therefore necessary before his dismissal, removal or reduction in rank is ordered. ILR (1974) 1 Delhi 19.

(5) Police Act (1861), Section 34, Clause 6 — Probation of Offenders Act (1958), Sections 3 and 12 — Government servant prosecuted under Section 34, Clause 6, Police Act pleading guilty — Magistrate releasing him after warning without using word 'convicted' in his order — Servant held was convicted under Section 3 of 1958 Act — Article 311 (2), Proviso (a) was attracted — Dismissal of servant without enquiry was not in violation of Article 311 (2) — Section 12 of 1958 Act was of no help. 1975 Lab IC 1694 (1696) (Gauhati).

(6) Central Civil Services (Classification, Control and Appeal) Rules (1965), Rule 19 (i) scope — Departmental punishment of Government Servant is not a necessary and automatic consequence of his conviction on a criminal charge — It is a penalty for his misconduct which has led to his conviction. **A 1973 Punj 1 (10) (FB).**

(7) In taking action against a Government servant who is convicted of any offence, the authority concerned has to take into account not merely the fact of his conviction but also examine his conduct leading to his conviction and consider inter alia the nature and quantum of the penalty to be imposed.

There is, however, nothing to debar such an authority from affording an opportunity to the person concerned to satisfy itself that his conduct resulting in his conviction rendered him unfit for being retained in service or to consider what punishment would suffice to meet the situation. 1969 Cur LJ 821 (Punj).

(8) The offence under Section 29, Police Act is created by a Special statute. It is a criminal offence and a charge thereof is a 'criminal charge' within the meaning of Article 311 (2) Proviso (a), Article 311 (2) therefore does not apply to his dismissal based on that conviction. The delinquent in such a case cannot question an inquiry held under Article 311 (2) on the ground that his service records were referred to without notice to him. A 1970 Cal 384 (386, 387) : 1970 Cri LJ 1225 : 1970 Lab IC 1243.

(9) The whole object of the proviso is to avoid duplication of enquiry in the matter where already there has been a regular trial by a competent court and the person has had ample chance of defending himself. A 1959 Assam 134 (135) (DB) ** 1974 Raj LW 171. (Proviso (a) to Article 311 (2) has relieved the punishing authority of the necessity of issuing notice both in regard to the charge and for the penalty proposed.)

(10) Proviso to Article 311 (2) becomes applicable only if a person has been convicted on a criminal charge. Conviction here can have only one meaning, namely, that the person must have been convicted finally. A 1959 Punj 401 (402) ** (1971) 1 Cut WR 1.

(10-A) Conviction of a civil servant prior to his appointment — Dismissal without enquiry on the ground of conviction — Proviso not attracted — Dismissal without enquiry is bad.

Articles 310 & 311 — Note 86 (contd.)
1975 Lab IC 930 (931) (Orissa). (A 1959 Assam 134, Dissented from.)

(11) The words "led to his conviction on a criminal charge" in Proviso (a) to Art. 311 (2) can only mean a criminal charge which has finally resulted in conviction of person proceeded against. A 1961 All 336 (337, 338) (DB).

(12) Dismissal of quasi-permanent employee after conviction on criminal charge — Dismissal not covered by the proviso — There is a distinction between dismissal because of 'conduct leading to conviction' and dismissal on 'conviction' — Imposing major punishment requires prior show cause notice especially where offence committed is a trivial one and unconnected with the professional duties of servant concerned. ILR (1972) 1 Delhi 115.

(13) Once the conviction is recorded by a competent Court of law on a criminal charge and until such conviction is set aside either on appeal or revision, such conviction remains effective and can be made the basis of dismissal, removal or reduction in rank of a public servant. 1970 Cri LJ 1185 : 1970 Lab IC 1246 (1248) (Mad).

(14) Where the dismissal orders against certain Railway employees were passed when appeals against their convictions under the Penal Code by the trial Court were already pending before the appellate Court which ultimately allowed them, the case of the employees is not covered by Article 311 (2), Proviso, Clause (a). A 1960 All 538 (539).

(15) Dismissal of Police Officer — No formal inquiry held — Proceedings taken under Public Officers (Conduct and Discipline) (Central Orders, Chapter D) Regulations 1969 — Regulations made by Director of Operations under Emergency (Essential Powers) Ordinance — Dismissal made by appropriate Service Commission — Valid and effective, though no enquiry was held. (1973) 2 Malayan LJ 191.

(16) Removal from service on ground of conviction on criminal charge — Conviction set aside in appeal — Government not entitled to benefit of sub-clause (a) of Proviso — Claim of departmental enquiry under Article 311 (2) is justified. A 1969 All 414 (419) (FB).

(16A) Railway Protection Force Rules (1959), Rule 47 — Disciplinary proceedings — Normal procedure of enquiry not followed in view of R. 47, on ground that it was not reasonably practicable — Disciplinary authority shall record reasons to support the ground though they need not be intimated to delinquent. 1980 Lab IC (NOC) 80 (Cal).

(17) Proviso (a) contemplates 'conviction' finally and not by trial Court. A 1965 Punj 153 (154, 155) °° A 1961 Mad 486 (492, 493).

(17-A) Dismissal of civil servant convicted of a criminal offence — Order of dismissal reciting section under which servant was convicted and also mentioning extenuating circumstances — Order is not invalid even if conduct leading to conviction is not mentioned therein. 1972 Lab IC 736 (744, 745) (FB) (Delhi). (A 1969 Andh Pra 371, Dissented from.)

(18) A charge under Sections 120 and 121, Railways Act, on which a person is convicted falls under the proviso as the offences covered by the aforesaid sections can be regarded to be criminal in the sense in which that expression is used in the proviso. A 1959 Punj 169 (169).

(19) Conviction on a criminal charge — Railway servant dismissed on conviction by trial Court — Both under the proviso and under Rule 1719 (1) of the Railway Establishment Code the disciplinary authority is entitled to dismiss him immediately without giving opportunity of being heard, and although an appeal against the conviction is pending. A 1970 Cal 501 (502) : 1970 Lab IC 1378.

(20) The words 'criminal charge' in the proviso (a) to Article 311 (2) connote nothing more nor less than criminal accusation. If this were not so, it will lead to startling results in cases where no charge is framed under the Criminal Procedure Code. A conviction under S. 70 (c), Hyderabad City Police Act is a conviction on a criminal charge within the meaning of the proviso. A 1966 Andh Pra 72 (72, 73) : 1966 Cri LJ 251 (DB).

(21) Conviction of Government servant on criminal charge — Order imposing punishment without reference to conduct which led to conviction is not sustainable. A 1973 Punj 1.

(22) Where a Government servant is convicted for contempt of Court, such conviction constitutes conviction on a "criminal charge" for the purpose of proviso (a). A 1946 Mad 375 (377).

(23) Conviction for contempt of Court — Dismissal on the ground of contempt and also for forgery — Rule 15 of Central Civil Services (Classification, Control and Appeal) Rules, 1957 attracted — Rule 18 (1) which is to the same effect as Article 311 (2) Proviso (a) not attracted — Opportunity to explain his case not given — Dismissal is illegal. A 1966 Punj 447 (449).

(24) Bihar and Orissa Boards Miscellaneous Rules (1928), Rule 176 (c) — Criminal prosecution started against Government servant — Acquittal on ground of benefit of doubt — This does not preclude the Government department from proceeding against said servant and punishing him after following rules of enquiry. A 1962 Orissa 125 (127) (DB).

(25) Only two exceptions can be treated as valid in dealing with the scope and effect of protection afforded by Article 311 (2). If a permanent public servant is asked to retire on ground that he has reached age of superannuation which has been reasonably fixed, Art. 311 (2) does not apply because such retirement is neither dismissal nor removal. If he is compulsorily retired under rules which prescribe normal age of superannuation and provide for a reasonably long period of qualified service after which alone compulsory retirement can be ordered, that again may not amount to dismissal or removal. A 1964 SC 1585 (1589, 1590) : 1964 (2) Cri LJ 481. (Article 9.1 of Pepsu Service Regulations as amended by Notification dated 19th January, 1960, held invalid.)

(26) Misconduct by Government servant — Conviction by criminal Court — Government passing order of suspension and of dismissal — Latter order amounts to second punishment for same misconduct and is illegal — Order held not covered by Proviso (a) to Article 311 (2). 1964 (1) Cri LJ 112 (113) (Mys).

(27) There is nothing in Article 311 (2) or Rule 7 (2) of the Punjab Civil Services (Punishment and Appeal) Rules 1952 to support the contention that the conviction which entails the extreme penalty of dismissal without an enquiry

Articles 310 & 311 — Note 86 (contd.)

must be for an offence involving moral turpitude. 1969 Cur LJ 821 (Punj).

(28) Where the Service Rule dispensed with the requirement of notice as regards assessment of guilt of delinquent on his conviction by Criminal Court but provided for notice and opportunity as regards imposition of the penalty, the order of dismissal without notice to show cause against is illegal. (1978) 2 Serv LR 661 (670) : 1979 Ker LT 440 (DB).

Proviso (b)—

(29) In all disciplinary proceedings against a Government servant he is entitled to be given a 'reasonable' opportunity at two stages. In respect of both the stages in special circumstances the superior authority may dispense with the service of notice on the delinquent public servant. In the first stage he may proceed with the enquiry ex parte if the person concerned has absconded or where it is for other reasons considered impracticable to communicate with him, but this he can do only 'for special and sufficient reasons to be recorded in writing." At the second stage also he may dispense with the issue of notice if he is satisfied that for some reasons to be recorded in writing "it is not reasonably practicable" to give the public servant concerned an opportunity of showing cause against the proposed punishment. A 1964 Orissa 29 (31, 32, 33) (DB).

(30) The purpose of Article 311 (2) read with the proviso is to extend limited constitutional guarantee to the Government servants. It cannot be construed as singling out the Government servants as a class for being denied the right to claim the enforcement of principles of natural justice and fairplay, to which even other citizens (including those who indulge in anti-social activities) are so entitled. (1975) 1 Serv LR 277 (Guj).

(31) When no legal right exists in the aggrieved person the principles of natural justice are not attracted against any action of the authorities. 1975 Lab IC 231 (234) (Raj).

(32) In order to bring the matter within the scope of Clause (b) of the Proviso to Art. 311 (2) there should be a reason recorded in writing for the authority being satisfied that it is not reasonably practicable to hold an inquiry. Where the order of retirement says that it is in public interest to retire the petitioner and does not even pretend that an inquiry had been necessary and could not be held such compulsory retirement under the Rules does not come within the scope of Clause (b) of Proviso to Article 311 (2). (1975) 2 APLJ 227 (DB) •• 1970 Lab IC 601 (605) (J & K).

(33) Proviso (b) to Article 311 (2) will cover a case where the delinquent is absconding (Obiter). (1971) 1 Cut WR 1.

(34) In order to bring the matter within the scope of Clause (b) of the proviso to Art. 311 (2) there should be a reason recorded in writing for the authority being satisfied that it is not reasonably practicable to hold an inquiry. Where the order of retirement says that it is in public interest to retire the petitioner and does not even pretend that an inquiry had been necessary and could not be held such compulsory retirement under the Rules does not come within the scope of Clause (b) of Proviso to Article 311 (2). 1976 Lab IC 503 (Andh Pra).

(35) Reasons for dispensing with enquiry under Clause (2) — Whether must appear on face of order of dismissal assuming they must be recorded in writing. A 1970 Cal 501 (502) : 1970 Lab IC 1378.

(36) Recording of reasons for not holding inquiry separately from order of dismissal is not by itself fatal. 1980 Lab IC 489 (492) (DB) (Punj).

(37) Non-service or non-communication of reasons for dispensing with inquiry — Detenu clearly informed about separately recording of reasons — Proceeding not vitiated if reasons are made available to him on request. 1980 Lab IC 489 (493, 494) (DB) (Punj).

(38) The reasons given in the order of removal from service did not refer to or mention a single effort to find out the employee or to serve any charge-sheet on him although in the notice of removal his home address was stated. The circumstances set out in the order were "The employee has been absconding notwithstanding due notices issued to all staff to be present in the context of the emergency arising out of the illegal strike. He is also found to be indulging in prejudicial activities. Thus, the employee is guilty of gross misconduct and is violating departmental rules."

Held, the circumstances set out in the order may justify order of dismissal but they do not give reasons for dispensing with an inquiry. The recording of reasons is a mandatory requirement of the Constitution. The notice of removal is therefore liable to be set aside. 1976 Lab IC 860 (Cal).

(39) Posts and Telegraph Extra-departmental Agents (Conduct and Service) Rules, 1964, R. 8 — Rule 8 ultra vires in so far as it contravenes mandatory provisions of Art. 311 (2) of the Constitution. 1976 Lab IC 892 (893, 894) (Orissa).

(40) Rule 14 (ii) Second Proviso, Clause (b) (Railway Servants (Discipline and Appeal) Rules (1968)), Rule 14 (ii) and Article 311 (2) are not in pari materia — Precedents bearing on former provisions are not used in interpreting latter. 1980 Lab IC 489 (499) (DB) (Punj).

(41) The use of the expression "may consider the circumstances of the case" in Rule 14 (ii) of the Railway Servants (Discipline and Appeal) Rules (1968) imply that the authority while exercising powers under Rule 14 must consider the circumstances of the case in an objective manner. The expression 'consider' indicates that the Disciplinary Authority is not permitted to act on its subjective satisfaction. Since the Disciplinary authority is required to consider the circumstances of the case, it would not be reasonable to hold that the rules of natural justice are excluded by necessary implication. In the absence of any statutory provision the principles of natural justice are attracted and if the power is exercised in violation of those rules, the exercise of power would be rendered void. 1977 Lab IC 105 (All).

(42) Proper investigation and fair inquiry is expected to be the rule and dispensation thereof, an exception, to be resorted to only when collection and production of evidence and inquiry is impracticable. Reasonableness of such impracticability has to be tested by lancing it against the constitutional safeguards secured for the public servants. Any attempt to whittle down such safeguards will not be justified unless the

Articles 310 & 311 — Note 86 (contd.)
circumstances enumerated in the proviso to Article 311 (2) and incorporated under R. 14 (ii) are strictly found to exist. In spite of Emergency and suspension of right to enforce fundamental rights, safeguards under Art. 311 are not suspended, nor the provisions are amended. There is no warrant to interpret the provisions differently from how the same could have been interpreted before Emergency. 1977 Lab IC 1590 (Bom). (Held, on facts circumstances relied on were superficial, misconceived and irrelevant and therefore they do not afford any legal justification for dispensing with the inquiry.)

(43) Where an order was passed under Rule 14 (ii) of Railway Servants (Discipline and Appeal) Rules, dispensing with disciplinary enquiry on the finding that delinquent's whereabouts were not known and that he was not interested in defending himself, the order would be valid. It cannot be challenged on the ground that the proviso to Clause (2) of Article 311 had not been invoked and therefore, finality envisaged in Clause (3) of that Article was not available. Once the conditions requisite for application of the proviso are satisfied the proviso comes into play and it is not necessary that it must be specifically invoked. 1977 Lab IC 643 (649) (Delhi).

(44) Order under R. 14 (ii) of Railway Servants (Discipline and Appeal) Rules (1968), dispensing with inquiry against employee — Effect of Article 311 (2) becomes inapplicable by virtue of the proviso (b) thereof — Disciplinary authority is not obliged to give any notice of charge or proposed penalty but can pass such order as deems fit in circumstances of the case. 1977 Lab IC 643 (650) (Delhi).

(45) Railway Servants (Discipline and Appeal) Rules (1968), Rule 14 (ii) — "Satisfaction" of disciplinary authority — Reasons for impracticability of holding inquiry — Reasons stated in the records of the case before passing the order of penalty — Non-mention in the order of penalty will not by itself render the order nullity. 1975 Lab IC 1288 (1299, 1300) (Cal). ((1975) 1 Cal LJ 75, Reversed.)

Proviso (c) —

(46) Under Proviso (c) where the President or Governor, as the case may be, is satisfied that in the interest of the security of the State it is not expedient to give a civil servant an opportunity to show cause, the satisfaction is that of the President or the Governor on the aid and advice of the council of ministers. A 1974 SC 2192. (A 1971 SC 1547, Overruled; A 1958 Andh Pra 619 and A 1958 Andh Pra 288 (DB) are no longer good law.) ** A 1970 Assam 80 (81, 82) ** ILR (1972) 2 Cal 230 ** ILR (1974) 1 Delhi 592.

(47) An order under Article 311 (2), Proviso (c) is an exercise of the administrative power by the executive and, therefore, must be subject to judicial review in the manner as other discretionary powers of the executive authorities. In a society aspiring to be governed by the rule of law the scope and extent of judicial review would depend not on the question whether the power is statutory or constitutional but on the terms of the grant of the power. If the power conferred is exercisable on fulfilment of certain conditions the exercise of such power is subject to judicial review by Court. 1977 Lab IC 856 (Cal).

(48) Before any action under Proviso (c) to Clause (2) of Article 311 of the Constitution is taken there should be materials for dismissal of a Government servant. Such materials need not be concerned with the question of the security of the State. There must, further, be materials germane to the question that an enquiry as contemplated under Clause (2) of Art. 311 of the Constitution was inexpedient and such inexpediency was in the interest of the security of the State. Therefore there must be some materials to indicate that in the interest of the security of the State it is inexpedient to hold an enquiry; more than this is not required to be fulfilled. 1977 Lab IC 856 (Cal) ** 1980 Ker LT 264 (269) (DB).

(49) Civil servant employee of Delhi Police Force — President can exercise power under Proviso (c). ILR (1974) 1 Delhi 592.

(50) Satisfaction contemplated is the subjective satisfaction of the competent authority. A 1967 Raj 194 (198, 199) (DB) ** A 1969 All 422.

(51) What Article 311 (2), Proviso (c) requires is satisfaction of the President about the expediency of not giving an opportunity to the employee concerned in the interest of the security of the State. A 1958 Bom 283 (289) (DB).

(51A) Departmental enquiry — Exoneration of the servant on merits by appointing authority — Second enquiry on same facts — No specific rule regarding it — Second enquiry cannot be held. 1975 Lab IC 640 (641) (Pat).

(52) The meaning of the words 'in the interest of" are wider than simply the expression "security of the State". The expression "in the interest of" includes, everything that even indirectly help the security of the State.

Actions which may not be for the security of State can still be 'in the interest" of the security of State. Security of State is different from the law and order or public order but maintenance of law and order as well as maintenance of public order may be in the interest of the security of State. Therefore, it can be said that failure to maintain law and order or failure to maintain public order might endanager not so much the security of the State but the "interest of" the security of the State. Attempt to change the government or to attack the persons who occupy the governmental positions need not necessarily create any problem for the security of the State but attempt to undermine the forces who are charged with responsibility of maintaining the intergrity of the State might endanger the interest of the security of the State. 1977 Lab IC 856 (Cal) ** ILR (1974) 1 Delhi 592.

(53) Held, on facts mere reference to proviso (e) of Cl. (2) of Art. 311 and inappropriate application of the old clause and the proviso, could not impliedly show that the Governor had his satisfaction regarding dispensing with the inquiry, and as the provisions of the Constitution in their true letters were not complied with in the order itself, the Governor's satisfaction in that regard was clearly not obtained. In that view of the matter the impugned order was invalid. A 1970 Assam 80 (81).

(54) It cannot be said that under Clause (c) of the proviso to sub-section (2) of Article 311, one of the two enquiries, namely, the second enquiry has been dispensed with and that it is

Articles 310 & 311 — Note 86 (contd.)
still obligatory to hold an enquiry as to whether the charges levelled against the Government servant have been substantiated and to give an opportunity to him to be represented in such enquiry. A 1962 Cal 481 (482, 483).

(55) Order issued under Art. 310 (1) terminating services of employee — Order challenged on ground of it being issued without satisfaction contemplated under Article 311 (2), Proviso (c) — Satisfaction not proved — Order violates Art. 311 (2). A 1969 All 422 (423).

(56) President passing order dismissing Civil servant in 1967 — Supreme Court quashing order for technical defect — President passing order of dismissal on same material in 1971 curing defect — Mere lapse of time did not vitiate order. ILR (1974) 1 Delhi 592.

(57) The applicability of Cl. (2) of Art. 311 requiring 'reasonable opportunity of showing cause against the action' is excluded by virtue of sub-clause (c) of the Proviso. Sub-clause (c) of the Proviso would be devoid of any meaning and content if it is held that the first or even the second opportunity under Art. 311 (2) falls outside the purview of the President's satisfaction. A 1962 Punj 400 (401).

(58) In absence of an enquiry being held into charges an order under Cl. (c) of Proviso to Article 311 (2) dispensing with all opportunity to show cause against the action proposed to be taken must be construed as intended to refer to the action including inquiry into the truth of the charges and the proposed penalty to be imposed after such inquiry. Merely because the form of the order is expressed in the language used in the unamended Art. 311 (2) it does not exclude the applicability of the amended Cl. (2) of Article 311 as a whole. **A 1971 SC 2004 (2007, 2008) : 1971 Lab IC 1182.**

(59) Civil Rules will not be applicable to a case where the President or the Governor decides under Proviso (c) to Art. 311, Cl. (2) that in the interest of the security of the State it is not expedient to give to the Government servant concerned the opportunity to show cause under Art. 311, Cl. (2). A 1958 Andb Pra 288 (291) (DB).

(60) Matters dealt with under Art. 311 can be disposed of in the manner contemplated by Article 77 of the Constitution which deals with the conduct of "Government business" since this expression means in generic sense the exercise of the executive authority of the Union which certainly comprises the discharge of the executive function of the President under Article 311. A 1967 Raj 194 (198) (DB).

(61) When the President or the Governor as the case may be is satisfied that it would not be expedient to hold any enquiry under Article 311 (2) in the interest of the security of State, he may dismiss a Government servant without giving him any opportunity of hearing. 1977 Lab IC 628 (Cal).

(62) Question of sufficiency of the data on which the satisfaction is based cannot be gone into — It can only be attacked on the ground of mala fides — In the absence of any specific allegation as to who was animated by ill-will or bad faith towards the concerned employee, the plea of bad faith on the part of the authority held could not succeed. **A 1967 Raj 194 (198, 199) (DB).**

(63) The Governor has no power to act under Art. 311 (2) (c) of the Constitution in respect of an employee of the High Court to dismiss him. The pleasure doctrine is not applicable in so far as the employee of High Court is concerned and the operation of Art. 311 (2) (c) of the Constitution accordingly does not come into play. There is also no power vested in the Governor over a High Court employee which might be called to be co-extensive with that of the powers of the Chief Justice in respect of such an employee. 1977 Lab IC (NOC) 39 (Cal).

(64) On basis of material before it Government dismissing civil servant instead of retiring him compulsorily — There is no discrimination or mala fide. ILR (1974) 1 Delhi 592.

(65) It is true that the satisfaction contemplated under the said provision being a subjective one, the Courts of law cannot substitute its view for those of the executive as to whether or not it would be expedient in the interest of the security of the State to dispense with the enquiry under Art. 311 (2). But the Court is entitled to enquire whether conditions precedent to the formation of such satisfaction have any factual basis. Secondly, whether the executive had acted in good faith. Thirdly whether the existence of the relevant materials upon which the validity of exercise of executive power is predicated are present. 1977 Lab IC 628 (Cal).

(66) If a party establishes by placing relevant materials before the Court that the order was made mala fide or for ulterior purposes, the order may be set aside on the ground that it is a fraud on the Court. A 1958 Andh Pra 619 (622) ** A 1958 Andh Pra 288 (291) (DB).

(67) Opportunity of being heard deprived under Proviso (c) — President need not assign reasons for so depriving. A 1962 Punj 400 (401, 402).

(68) Order dismissing civil servant under Proviso (c) drafted and typed earlier and placed before President subsequently — President signing order — Order held valid. ILR (1974) 1 Delhi 592.

(69) During the proclamation of emergency the Governor did not cease to be a constitutional authority and he was not deprived of all his powers and functions including those under Art. 311 (2), Proviso (c). Such could not be the result in view of Cl. (c) (1) of Proclamation dated 19-3-1970 and also the Presidential Order GSR 491 of the same date. The effect of Presidential Order was that the Governor's functions were subject to the control and superintendence of the President. It was not necessary for the President to issue another Proclamation under Article 356 for conferring powers and functions upon the Governor. Consequently the order of the Governor dismissing an employee after exercising power under Art. 311 (2) (c) was not invalid. 1977 Lab IC 628 (Cal).

(70) Satisfaction contemplated under the proviso is not personal satisfaction of the Governor but of Government. A 1962 Cal 481 (484).

(71) When the President under Article 356 of the Constitution assumed to himself all the functions of the Government of the State and all the powers exercisable by the Governor of the State and thereafter delegated those functions and powers to the Governor the President was acting on the advice of the Council of

Articles 310 & 311 — Note 86 (contd.)
Ministers. Therefore, the Governor in discharging his function under sub-clause (c) of Cl. (2) of Article 311 of the Constitution was acting by virtue of the delegation made to him on the advice of the Council of Ministers. Actions taken by the Governor further were subject to the superintendence, direction and control of the President and such superintendence direction or control by the President had to be on the advice of the Council of Ministers. In such circumstance there was no further scope for the Governor, in exercising his functions under sub-clause (c) of the Proviso to Cl. (2) of Art. 311 of the Constitution to obtain the advice of the Council of Ministers. Thus the impugned order of dismissal passed by the Governor was not bad because he had not obtained the advice of the Council of Ministers. 1977 Lab IC 856 (Cal).

(72) Satisfaction contemplated by Proviso (c) for dispensing with enquiry under Art. 311 (2) has to be that of the Governor and not that of Chief Minister though the former has to act with the aid and advice of the latter. The "executive action of the Government of a State" in Art. 166 (1) cannot be equated with the exercise of the power by the Governor under Art. 311 (2), Proviso (c) to claim complete immunity. 1972 Lab IC 387 (390) (Assam).

(73) It is the satisfaction of the President or Governor in the constitutional sense under the cabinet system of Government. Therefore, such powers under Art. 311 (2), Proviso (e) like any other executive business may be allocated by the Rules of Business and in such case the decision of any Minister or Officer under the Rules of Business framed under Art. 166 (3) would be the decision of the Governor. 1977 Lab IC 628 (Cal).

(74) Order removing railway servant from service and dispensing with holding of inquiry for security purposes — Matter disposed of by Railway Minister in person — Order issued in the name of President, reciting his satisfaction and authenticated by a Deputy Director of Railway Board — Order cannot be challenged on ground that it is not an order or instrument made by the President — Personal satisfaction of the President is not necessary. A 1967 Raj 194 (196) (DB).

87. **Article 311 (3).**— (1) The application of Clause (3) of Article 311 does not come in except with reference to sub-clause (b) of the Proviso. A 1954 Assam 18 (22) : 1954 Cri LJ 31 (DB).

(2) Interpretation of — Decision not to hold inquiry for some reason — Finality of — Non-service of copy of reasons on delinquent official — Does not lead to fatal prejudice. 1980 Lab IC 489 (497) (DB) (Punj).

87-A. **Transfer.**— (1) Fundamental Rules, R. 15 — Power of transfer — The rule is that the Government has the power to transfer a Government servant within the range of transferability even if such a transfer results in loss of some advantages to the Government servant concerned. It is only by way of an exception to this rule that it can be shown that the order was by way of a camouflage with the real intention to punish the Government servant. The petitioner has to show in such a case that the Government has committed fraud on the power which it undoubtedly possesses. (1971) 2 Serv LR 453 : ILR (1971) 1 Delhi 754.

(2) The power vested in the Government to transfer any official must be used honestly, bona fide and reasonably. If the power is used for extraneous considerations for achieving an alien purpose or for oblique motive, its use would be struck down by the courts. Once the Government is shown to have the authority to transfer a Government servant, the courts would be most reluctant and disinclined to interfere with the exercise of the administrative discretion. 1978 J & K LR 57 : 1978 Lab IC (NOC) 105 (DB).

(3) Transfer from one department to another — Administrative decision — Reopening of — Power can be exercised only to redress an injustice and for good reasons. (1980) 1 Serv LR 795 (805) : 1980 Lab IC (NOC) 115 (DB) (Delhi).

(4) Transfer of Junior Engineer from work side to non-work side resulting in his loss of special allowance — Allowance attached to certain post — Cannot be claimed as of right — No violation of Arts. 14, 16 and 311. ILR (1978) 57 Pat 914 : 1979 Lab IC (NOC) 124 (DB) (Pat).

(5) Transfer of Senior Cashier as noter/drafter on identical pay scale — Transfer not by way of punishment and not causing any financial loss to the employee — Article 311 not attracted. 1979 Lab IC 1215 (1220) (All) •• ILR (1971) 2 Punj 757. (Punjab Agricultural Produce Markets Act (23 of 1961), S. 3 (11) — Transfer of servant from one department to another having different cadres and Service Rules — No decrease in emolument — Held no injustice.)

(6) Civil Servant transferred pending enquiry against him — Enquiry being preliminary in character, no question of giving opportunity to him arises — Transfer does not amount to punishment — Article 311 not attracted. 1973 Serv LJ 213 : 1973 Lab IC 301 (305) : 1972 Ker LT 54.

(7) Transfer of employee from one department to another — Plea by employee that transfer was unilateral and to his prejudice — Burden lies upon him to substantiate the plea — On employee's failure to do so no relief could be granted. 1980 Lab IC (NOC) 86 (Cal).

(8) Petitioner confirmed as clerk against a pensionable post in the Directorate of Punjab State Transport Department — Department subsequently bifurcating into two wings commercial and non-commercial — Petitioner transferred to Punjab Roadways, where posts were non-pensionable, without his consent — Held, that the order of transfer was bad and that the petitioner should be deemed to have continued to serve in the wing where posts were pensionable. (1980) 1 Serv LR 691 (693, 694) (Punj).

(9) Where a person was appointed on new post on his representations and the order throughout mentioned about fresh appointment and not a continuance of any old appointment, subsequent order of transfer to earlier post having no prospects would be bad. 44 Cut LT 132 : 1978 Lab IC (NOC) 151 (DB) (Orissa).

(10) Petitioner, originally a panchayat clerk posted in the office of the Director of Panchayat Raj, as Lower Division Assistant but before his confirmation to that post was transfer-

Articles 310 & 311 — Note 87-A (contd.)
red to his substantive post which was a lower grade — Held that such a transfer was not possible unless he was first reverted — Transfer was therefore invalid and unenforceable. (1974) 2 Serv LR 199 (All).

(11) Transfer — Petitioner an employee of Collectorate retrenched on account of abolition of post — Subsequently, on report of vacancies he was appointed in office of Regional Transport Officer — However appointment order was issued by Additional District Magistrate — Additional District Magistrate later transferring petitioner to another department — Transfer order unjustified — District Magistrate had no jurisdiction to pass transfer order as office of Regional Transport Officer and Collectorate are two independent establishments — Further, petitioner could not have been transferred outside the establishment of Collectorate. 1977 Lab IC 1690 (1691) (DB) (Orissa).

(12) Administrative instructions in the nature of guidelines as to the timing of transfers etc. are not enforceable provisions and non-observance thereof would not result in the orders being set aside. 1979 Lab IC 749 (Orissa)

(13) Transfer — Panchayat employee transferred because some members want it — Authority making order without going into complaints made against employee. 1975 Ker LT 375.

(14) Transfer of Government servant from Jammu to Leh — Simply because the transfer is made in winter months is no ground to hold that it is by way of punishment. 1978 Lab IC (NOC) 105 (J & K).

88. Voluntary resignation or voluntary retirement.— (1) There is no principle of law which prohibits termination of service of a Government servant by the Government at the Government servant's request — It is open to an employer to terminate the services of its employee by mutual consent. In such cases neither the provisions of Art. 311 nor the principles of natural justice are attracted. 1969 Serv LR 819 (SC).

(2) Where a civil servant has attained the age of fifty-five years and for some reason or other himself confesses his inability to continue in service any longer and seeks permission for retirement, it would be a useless formality to ask him to show cause as to why his service should not be terminated, before the order for his retirement is passed. Article 311, Cl. (2) cannot have any possible application in such circumstances. A 1954 SC 548 (586) ** A 1957 Assam 77 (80) (DB).

(3) Where a civil servant applies for and is granted permission to retire on his completing the age of fifty-five years and he accordingly retires, he cannot subsequently change his mind and ask for the cancellation of the retirement order, though he may be on 'post-retirement leave' and such leave may not have expired at the time. A 1954 SC 584 (587) ** A 1970 Orissa 130 (131) : 1970 Lab IC 1004.

(4) While the Government reserves its right under R. 56 (b) of (Assam) Fundamental Rules to compulsorily retire a Government servant, even against his wish, there is a corresponding right of the Government servant under F. R. 56 (c) to voluntarily retire from service by giving the Government three months notice in writing There is no question of acceptance of the request for voluntary retirement by the Government when the Government servant exercises his right under F. R. 56 (c). A 1978 SC 17 (19) : 1977 Lab IC 1852.

(5) Voluntary retirement sought before the age of superannuation invoking Central Civil Services Pension Rules (1972) — Subsequent withdrawal of letter of retirement before retirement became effective would have been permissible, but for Rule 48 (2) of Pension Rules (1972) opted by employee in this case — R. 48 (2) makes such withdrawal subject to specific approval of the authority, which in this case has been declined. (1979) 2 Serv LR 723 : 1979 Lab IC (NOC) 154 (Delhi).

(6) A civil servant can withdraw his resignation at any time before it is accepted. A 1956 All 153 (154) ** 1973 Lab IC 1360 (1361) (Orissa) ** 1971 Lab IC 121 (122) (Madh Pra) ** 1971 Lab IC 1334 (DB) (Orissa).

(7) Government servant — Resignation — Withdrawal of — Subsequent acceptance of resignation with retrospective effect — Held illegal. 1975 Lab IC 943 (944 to 947) (Pat). (A 1956 All 70, **Dissented from.**)

(7A) Withdrawal of resignation by the Director of a Co-operative Society — Resolution by the society accepting the resignation without considering the letter of withdrawal which was pending on that day, is not legal — Director has a right to withdraw his resignation before it is accepted. 1973 Kant LJ 30 (Tribunal).

(8) Under the proviso to Rule 161 (2) (ii) of the Bombay Civil Services Rules, it is open to the appointing authority to withhold permission to retire to a Government servant when (1) he is under suspension or (2) against whom departmental proceedings are pending or contemplated. The appointing authority has no jurisdiction to take disciplinary proceedings against the Government servant, who had effectively retired. 1978 Serv LWR 199 (203, 205) (SC).

(9) Resignation — Its acceptance should be by appointing authority — Unless appointing authority delegates that function to a subordinate authority, latter's acceptance of resignation not legally effective. 1971 Lab IC 121 (122) (Madh Pra).

(10) Where a letter of resignation is expressly made operative only from a future date, it can be withdrawn at any time before such date. A 1956 All 70 (71).

(11) Where a person's services are terminated on the ground of his having tendered his resignation while as a matter of fact he has not done so, and he is not given any opportunity of showing why he should not be dismissed or removed from service, the order cannot stand. A 1954 Bhopal 25 (30).

(12) As in the case of a temporary Government servant, a probationary Government servant also may terminate his service by one month's notice. A 1963 Cal 359 (364).

(13) Resignation by servant — Withdrawal of — Person in temporary service relieved from post on his giving notice of resignation — He cannot withdraw resignation after he was relieved. 1975 Lab IC 1279 (1280, 1282) (Him Pra).

89. Suspension — See also Note 105.— (1) Article 311 is not concerned with suspension from service. A 1962 SC 630 (632).

(2) Suspension is of two kinds, interim suspension and suspension as a penalty. Suspension pending departmental enquiry or pending

Articles 310 & 311 — Note 89 (contd.)
criminal proceedings is called interim suspension after departmental enquiry, public servant may be found guilty and penalty by way of suspension may be imposed, in which case it is called suspension as a penalty. A 1966 All 552 (554) ** A 1964 SC 787 (792, 793) ** (1975) 2 Serv LR 167 (Punj).

(3) Suspension is of two kinds, namely suspension as punishment and suspension pending enquiry. Suspension during enquiry may however also be of two kinds, for a distinction must be drawn between suspending an employee from service and suspending him from performing duties of his post or office. If there is contract of service in strict sense, first kind of suspension involves suspension of contract, while second involves only a suspension of employee from performance of his duties on the basis that contract is subsisting. A 1961 All 580 (582) (DB).

(4) The power to suspend, in the sense of a right to forbid an employee to work, is not an implied term in an ordinary contract between master and servant; such a power can only be the creature either of a statute governing the contract, or of an express term in the contract itself. The distinction between suspending the contract of a servant and suspending him from performing the duties of his office on the basis that the contract is subsisting is important. The suspenion in the latter case is always an implied term in every contract of service. When an employee is suspended in this sense, it means that the employer merely issues a direction to him that he should not do the service required of him during a particular period. As the Madhya Pradesh Government Servants (Temporary and Quasi-Permanent Service) Rules (1960) do not provide for suspension during pendency of an enquiry the order of suspension by the Government pending enquiry against him cannot amount to an order suspending the contract of service. **A 1970 SC 1494 (1496, 1497) : 1970 Lab IC 1332.**

(4A) Government as employer cannot be divested of its power to suspend employee by a service rule stipulating appointing authority as authority to suspend an employee. A 1971 All 214 (216, 217, 218) : 1971 Lab IC 646.

(5) Where there is power conferred on the employer either by an express term in the contract or by the rules governing the terms and conditions of service to suspend an employee, the order of suspension has the effect of temporarily suspending the relations of master and servant with the consequence that the employee is not bound to render service and the employer is not bound to pay. In such a case the employee would not be entitled to receive any payment at all from the employer unless the contract of employment or the rules governing the terms and conditions of service provide for payment of some subsistence allowance. **A 1977 SC 1146 (1157) : 1977 Lab IC 710.**

(6) Suspension order does not put an end to the service under the Government. Real effect of suspension order is that though he continues to be a member of the Government service, he is not permitted to work and further during the period of his suspension he is paid only some allowance generally called "subsistence allowance". **A 1963 SC 687 (690, 691) ** A 1977 SC 1466 : 1977 Lab IC 697.**

(7) In the course of ten years the incumbent was alleged not to have attended the disciplinary proceedings only on two occasions due to illness. The proceedings were prolonged by the Department itself for the remaining period. The incumbent could not thus be held responsible for prolonging the enquiry against him. The reduction of subsistence allowance held was arbitrary having been passed without any material to show that he was responsible for prolonging the enquiry. ILR (1977) 1 Cut 45.

(8) The authority entitled to appoint a public servant would be entitled to suspend him pending a departmental enquiry into his conduct or pending a criminal proceeding, which may eventually result in a departmental enquiry against him. This general principle is illustrated by the provision in Section 16 of the General Clauses Act which is in consonance with the general law of master and servant. **A 1964 SC 787 (792, 793).**

(9) Even under old Rule 49 of the Civil Services (Classification, Control and Appeal) Rules, 1930, a civil servant could be suspended while an enquiry into his conduct was pending. Though suspension as a punishment could only be the result of an enquiry and an act of judgment on the part of the competent authority, still suspension during the pendency of an enquiry was made. A 1963 Punj 87 (89) (DB). (Reversed on another point in A 1964 SC 787.)

(10) Interim suspension — Public servant should be paid subsistence allowance in accordance with any statute or rule there may be to govern the matter — If there is no rule he will be entitled to full emoluments during the period of suspension. **A 1964 SC 787 (793).**

(11) Rule 7 (v) of the Bengal Subordinate Civil Services Rules speaks about suspension as a substantive punishment. The petitioner, a civil servant, was suspended from service on the basis of a First Information Report in respect of certain offences alleged to have been committed by him. The petitioner was, however, discharged at the subsequent trial on the technical ground of want of proper complaint. On the same day a fresh complaint was filed in accordance with law and it was subsequently ordered that the suspension order should stand **Held**, that the suspension order had not come to an end by the discharge of the petitioner but continued till the final determination of the criminal proceeding. **A 1961 Cal 225 (225, 226).**

(12) Suspension is not considered as substantive punishment under Bengal Police Regulations — Non-observance of procedure laid down under the Article will not make the order void. (1973) 77 Cal WN 300.

(13) Under Rule 13 of the Punjab Tahsildari Rules, 1952, it is true that the Commissioner alone is competent to pass an order of suspension by way of penalty against a Tahsildar but an order of suspension pending departmental enquiry passed by the Financial Commissioner cannot be challenged on the ground that it was not passed by the competent authority as according to R. 3, the appointing authority to the post of Tahsildar is the Financial Commissioner. A 1968 Punj 406 (412) : 1968 Lab IC 1773.

(14) Suspension is one of the punishments which may be imposed on a civil servant under R. 49 of the Civil Services (Classification, Control and Appeal) Rules. Apart from such sus-

Articles 310 & 311 — Note 89 (contd.)
pension of a punitive nature, Government has an inherent power to suspend an officer from performing the duties of his office pending an inquiry into charges against him. A 1955 Pat 131 (134) (DB) ** A 1952 All 681 (683) (DB).

(15) 'Suspension' is an implied incident of removal, and an employee can be suspended pending final determination of charge. A 1960 Madh Pra 273 (277) (DB).

(16) Revival of order of suspension on setting aside order of reinstatement — Employee on being allowed to join duties during suspension discharging his duties — He is entitled to full emoluments. (1971) 2 Serv LR 39 (Delhi).

(17) An order of suspension does not amount to an order of reduction in rank. A 1958 Andh Pra 35 (36) (DB) ** A 1958 Ker 72 (74) (DB) ** A 1957 Assam 77 (82) (DB) ** A 1957 Mad 46 (46) (DB) ** A 1956 Cal 662 (667) ** A 1955 Pat 131 (134) (DB) ** (1975) 2 Serv LR 167 (Punj). (Grant of subsistence allowance only for suspension period — No reduction in rank.)

[But see A 1954 Ajmer 22 (25) ** A 1952 Pepsu 69 (71, 72) ** A 1949 Nag 118 (120) (DB).]

(18) Orissa Education (Recruitment and Conditions of Service of Teachers and Members of the Staff of the Aided Educational Institutions) Rules (1974), R. 21 (2), Proviso — Suspension of employee by way of penalty to be with prior approval of authority mentioned in proviso of the Rule — Suspension during pendency of disciplinary enquiry is not a penalty — Prior approval not necessary. ILR (1977) 2 Cut 460 : 44 Cut LT 328.

(19) The basic idea underlying the root word "suspend" and all its derivatives is that a person in the service of the Government, while holding an office and performing its functions of holding a position or privilege, should be interrupted in doing so and debarred for the time being from further functioning in the office or holding the position or privilege. He is intercepted in the exercise of his functions or his enjoyment of the privilege and put aside as it were, for a time, and excluded, during the period, from his functions or privileges. A 1958 Andh Pra 619 (623) ** A 1958 Madh Pra 44 (45) (DB) ** A 1957 Assam 77 (82) (DB) ** A 1957 Punj 130 (131, 132) (FB) ** A 1954 Cal 340 (343) (DB) ** (1979) 2 Serv LR 194 (195) (Cal). (Attending roll call by a Police Personnel is a part of his duty. If he has been suspended from performing his duty, the authority concerned cannot, at the same breath, call upon him to attend the roll call.)

(20) Departmental proceedings do not lapse with the withdrawal of suspension of delinquent officer. A 1976 Pat 158 (168).

(21) Government's power to suspend its servant from service is inherent and unlimited — Pendency of departmental enquiry not necessary for its exercise. ILR (1969) 2 Punj 149 (153, 155).

(22) Suspension in anticipation of departmental proceedings — No enquiry initiated — No charges framed — However special circumstances warranted such step — No reason to interfere with order of suspension. 1979 Lab IC (NOC) 62 (DB) (Pat).

(23) Suspension of Government servant in anticipation of departmental proceedings — No proceedings initiated — No charges framed — No material to show that there was material on record to indicate that there were special circumstances requiring suspension — Suspension order illegal and without jurisdiction. 1979 BLJR 572 : 1979 Lab IC (NOC) 61 (DB).

(24) Government servant — Suspension — Government servant cannot be kept on suspension indefinitely. (1971) 2 APLJ 463 ** A 1970 Mad 155.

(25) An order of suspension with retrospective effect is a contradiction in terms, and invalid. A 1958 Andh Pra 619 (623, 624) ** A 1958 Cal 239 (241) ** A 1958 Madh Pra 44 (45, 46) (DB) ** A 1957 Orissa 51 (54) (DB) ** A 1956 Cal 662 (666) ** A 1954 Cal 340 (343) (DB) ** A 1963 Punj 298 (311, 312). (But such an order is not absolutely void but is operative from the date the Government servant is actually relieved of his duties and placed under suspension.) ** A 1962 Guj 197 (203) (DB) ** A 1960 Bom 274 (275, 276) (DB) ** 1960 Raj LW 385 (388, 389, 390) ** A 1959 Madh Pra 404 (407) (DB). (Order is effective from the day it is passed for the future, but it is ineffective ex post facto.)

(26) Order of dismissal with retrospective effect is in substance an order of dismissal as from date of order with super-added direction that order should operate retrospectively as from anterior date — The two parts are severable — Though the court cannot pass new order of dismissal, it can give effect to valid part of order. A 1966 SC 951 (953). (A 1961 Cal 626 and 61 Cal WN 880, Overruled.)

(27) Suspension pending enquiry not provided by bye-law of Co-op. Society — Suspension order with retrospective effect is illegal. A 1961 Madh Pra 289 (293) (DB).

(28) Rule 102 of Karnataka Civil Services Rules does not provide for automatic suspension of Government servant, the moment he is arrested for criminal offence. 1979 Lab IC 453 (454) (Kant).

(29) Government servant suspended by competent authority under Rule 31 of Jammu and Kashmir Civil Services (Classification, Control and Appeal) Rules (1956) — Fact that order was confirmed by Government after some time makes no difference — No question that order was given retrospective effect arises. A 1964 J & K 14 (16) (DB).

(30) Order of suspension with retrospective effect — Order of suspension cannot be made to operate retrospectively — Court, while declaring retrospective part invalid, may allow prospective part of the same order to stand — But Court will not do so if that amounts to passing of 'new' order. A 1965 Cal 13 (15, 16) ** A 1966 Cal 485 (487, 488). (On facts held that since petitioner was treated as continuing in service during his absence order dismissing him from date of his absence was meaningless and was invalid to that extent but prospective part could still be given effect to.)

(31) An order of suspension passed before the date of charge-sheet and continued beyond 4 months without obtaining approval of higher authority concerned is not sustainable under Rule 1711 (b) (as it stood on 18-4-57) and is

Articles 310 & 311 — Note 89 (contd.)

void. Compliance with procedure as laid down in Rule 1711 is essential for validity of order passed for suspension under Railway Establishment Code may it be a punitive suspension or a suspension pending enquiry. A 1964 Pat 168 (172, 173).

(32) Courts of law are not bound by departmental interpretation of rules, but have to interpret these rules according to the language and other canons of interpretation. The post-retirement leave can by no stretch of imagination be treated as extension in service. Since his service had ceased, no order of suspension or dismissal could be passed with regard to him, because an order of suspension or dismissal could be passed only with regard to a person who was in actual service on the date when such an order was passed. A 1958 J & K 41 (42) (DB).

(33) Where an officer is suspended, there can be no "re-instatement" with retrospective effect. A 1958 Cal 239 (241).

(34) Suspension pending departmental enquiry — Re-instatement — Denial of full pay and allowances for suspension period — There is necessity of affording opportunity to show cause. (1975) 2 Serv LR 167 (Punj).

(35) Government servant — Order of suspension in contemplation of departmental inquiry — Subsequent order of discharge set aside as illegal — Order of suspension merged in the order of discharge, and was not revived when the order of discharge was set aside — Subsequent order of suspension with retrospective effect — Such order could not be passed and must be set aside. A 1956 Cal 447 (448).

(36) The power to suspend an employee lies only with the appointing authority. Where an employee was appointed by executive officer of Municipality, the power to suspend lies only with that Authority and not with his subordinate. U. P. Municipalities Act (1916) being repealed by U. P. Nagar Mahapalika Adhiniyam (2 of 1959), the executive officer succeeded by Mukhya Nagar Adhikari, alone could suspend an employee appointed by him and not the Nagar Swasthya Adhikari. A 1966 All 552 (555).

(37) An order of suspension followed by an order of dismissal comes to an end on the order of dismissal being passed. Where the order of dismissal is subsequently set aside or declared invalid, the order of suspension is not thereby revived. A 1955 SC 600 (603) •• 1976 Lab IC 892 (894) (DB) (Orissa). (A 1952 Nag 170, Disting.) •• A 1958 Madh Pra 44 (46) (DB) •• A 1957 All 436 (438) •• A 1956 All 151 (152) (DB) •• A 1956 Cal 662 (666) •• A 1963 Raj 203 (206). (In such a case a fresh order of suspension cannot be passed so as to have a retrospective effect in the absence of any statutory authority to do so.) •• A 1961 Madh Pra 261 (262, 266) (DB). (Subsequent order of Government continuing suspension retrospectively from date of commencement of previous order of suspension to enable Government to hold proper enquiry against him — Order so far as it was retrospective held could not be sustained.) •• A 1960 Madh Pra 273 (277, 278) (DB). (Order of dismissal is effective from date of order.) •• 1960 Raj LW 385 •• A 1959 Cal 1 (8) (DB).

[But see A 1966 Punj 500 (502) (DB). (Order of suspension — Its fate is not linked with and is not dependent upon decision as to validity or invalidity of dismissal order. If the order of dismissal is held illegal and set aside the order of suspension is not automatically set aside.)

(38) Government servant on leave preparatory to retirement — Leave revoked by Government — Government servant suspended and departmental enquiry ordered against him — Held, no breach of service rules. A 1964 SC 72 (81).

(39) Court must take into account subsequent events — Illegal order of suspension supplanted by another order of suspension — Earlier order will not be quashed. A 1959 All 686 (688).

(40) Where an order of suspension is passed against a civil servant pending a departmental inquiry and thereafter the order of removal is passed for reasons not connected with the departmental enquiry, no departmental enquiry can be held thereafter to punish the employee as the relationship of master and servant ceased. The order of suspension merged into the order of removal, and it could not revive when the latter order was cancelled. A 1959 Madh Pra 295 (296) (DB).

(41) Where a suspension order has been passed in view of criminal proceedings being started against a Government officer, the suspension would automatically come to an end on the termination of the criminal proceedings. A 1958 Cal 239 (241) •• A 1953 Cal 504 (505)

[But see A 1957 All 436 (438).]

(42) Suspension of delinquent in consequence of pending criminal case against him — Criminal case ending in discharge — Initiation or continuance of departmental proceedings on same allegations cannot revive old order of suspension — Fresh order of suspension necessary unless statutory rules provide for automatic revival of old order of suspension. A 1969 Cal 461 (462, 463) : 1969 Lab IC 1299.

(43) Where pending the criminal trial of a Government servant, departmental proceedings are initiated against him on other charges, his suspension on such charges can be continued notwithstanding his acquittal in the criminal case. A 1957 All 436 (438).

(44) A Government servant under suspension continues to be a Government servant. A 1958 Cal 239 (241). (He is in a state of suspended animation as it were.) •• A 1957 Punj 130 (132) (FB) •• A 1956 Mad 95 (96).

(45) Suspension of Government servant — Services could be terminated even during period of suspension as relationship of employer and employee continues. (1975) 77 Pun LR (D) 150.

(46) Temporary Government servant under suspension — Relationship of employer and employee suspended for the time being, obligations imposed on both sides are suspended — There cannot be any termination of services by notice. A 1967 Madh Pra 231 (234) (DB).

(47) There is no question of suspension of a temporary servant whose services are intended to be terminated. A 1960 Manipur 45 (47).

(48) A Government servant may be placed under suspension pending a criminal charge against him although no departmental proceedings are initiated against him at the time. A

Articles 310 & 311 — Note 89 (contd.)
1957 Orissa 51 (54) (DB) ** A 1958 Ker 374 (375) (DB). (Suspension pending inquiry into conduct, in terms of Service Rules valid.)

(49) Suspension pending departmental inquiry is not punishment and is not hit by Art. 311. A 1959 Madh Pra 295 (297) (DB).

(50) Suspension without inquiry of a municipal Sanitary Inspector under criminal charge — Validity — Suspension though not valid under R. 28 of Niyamavali is valid under fundamental Rule 199. ILR (1977) 1 All 517 : 1978 Lab IC (NOC) 52 (DB).

(51) Suspension pending inquiry causes financial and mental suffering to the employee — Suspension can be treated as a punishment. (1971) 1 Andh WR 211.

(52) Suspension from service — Exoneration of employee by Court — Railway authority intending to hold departmental enquiry — Order of suspension from date of dismissal which was set aside by Court — Order of suspension is valid under Cl. (4) of Rule 40 of Railway Protection Force Rules (1959). A 1967 Bom 332 (334).

(53) Suspension of an officer pending an enquiry into his conduct is not a penalty under any of the Service Rules. The expressions 'honourably acquitted' and 'acquitted of blame' occurring in Rr. 108 (b) (i) and 109 (Jammu and Kashmir Civil Services (Classification, Control and Appeal) Rules (1956)) have been used to describe an acquittal based on the positive innocence of the accused. Provisions of Rr. 107 and 108 (b) also show that an officer cannot claim as of right any salary or allowance equal to salary for the period of his suspension. This is not a penalty but one of the conditions of service governing a civil servant. The Government is expressly empowered by Rule 31 (1) to place a Government servant under suspension where an inquiry into his conduct is contemplated and the effect of the suspension is to put an end to his right to ask payment of salary for the period of suspension. A 1962 J & K 68 (70, 72).

(54) An order of suspension, though it may be of a punitive nature, is not covered by Article 311. A 1954 Madh B 49 (50, 51) (DB) ** A 1958 Andh Pra 35 (36) (DB) ** A 1956 Punj 102 (104).

(55) It cannot be said that there was no power to suspend Government servant without first framing charge against him. A 1963 Punj 298 (311) (DB).

(56) Not being covered by Article 311, Cl. (2), an order of suspension against a civil servant, even if it is passed as a form of punishment against him, would not require for its validity that it should be preceded by a show cause notice under that clause. A 1956 Bom 483 (484) (DB) ** A 1956 Punj 58 (71) (DB) ** A 1954 Cal 60 (63).

(57) Where a person is suspended pending an enquiry against him which culminates in his dismissal and the validity of the dismissal or the enquiry which results in the dismissal is not questioned, any informality or irregularity with regard to the order of suspension before the enquiry proceedings will not affect the validity of such proceedings or the order of dismissal. A 1956 Punj 102 (104) ** A 1956 Sau 14 (16) (DB).

(58) The suspension referred to in S. 45 (1) of Madras Hindu Religious and Charitable Endowments Act (19 of 1951) is the final order of punishment passed by the Deputy Commissioner after enquiry into the charges was made. The suspension referred to in S. 45 (3) of the Act is during the period when the enquiry into charges is pending as S. 47 (2) refers only to the suspension which is ordered by way of punishment under Section 45 (1) under a final order. ILR (1966) Andh Pra 964 (966).

(59) It is one of the implied stipulations of a contract of service that the employer will not, by any act of commission or omission, add or suffer to be added to the employment new conditions involving obligations, dangers or inconveniences which were not incident to it and were not within the contemplation of the employee when he was engaged. Normally, a change of duty may be possible without the consent of the employee if it does not entail any of the above consequences. But where they do, they can only be changed with the concurrence of the employee. Thus, where a municipal committee ordered its primary school teachers to attend certain latrines to count the persons using them and on their refusal to do so, suspended them, **Held**, that no rule of law had been shown which could be called in aid to compel them to perform this additional duty. The order was, therefore an unlawful order which the teachers were not bound to obey. A 1955 Nag 206 (207) (DB).

(60) Where a Government servant had been exonerated by the Government in respect of certain charges into which an enquiry had already been made previously the commencement of a new enquiry into those dropped charges along with a charge not dropped is in excess of jurisdiction and an order of suspension under Rule 10 (1) of Mysore Civil Services (Classification, Control and Appeal) Rules (1957), passed by the Government must be regarded to have been based on irrelevant considerations, and the order of suspension has to be set aside. A 1961 Mys 37 (43, 44) (DB).

(61) There is inherent power in the Government to suspend a Government servant on a charge of misconduct. A 1963 Punj 298 (310, 311) (DB) ** 1977 Lab IC 73 (All). (The power to suspend a Government servant pending an inquiry into his misconduct can only be conferred by statute. There is no inherent right.)

(62) All India Services (Discipline and Appeal) Rules (1955), Rule 20 — Right to submit memorial to President is similar to right of appeal of a Government servant against order of suspension — There is no curtailment of right guaranteed under Article 314. A 1963 Punj 87 (89) (DB). (Reversed on another point in A 1964 SC 787.)

(63) The objection that an employee could not be dismissed from date of his suspension was of importance only in relation to payment of salary to him for period of suspension — If dismissal order was validly passed, the order was no doubt effective from the date of making of that order — Effect of order of suspension was to suspend contract of service as a whole and no claim of pay during period of suspension could be made. A 1963 Madh Pra 298 (300) (DB).

Articles 310 & 311 — Note 89 (contd.)

(64) Suspension is not dismissal — Until servant is dismissed, he continues in employment — Where the master chooses to continue the servant in his employment there is no right to suspend him or deprive him of any part of his wages. (1956) 60 Cal WN 1023 (1025).

(65) The order directing the petitioner to stop work or placing him under suspension does not amount to his removal from service. The District Registrar committed error in taking stand that the petitioner's name stood automatically removed from the list on the issue of the order by the Inspector General of Registration directing the petitioner to cease work. 1976 Lab IC 478 (All).

(66) Suspension pending or in contemplation of a disciplinary proceeding does not amount to temporary removal from service. A 1973 Orissa 244 (255) (FB).

(67) Where a servant is placed under suspension pending an enquiry, but the authorities withdraw the enquiry thereby depriving the servant of the opportunity to prove that the charge against him was wrong and that suspension was wholly unjustified, servant cannot be deprived of his full pay and allowances. 1966 MPLJ 655 (657).

(68) Where the Government has no power to suspend the employee, the Government remains under an obligation to pay to such employee the full salary for the period for which it actually, without dismissing him, does not allow him to work professing to have suspended him for that period. A 1957 Punj 130 (132) (FB) ** A 1954 Punj 298 (301) (DB).

(69) Suspension on untenable allegation — Suspension set aside and employee reinstated — Claim for salary is sustainable. A 1965 Cal 281 (282).

(70) Petitioner was put under suspension and thereafter he was reinstated. No departmental enquiry was held. It was held that the order treating the period of suspension as "extraordinary leave without pay" and not as "dies non" as stated in earlier order, without giving an opportunity of being heard, was not sustainable in law and hence quashed. 1977 Lab IC 1422 (1424) (DB) (Gauhati).

(71) Government servant discharged of offence — Suspension during trial — After discharge servant claiming pay for suspension period under Rule 109, J. and K. Civil Service Regulations—Servant is entitled to his pay. A 1966 J & K 27 (28, 29).

(72) In the absence of rules regarding remuneration during period of suspension, employee is entitled to full remuneration. A 1966 All 552 (555).

(73) Government servant need not be suspended pending departmental enquiry — When he continues to work, pendency of enquiry does not prevent his being promoted, reverted or transferred in accordance with exigencies of administration. 1971 Lab IC 937 (938) (Mys).

(74) Where the Government in the exercise of a lawful power vested in it to suspend an employee does suspend him, it cannot be said to be under any obligation to pay any salary to the employee unless the terms of service themselves provide for payment of the whole or a part of such salary. A 1957 Pun 130 (132) (FB) ** A 1954 Punj 298 (301) (DB).

(75) Suspension of delinquent in consequence of pending criminal case against him — Discharge of delinquent in criminal case — Delinquent is deemed to have been reinstated and is entitled to recover full salary and allowances. A 1969 Cal 461 (462, 463) : 1969 Lab IC 1299.

(76) Order to treat suspension period as leave admissible under Rule 91, Orissa Service Code — Passed without serving show cause notice to the servant — Is bad in law. (1972) 1 Cut WR 863.

(77) Under the Railway Establishment Code, the railway administration has power to suspend the railway employees in certain given circumstances only and when a railway employee is duly suspended, he is not entitled to any wages but is entitled to lesser amount which is called compensatory or subsistence allowance. Therefore, a railway employee cannot during his period of suspension claim his full salary. A 1957 Punj 130 (132) (FB) ** A 1954 Punj 298 (301) (DB).

(78) A railway employee cannot go to the Authority under the Payment of Wages Act alleging that his wages have been illegally deducted, because in fact there has been no deduction. A 1957 Punj 130 (134) (FB) ** (1956) 58 Bom LR 821 (823, 824) (DB).

[See however A 1952 Bom 235 (239) (DB).]

(79) Where a person is suspended and then ultimately dismissed, he is not entitled even to a month's salary in lieu of notice. A 1955 Punj 40 (41).

(80) Where after suspension the services of a temporary civil servant are terminated by one month's notice, he is entitled to salary for the period of suspension. A 1954 Madh B 49 (53) (DB).

(81) Where it was stated in the impugned order of suspension that Government considered that in view of the nature of the charges framed against the petitioner, he should be placed under suspension pending the proposed enquiry into those charges: Held, that the recital in the impugned order clearly revealed that in the opinion of the Government the suspension of the petitioner was necessary in the public interest and the omission to reproduce the very words of the rule in the impugned order was immaterial. A 1961 Mys 37 (40) (DB).

(82) Suspension during disciplinary proceedings under Rule 10 (1) (a) of Central Civil Services (Classification, Control and Appeal) Rules (1965) — Notice issued by President to show cause why penalty imposed should not be enhanced — Disciplinary proceedings must be held to be pending and therefore, suspension order passed after notice to show cause is valid. 1979 Lab IC 759 (762) : 1979 Ker LT 169.

(83) Suspension — Order under Rule 54 of the Fundamental Rules that person suspended is allowed 3/4th salary for the period of suspension and period of suspension be not counted as period spent on duty for purposes of increment — Principles of natural justice require that in passing an order under Rule 54 of the Fundamental Rules opportunity to show cause must be given — Where no such opportunity is given the order is illegal as violating the principles of natural justice. (1973) 1 Serv LR 194 (All).

(84) Government is entitled to place an officer under suspension even before definite charges are communicated to him, when preli-

Articles 310 & 311 — Note 89 (contd.)
minary investigation has been made into his conduct following allegations of corrupt or malpractice levelled against him. A 1971 SC 823 (826, 829). (A 1967 Pat 81, Reversed.)

90. Retirement on superannuation.— (1) The retirement of a Government servant on superannuation according to the Service Rules is not dismissal or removal from service within Article 311. A 1958 SC 36 (48) •• A 1953 Trav-Co 140 (143, 144) (DB) •• 1970 Serv LR 45 (J & K).

(2) Retirement of permanent employee on account of physical incapacity before age of superannuation — Requirements of Article 311 (2) have to be complied with. (1972) 2 Cut WR 1605.

(3) If under the rules, a public servant is compulsorily retired after a period of qualified service, which is reasonably long, then the order would neither amount to dismissal nor to removal within the contemplation of Art. 311 (2). Where the petitioner has attained the age of 55 years which is reasonably long, his compulsory retirement cannot be considered to amount to removal. It is an order of compulsory retirement which is within the permissible power of the authority passing the impugned order. A 1966 Punj 297 (301) (DB).

(3-A) Delhi Road Transport Authority (Conditions of Appointment and Service) Regulation (1952), Regn. 8 — Date of birth — Wide discrepancy in two records regarding date of birth of employee — Age as assessed by Medical Board appointed by employer can be accepted — Order of retirement set aside. A 1980 SC 1251 : 1980 Lab IC 745 (745). ((1980) 1 Serv LR 251 (Delhi), Reversed.)

(4) Where a Government servant is made to retire from service on the ground of superannuation in consequence of a decision of the Government to calculate the age of officers similarly placed according to their college records in preference to the entries in the Civil List, it cannot be said that the retirement of the Government Officer is a punishment, although the calculation of his age in accordance with his college records, instead of in accordance with the entry in the Civil List, may have operated to his disadvantage. A 1954 Trav-Co 32 (33) •• 1968 Lab IC 1348 (1349, 1351) (Raj). (According to date of birth mentioned in application.) •• A 1963 Punj 104 (110). (Even when it is according to incorrect date of superannuation.)

(5) In absence of proof of the writings contained in the horoscope in terms of Section 67 of the Evidence Act it could not be made an exhibit in the case in terms of Section 32 (5) as evidence of the Government servant's age. As the date of birth of the Government servant in this case had remained unaltered he was liable to retire on attaining the age of superannuation arrived at according to that date. ILR (1976) 2 Cal 328 (335).

(5-A) The date of compulsory retirement under Fundamental Rules, Rule 56 (a) must be determined on the basis of the service record and not on what the Government servant claims to be his date of birth unless the service record is first corrected consistently with appropriate procedure. Where the application for rectification of service record as filed by Government servant concerned was itself not entertainable by reason of having been filed within three years perior to his date of actual superannuation as entered in service record in view of S. R. 8 Note and such Government servant was compulsorily retired on such date of his actual superannuation without giving him opportunity to prove his true age as claimed by him the guarantee of Article 311 (2) could not be claimed to have been infringed. A 1971 SC 173 (174). (A 1967 Assam 13, Reversed.)

(6) Where there was superannuation in accordance with the terms of service, it was neither a case of dismissal, discharge nor reduction in rank, and therefore was not governed by Article 311 of the Constitution. A 1958 Cal 411 (412, 413).

(7) Bihar Service Code, Rule 74 — Appellant retained in service after superannuation — Extension of service not granted — Appellant ordered to retire under Rule 74 — Order does not offend against Article 311 of the Constitution. A 1965 Pat 186 (187) (DB).

(8) Municipal Servant — Suspension and departmental inquiry pending against him — Servant attaining age of superannuation cannot be allowed to continue in service thereafter and he will be etitled to subsistence allowance only up to the date although the actual retirement had been made subsequently. 1974 (2) Cut WR 1169.

(9) Government of India Act (1935), S. 241 (1) (b) — Rules framed in Assam, Rule 56 — Tenure of service — Retirement of Government servant — Order as to extension of service made on date when servant has ceased to be in service — Order is nullity. A 1965 SC 473 (475, 476).

(10) Retirement as head of Department on superannuation — Fresh appointment as Principal after a lapse of some time — Held on facts and circumstances of the case that Govt. order of fresh appointment was illegal. Inherent or executive power cannot be exercised in breach of statutory provisions. 1977 Lab IC 1397 (1407) (Cal).

(11) Bihar Government Instructions, dated 24th August, 1963 — Three months' notice given to Government servant — Power to terminate his service can be exercised any time between 55th and 58th years. A 1967 Pat 30 (31) (DB).

(12) Withdrawal of option to retire by civil servant on date of retirement itself — He cannot be retired unles final decision is taken on withdrawal application by competent authority or Government. 1969 Lab IC 61 (65, 66) (Raj).

(13) Held on facts that (i) Article 311 had no application to the termination of the Government employee's service. The termination of service resulting from change in the age of superannuation did not amount to removal within the meaning of Article 311. A 1964 SC 600, Dist. (ii) that the new rule reducing the age of retirement from 58 years to 55 years could not be said to be retrospective. The proviso to the new rule and the second notification were only methods to tide over the difficult situation which would arise in the public service if the new rule was applied at once and also to meet any financial objection arising out of the enforcement of the new rule. The new rule, therefore, could not be struck down on the ground that it was retrospective in operation. A 1965 SC 1567 (1569, 1570).

Articles 310 & 311 — Note 90 (contd.)

(14) Retirement on superanuation — Fundamental Rules, Rule 56 (b) (i) — Rule does not give an absolute right to Government servant to be retained up to age of 60 — Nor Government has absolute right to refuse his retention beyond age of 55 years — **Held,** under circumstances that Government acted lawfully in exercising discretion in retiring the Government servant at the age of 55. ILR (1969) 2 Cal 289.

(15) Memorandum D/- 21-3-1963 issued by Government of Assam under F. R. 56 — Compliance with test under memorandum by employee attaining 55 years — Entitled to continue in service up to 58 years — Abridgement of his right under Article 310 is illegal. A 1969 Assam 46 (50) : 1969 Lab IC 534 (DB).

(16) **Held,** on facts and circumstances of the case that petitioner's date of birth was 1-9-1913 and that, therefore, order requiring him to retire before superannuation, i. e., 12-7-1968, was bad in law. 1970 Pat LJR 369.

(17) Order prematurely retiring Government Servant in contravention of Rule 294 (a) Note 4 of Mysore Service Regulation and Article 311 (2) of Constitution is void from its inception. A 1971 Mys 117 : 1971 Lab IC 473.

(18) Rules did not compel Government to embark on enquiry into age, though change in recorded age to the prejudice of servant had to be effected by following principles of natural justice. 1968 Lab IC 1348 (1350) (Raj).

(19) Merely because a regular departmental proceeding has been initiated against the servant and is still in its preliminary stage when the order compulsorily retiring him is passed, that order will not amount to punishment. A 1968 Pat 113 (116) : 1968 Lab LJ 457 (DB). (The absence of evidence in support of specific charges, made in a departmental proceeding against a public servant; will not by itself suffice to show that, if on a review of the entire official career of the public servant, the superior authority decides that he is an unsuitable employee and should be weeded out on his attaining the age of superannuation, such a decision is either mala fide or involves the element of punishment.)

(20) Compulsory retirement of public servant during pendency of departmental enquiry — Order passed under para. 6 of Government of India Notification O. M. No. 33/18/62 Ests. (A) dated 30-11-1962 on the ground that the servant is unsuitable employee and has attained the age of superannuation — Order is valid. A 1968 Pat 113 (115, 116) : 1968 Lab IC 457 (DB).

(21) Orissa Protection Rules, (Rules for Protection of Officers of Old Bihar and Orissa Services) Rule 6 — Officer in old Bihar and Orissa Secretariat transferred to Orissa on formation of that State — Confirmation as Registrar in Secretariat on 14-10-1958 while Officer (junior to him) in old Bihar and Orissa Secretariat confirmed as Registrar in Bihar on 23-8-1956 — Contravention of protection afforded to transferred officers — Date of confirmation for purpose of pension must be taken as 23-8-1956. A 1964 Orissa 65 (68) (DB).

(22) Departmental enquiry pending — Government servant asked to apply for leave preparatory to retirement without waiting for enquiry to conclude — Offer not availed of — Enquiry dropped before Government servant was retired on his attaining age of superannuation — **Held** there was no inhibition against his retirement — Order refusing leave after retirement held valid. A 1961 Madh Pra 293 (295) (DB).

(23) Retention in service of public servant after due date of retirement — Extension of service granted for purpose of conducting enquiry against him on charge of neglect or inefficiency — **Held** that extension of service was clearly illegal and cannot be regarded as extension on public grounds within the meaning of Rule 16 (1) of All India Services (Conduct) Rules (1954). A 1971 Assam 45 : 1971 Lab IC 412 (417).

(24) Railway employee who had declared himself as Anglo-Indian and had enjoyed privileges for Anglo-Indians was retired after attaining 55 years — **Held** he could not contend that he was Indian Christian and as such liable to retirement only after attaining 60 years — Order does not amount to punishment — Employee has no right to hold the post until 60 years. (1962) 2 Lab LJ 584 (586) (Andh Pra).

(25) Retirement of servant under R. 2046 (b) of Railway Establishment Code — Show cause notice is not necessary. A 1971 Raj 12 : 1971 Lab IC 213.

(26) Jammu and Kashmir Constitution, Section 126 — Jammu and Kashmir Civil Services (Classification, Control and Appeal) Rules (1956), Rule 33 — Right of Government servant to be retained in service till age of superannuation — Retirement before such age amounts to his virtual removal from service unless it is a case of compulsory retirement or is in public interest — Such retirement violates Art. 311 (2) read with Section 126 of Jammu and Kashmir Constitution and also Rule 33. 1970 Kash LJ 369.

(27) Petitioner was a member of Haryana Medical Education Service and was on the staff of Medical College Rohatak — Transfer of Medical College to University — Post of petitioner abolished as a result of transfer — Petitioner was then appointed by the University on the old service conditions — **Held** that as the petitioner was an employee of the University he was entitled to continue till he attained the age of 60 under the University Rules and the Government order for his retirement on attaining the age of 58 was wholly illegal and unjustified. (1980) 1 Serv LR 533 (539) (Punj).

(28) Reasonable opportunity — Retirement because of interpolation of entries in service book — Order quashed since there was no prior notice affording opportunity to the employee. 1978 Lab IC 146 (149) (Him Pra).

(29) Retirement of servant under R. 2046 (h) of Railway Establishment Code — Show cause notice is not necessary. A 1971 Raj 12 (16) : 1971 Lab IC 213. (1970 Serv LR 213 (Delhi), Dissented from.)

90-A. Premature retirement.— (1) A permanent Government servant cannot be prematurely terminated from service on ground of physical incapacity without complying with Article 311 unless any rule to the contrary exists. 1973 Lab IC 1568 (1568) (Him Pra).

(2) Premature retirement — Forming bona fide opinion by the Competent Authority is a condition precedent — Order passed without forming such opinion is liable to be quashed. 1978 Lab IC 568 (571) (Guj).

Articles 310 & 311 — Note 90-A (contd.)

(3) Premature retirement — Arbitrary and capricious order — Retiring authority not applying his mind to record — Extraneous matter taken into consideration — Order is liable to be set aside. A 1976 Punj 329 (332) (DB).

(4) H. P. Civil Service (Premature Retirement) Rules 1976, Rule 3 (1) — Disciplinary enquiry against Govt. employee completed and major penalty proposed — Show cause notice against penalty not issued — Employee prematurely retired under Rule 3 (1) — Retirement was by way of punishment — Order hit by Article 311 (2). 1978 Lab IC 244 (249) (Him Pra).

(5) H. P. Civil Service (Premature Retirement) Rules 1976, Rule 3 (1) — Premature retirement order challenged as measure of punishment — Court can look into attendant circumstances. 1978 Lab IC 244 (248) (Him Pra).

(6) Where the Government employee was suspended and charged with embezzlement of Government dues by the Collector and an Enquiry Officer was appointed to hold enquiry into the charges and the employee was directed to submit his explanation but the Collector instead of pursuing the departmental enquiry prematurely retired the employee from service under R. 56 it was held that though the order of premature retirement was innocuous, the sequence of events which led to the passing of the order clearly showed that the employee was prematurely retired by way of punishment on account of the said charges and since the employee was not afforded any opportunity of defence the order was in violation of Art. 311 (2) and must be quashed. 1977 Lab IC 384 (All).

91. Withholding increments.— (1) The withholding of increments does not amount to a reduction in rank. ILR (1956) Punj 1213 (1222, 1223).

(2) One cannot cross the efficiency bar as a matter of right. If the authority after assessment of the overall service record of the officer in regard to his efficiency, integrity, intelligence etc. forms an opinion that the officer does not deserve to be put across the line drawn in the grade at the stage of the efficiency bar then the matter cannot be agitated by the adversely affected officer vis-a-vis the authority's decision. (1979) 1 Serv LR 858 (860) (DB) (Punj).

(3) Increments — Stoppage of two increments with cumulative effect — Not a major punishment — Article 311 (2) not applicable. (1973) 1 Cut WR 882.

(3A) Where the crossing of efficiency bar, according to the relevant rules, depends upon good work and efficiency, order postponing time of crossing of efficiency bar on basis of adverse entries after issue of show cause notice and consideration of cause shown cannot be considered to be in the nature of punishment. Article 311 (2) is therefore not attracted. 1972 Lab IC 953 (958, 959) : (1972) 2 Sim LJ 59 (Him Pra). (1969 Serv LR 120 (Punj), Followed.)

(4) Increment — Withholding of increment for failure to pass departmental examination after long service — Held : passing petty tests after a petrifying length of dull official service is an odd insistence except in important levels of work. A 1976 SC 1177 (1178).

(5) Reduction in rank is not the same thing as withholding of increment, which is merely an instance of loss of prospects of earning more than what the employee may be earning at the time. If a reasonable notice, to meet the charges levelled against the petitioner, was, in fact, given during the course of the inquiry then, if the proposed action to be taken against him is merely of withholding of incerment he would not be entitled to the right conferred by Article 311 (ii) of the Constitution nor would failure to give such second notice violate any rule of natural justice. A 1959 Punj 643 (645).

(6) Withholding of increments or reduction to a lower stage in the same time scale do not amount to reduction in rank. 1969 Lab IC 330 : 1967 RLW 266 (270).

(7) Violation of service Rules and principles of natural justice — Order withholding three increments quashed. A 1972 Gauhati 2 (SB).

(8) The petitioner was suspended from services on basis of certain complaints on 29-8-1959. Despite this he was allowed to attend a refresher course from 31-1-1960 to 29-2-1960 and was paid full salary for that period. On 18-11-1960, a charge-sheet was given to him to which he replied on 29-11-1960. Later a show cause notice was given proposing that the period of suspension would be treated as leave without pay, and the petitioner replied to it. Again a second show cause notice was served on him, stating that he was guilty of misbehaviour and neglect of duties and hence his next increment should be stopped. It was not clear on the record whether the petitioner sent any reply or not. But on 7th July, 1963, an order was passed which stated that since the charges against the petitioner had been proved, the next increment should be stopped and that his period of suspension was not to be treated as period on duty and was to be ignored for all purposes. Held, that the order amounted to removal from service for the period of suspension and since the provisions of Article 311 had not been complied with the order should be quashed. 1967 Cur LJ 419 (421) (Punj).

(9) Rude and improper behaviour by Police Constable in private life — Withholding of increment and reduction to lower stage in time scale in contravention of the provisions of C. P. and Berar Police Regulation 217 (a) — Order held legal. A 1960 Bom 285 (DB).

(10) Punjab Civil Service Punishment and Appeal Rules 1952, Rule 7 — Departmental enquiry — Withholding of future increments — Punishment inflicted not covered by Rule 7 or Article 311 of Constitution — Authority need not give reasons for holding a view different from the enquiring officer. 1967 Cur LJ 156 (164) (Punj).

(11) Stoppage of increments is also covered by Rule 16 — Rajasthan Civil Services (Classification, Control and Appeal) Rules (1950) — Non-compliance of Rule 16 gives cause of action to public servant — He is not apprised of allegations made against him — Enquiry is vitiated. 1969 Lab IC 330 (Raj).

(12) Rajasthan Civil Services (Classification, Control and Appeal) Rules, 1950 — Stoppage of increments is also covered by Rule 16 — — Non-compliance of R. 16 gives cause of action to the public servant. 1969 Lab IC 330 : 1967 Raj LW 266 (271).

(13) Withholding of increments is a penalty provided under service rules. Where an order

Articles 310 & 311 — Note 91 (contd.)
of termination of service was accompanied by a penalty or punishment causing a monetary loss to Government servant, it would be illegal and ineffective if the provisions of Article 311 (2) were not complied with. A 1960 Punj 126 (131) (DB).

(14) Withholding of increment which falls within Rule 11 (i) Item (iii) of Kerala Civil Services (Classification, Control and Appeal) Rules, (1960) is a penalty and the procedure laid down in Rule 16 has to be followed. Rule 15 (12) (i) (a) is not applicable to such case. Rule 16 does not require a copy of enquiry report to be furnished to Government servant. Therefore, failure to furnish it, will not vitiate the order. 1978 Ker LT 928 : 1978 Lab IC (NOC) 194.

(15) Normally, it is appointing authority who has to impose punishment (withholding of increments) on delinquent officer, and this power cannot be delegated to any other authority unless there is any statutory rule or provision of law permitting that delegation. Thus the Superintending Engineer, Panchayat Raj, Public Works Circle, Punjab has no jurisdiction to pass order punishing the Sectional Officer, who had been appointed by Financial Commissioner, Development and Secretary to Government Punjab Development and Panchayat Department. 1971 Lab IC 554 (555) (Punj).

92. Compulsory retirement.— (1) (Obiter) — If any Rule permits the appropriate Authority to retire compulsorily a civil servant without imposing a limitation in that behalf that such civil servant should have put in a minimum period of service, that Rule would be invalid and the so-called retirement ordered under the said Rule would amount to removal of the civil servant within the meaning of Article 311 (2). **A 1964 SC 600 (617).**

(2) Compulsory retirement — Rule 244 (2) of Rajasthan Service Rules (1951) is not violative of Article 311. 1971 Lab IC 247 (249) (Raj) °° 1977 Serv LJ 495 (Raj) °° (1975) 1 Serv LR 681 (Pat) °° 1975 Raj LW 520 °° 1973 Lab IC 292 (295) (Him Pra).

(3) Where the memorandum issued by the Government as a general order under F. R. 56 raising the retirement age to 58 years, inter alia provides that the appointing authority may, without assigning any reason, require the Government servant to retire after he has completed 55 years of age, the provision for compulsory retirement does not offend Article 311 (2). The provision complies with the two ingredients of compulsory retirement, viz., the retirement must be before the age of superannuation and it must be after service for a specified period. **A 1970 Assam 1 (5, 6, 9) : 1970 Lab IC 11 (FB).** (Reversed on another point in A 1970 SC 1314.) °° 1972 Lab IC 362 (370, 371) (FB) (Orissa). (Article 311 (2) will not apply to a case of termination of service of ministerial servant under Section 71 (b), Orissa Service Code by compulsorily retiring him on his attaining 55 years of age.)

(4) Compulsory retirement under R. 161 (1) (a), First Proviso, Bombay Civil Services Rules — Though a minimum period of qualifying service is not prescribed by the proviso it is not ultra vires Article 311 (2) of Constitution since its pre-condition of high age is a check against retirement at an early stage of the career. 1971 Lab IC 108 (111, 113) (Guj).

(5) Compulsory retirement — Ministerial servant under Bihar and Orissa Government becoming servant under Orissa Government — Previous breaks in service condoned — His retirement on attaining age of 55 under R. 71 (a) of Orissa Service Code is illegal as he was entitled to the higher age limit of 58 for retirement under Rule 75 (6) of the B. & O. Service Code. ILR (1974) Cut 1274.

(6) Natural justice — Principle not applicable to compulsory retirement in accordance with rules of service. **A 1965 All 142 (150) (FB)** °° 1976 Lab IC 818 (Orissa). (Order of compulsory retirement of public servant in public interest without adverse comment — Public servant need not be given opportunity of being heard under Art. 311 (2).) °° 1971 Lab IC 122 (Mys).

[But see **A 1971 SC 40 (42, 43) : 1971 Lab IC 8** °° A 1969 Raj 182 (191). (Services under the Union and the States — Compulsory retirement — Order retiring Officer before attaining age of superannuation prescribed by Service Rules — As order affects civil rights of the Officer and has civil consequences, Government must give him opportunity to show cause — It cannot avoid conformity to principles of natural justice on any supposed ground of inconvenience. Case law discussed.)]

(7) Compulsory retirement according to rules does not involve civil consequences and hence it is not necessary to afford Government servant concerned an opportunity to show cause against his compulsory retirement. **A 1973 SC 698 (701) : 1973 Lab IC 427.**

(8) A person who retires or is made to retire from service no longer remains a member of the service or holds a civil post. Once an order of retirement becomes effective he cannot be demoted, removed or dismissed from service and therefore an inquiry cannot be held against him. A 1967 Raj 82 (84) (DB).

(9) Where Welfare Officer of the factory owned by Government was governed by special rules viz. the U. P. Welfare Officers Rules framed under Factories Act, he could not be deemed to be a Government servant the conditions of whose service have been or may be prescribed by the Governor under Article 309. The State Government has therefore no jurisdiction to compulsorily retire such Welfare Officer by invoking Rule 56 of the U. P. Fundamental Rules. (1978) 2 Serv LR 881 (884) (All).

(10) Compulsory retirement of Welfare Officer of Government Press, a factory — Conditions of service controlled by U. P. Factories Welfare Officers Rules (1955) — Absence of provision for compulsory retirement in Rules — Welfare Officer cannot be retired compulsorily by applying Rule 56 (a) (i), U. P. Fundamental Rules applicable to Government servants by treating him as such. 1978 Lab IC 1269 (1270) (DB) (All).

(11) Compulsory retirement — When an order of compulsory retirement is challenged in the High Court, it is the duty of the Government to place before it at least some relevant material to show that the public interest required the retirement of the officer concerned. ILR (1973) Cut 387 °° 1980 Lab IC 130 (134) : (1980) 1 Cal LJ 15 (DB). (Compulsory retirement — Adverse remarks in confidential roll — Non-communication of to servant — Compulsory retirement on the basis of adverse remarks

Articles 310 & 311 — Note 92 (contd.)
is invalid.) ** 1978 Lab IC (NOC) 177 (Cal) ** 1976 Lab IC 1087 (1092) (DB) (All).

[See also 1973 Lab IC 249 (256, 262, 263) (Bom). (An order of compulsory retirement is liable to be struck down, if it is shown to be mala fide, arbitrary, capricious or passed without any material or on extraneous material. In the event of the grievance of there being no material, the burden to indicate the nature of the material is on the State.]

(6) Where a Govt. servant holding a substantive post in Class III was appointed on probation to a Class II post but on expiry of probation period no order was issued either extending the period of probation or confirming him on satisfactory completion of probation it was held that although in the absence of such order the official may be deemed to have satisfactorily completed the period of probation yet on the basis of such deemed completion of probation he could not be compulsorily retired on attaining the age of 55 under F. R. 56 (j) (i) in the absence of a specific order confirming him in the Class II post as the said rule was applicable only to substantive holders of Class I & Class II posts. 1978 Lab IC 1405 : (1979) 3 Ser LR 608 (DB) (Ker).

[See also 1973 Lab IC 682 (Bom). (Bombay Civil Service Rules, R. 161 (C-1) as amended in 1971 — Under the amended Rule the Government has power to compulsorily retire a civil servant of Class I or Class II but only on the ground of public interest — When the public interest does not require compulsory retirement in the case of a servant then he is entitled to continue in service under Rule 161 (1) until he completes 58 years.)]

(7) It is not obligatory for the Government to state in its order of compulsory retirement the reasons for not accepting the views of the Public Service Commission. What is required under the Constitution is consulting and not concurrence of the Public Service Commission. (1978) 2 Serv LR 372 (379) (Kant).

[See also 1978 Lab IC 1525 (1528) (Raj). (Compulsory retirement of petitioner — Government circular prescribing procedure — Recommendations of Screening Committee do not fetter discretion of appointing authority to exercise independent judgment.)]

(8) Compulsory retirement after the employee has put in a sufficient number of years of service having qualified for full pension is neither a punishment nor a stigma so as to attract the provisions of Article 311 (2) of the Constitution. Compulsory retirement of an officer who fulfils the conditions of Rule 16 (3) of the All India Services (Death-cum-Retirement) Rules 1958 is undoubtedly in public interest and is not passed by way of punishment. A 1980 SC 563 : (1979) 2 Serv LR 792 (796) ** (1978) 2 Mad LJ 202 : 1979 Lab IC (NOC) 20. (Compulsory retirement in public interest — Officer concerned was recently promoted — No ground to infer that compulsory retirement was arbitrary since considerations for promotion and compulsory retirement vary.) ** 1979 BBCJ (HC) 423 : 1979 Lab IC (NOC) 94 (DB) ** 1978 Lab IC 1500 (1506, 1507) (DB) (Pat) ** ILR (1975) Cut 1008 ** 1971 All LJ 704 ** 1971 Kash LJ 74 ** 1971 Lab IC 122 (Mys). (The expression "public interest" has a well defined connotation and comprehends in itself various factors that enter into consideration of the Government before it can come to the conclusion that the circumstance of a public servant in service will not serve the purpose of his appointment to a public post.) ** 1970 Lab IC 953 (954, 955) (Punj) ** 1969 Lab IC 386 (All).

[See also (1976) 1 Serv LR 633 (635) (All). (An order of compulsory retirement can only be passed in public interest and there must be some material to support the opinion that it is necessary in public interest to retire a Government Official. An order of compulsory retirement passed without such material is liable to be struck down.)]

(9) Order of compulsory retirement which an appointing authority can issue with whatever its motive, will be bad in law if it casts some stigma on the public servant and no inquiry as envisaged by the Article is held against him. The Court can infer from the order whether some stigma has been cast on the employee or not and it is not necessary that the order should itself state in terms that some stigma is cast. 1972 Lab IC 283 (284, 285) (Punj).

(10) An order of compulsory retirement which has serious consequences on a civil servant, as it brings about premature retirement must be made after a thorough examination of the records of the civil servant concerned and after recording the opinion, that such retirement is necessary in public interest. ILR (1978) 2 Kant 1814 : 1979 Lab IC (NOC) 6.

[See also ILR (1970) 2 Delhi 883. (Retirement in public interest under Rule 56 (j) of Fundamental Rules — Opinion formed by responsible officers of Department including Minister-in-Charge after applying mind — Decision that retirement was in public interest held to be taken by President i. e. appropriate authority.)]

(11) It is for the subjective satisfaction of the appropriate authority to come to a conclusion to retire a Government employee, in public interest, but the first and primary pre-requisite for this subjective satisfaction is that the entire record of service, whether good or bad, of the employee concerned must be before such appropriate authority so that the Court may be satisfied that the appropriate authority had applied its mind before passing the order of compulsory retirement.

Held on facts that the impugned order of compulsory retirement is vitiated and must be held to be arbitrary because the same had been passed by the appropriate authority without the application of mind. 1976 SLWR 445 (448) (Punj) ** 1974 Lab IC 472 (473, 474, 477, 478) (All) ** 1974 Serv LJ 106 (All) ** ILR (1972) 2 (Delhi) 620 ** 1975 Lab IC 1325 (DB) (Orissa).

[See also 1976 Lab IC 1005 (1008) (DB) (Orissa). (Compulsory retirement — Writ Petition — Allegation of mala fides, bias and ill-will against several officers — Strict proof necessary.)]

(12) The guideline laid down in G. O. D/-2-11-1973 provides that normally only those

Articles 310 & 311 — Note 92 (contd.)
Government servants should be considered for compulsory retirement whose integrity is found doubtful or whose efficiency had gone down to such an extent that improvement therein was not possible. Administrative instructions may not have any statutory force but they are relevant and can be looked into for finding out whether an order has been passed keeping in view the tests and guideline laid down. Therefore omission to consider and apply the tests laid down in the G. O. will attract Article 16. The order passed was without any regard to the guidelines set out and can succesfully be challenged on the ground of non-application of mind to the relevant tests. 1975 Serv LJ 548 (All) °° (1980) 1 Serv LR 433 (448) (Delhi). (A bona fide opinion to compulsorily retire a member of service in public interest formed by the Government on the basis of record cannot be challenged on the ground that such formation of opinion was not justified by record. The High Court cannot interfere with the opinion of the Govt. unless it is established on the record to be mala fide or based on collateral or arbitrary grounds.) °° A 1971 All 271 (272) : 1971 Lab IC 731.

[See also 1979 All WC 696 (DB). (Compulsory retirement — Action based on adverse entries for unsatisfactory work — Thus, order of retirement not capricious or arbitrary but based upon consideration of relevant material — Interference with the order unwarranted.)

(13) Where the order of compulsory retirement does not, on the face of it, contain anything which may be said to cast a stigma on the public servant, the Court will not go behind the order. One must look to the order of compulsory retirement itself dehors all contextual facts and circumstances to find if there is anything there which violates Art. 311 (2). There is no duty to hold an inquiry in case of compulsory retirement. If any inquiry is held, it is only for the satisfaction of the authority to take action. If authority is otherwise satisfied without any inquiry that satisfaction is not open to question in a Court of law. 1976 Lab IC 559 (562) (DB) (Orissa) °° (1980) 1 Serv LR 433 (447) (Delhi). (In cases of compulsory retirement under the statutory rules the resort cannot be had to the Government files to discover any remark amounting to stigma.) °° 1976 Lab IC 604 (Pat) °° (1976) 2 Serv LR 363 (386) (Pat).

[See also 1978 Lab IC 568 (570) (Guj). (Order of compulsory retirement — Authority bona fide forming opinion to pass such order — Cannot be challenged — To prevent Court from going behind such order, it should be established that the authority bona fide formed such opinion.) °° (1978) 2 Mad LJ 202 : 1979 Lab IC (NOC) 20. (Order of compulsory retirement under Fundamental Rule 56 (d) — Challenged as being arbitrary — Court can consider sufficiency of material — Government servant has no right to peruse record.)]

(14) Order retiring Government servant under Note I to Para 465 of Civil Service Regulations — Order is not invalid merely because Government servant could not avail of leave accrued to him. A 1971 All 129 (130) : 1971 Lab IC 300.

[See also A 1971 All 271 (273) : 1971 Lab IC 731. (Compulsory retirement — Article 465 of Civil Service Regulations (as adopted in U. P.) is not repugnant to Art. 311.)]

(15) Pendency of representation does not place any restriction on the power of State Government to retire the Government servant compulsorily provided conditions precedent laid down by the rules are complied with. (1976) 1 Serv LR 131 (133) (All).

(16) If the rules of compulsory retirement prescribe a normal age of superannuation and a reasonably long period of qualified service after which compulsory retirement can be ordered, the order of retirement would not amount to dismissal or removal under Art. 311 (2) of the Constitution. Compulsory retirement does not involve civil consequences. It does not take away any of the rights that have accrued to the Government servant from his past service. The order will not be one of punishment merely because there is the possibility of loss of future prospects, namely, that he will not get his pay till the age of superannuation or enhanced pension. The order would, however, amount to punishment if it involves loss of benefits already earned. So also if the order of compulsory retirement ex facie contains any express imputation or stigma, it would amount to removal and the order would be bad unless it has been reached after an enquiry under Art. 311 (2). Held the order dated 8-9-1973 issued by the Governor of Orissa under Rule 71 (a) compulsorily retiring the petitioner contained no express words casting stigma or imputation against the petitioner. (1974) 40 Cut LT 977 °° A 1979 SC 193 (202) : 1978 Lab IC 1672 °° A 1976 SC 1841 (1843). (Compulsory retirement simpliciter does not amount to dismissal or removal or reduction in rank under Article 311 or under the Service Rules. It is in fact compulsory retirement in accordance with the terms and conditions of service.)

(17) Order of compulsory retirement wrongfully passed — No actual malicious intention on part of Government in passing the wrongful order so as to amount to malice in fact — If a discretionary power has been exercised for an unauthorised purpose, it is generally immaterial whether its repository was acting in good faith or in bad faith — Held : that the order of compulsory retirement amounted to abuse of the power vested in the authority concerned and was liable to be set aside. A 1979 SC 49 (51, 52) : 1978 Lab IC 1641.

(18) Where the punitive action was instituted on a part of the material on which retirement order was based, the compulsory premature retirement was regarded as punitive and since the procedure laid down by Art. 311 (2) of the Constitution was not followed before passing the order of retirement by way of punishment, the impugned order of retirement was, held, invalid. 1979 Serv LC 23 (29, 30) (DB) (Delhi).

(19) Fundamental Rules, R. 56 — Government decision No. 23 below F. R. 56 providing for compulsory retirement without assigning reasons — Decision No. 23 substituted by F. R. 56 (j) on 21-7-65 providing for compulsory retirement in public interest — Notice of retirement served on 30-6-66 under Decision No. 23 when decision was not subsisting — Held that if power can be traced to a valid power the fact that the power is purported to have been exercised under non-existing power

Articles 310 & 311 — Note 92 (contd.)
does not invalidate the exercise of that power. A 1976 SC 2581 (2583) ** A 1977 SC 854 (858).

(20) All India Services (Death-cum-Retirement Benefits) Rules (1958), R. 16 (3) (as inserted by Notification, D/- 1-9-1965) — Compulsory retirement — Notice of three months — Need not be by Central Government itself nor it must expire with the date of retirement — Expiry can be earlier also. 1980 Lab IC 343 (348) : 1979 Raj LW 509 (DB).

(21) Central Government ordering compulsory retirement of an I. P. S. Officer, on consideration of recommendations of the Review Committee and the State Govt. — Recommendations based on uncommunicated adverse remarks against the officer and findings made against him in departmental proceedings which were finally not proceeded with — Held that the Central Government having relied on recommendations of Review Committee and the decision of the State Govt. accepting the same, the order of compulsory retirement was illegal. 1980 Lab IC 130 (139, 141) : (1980) 1 Cal LJ 15 (DB).

(22) Compulsory retirement — Disciplinary proceedings against Government officer — Officer not informed of findings of enquiry officer — Compulsory retirement based on such findings is unjustified and violative of rules of natural justice. 1980 Lab IC 130 (135) : (1980) 1 Cal LJ 15 (DB).

93. Compulsory retirement on proportionate pension in terms of specific service Rule is not dismissal or removal.— (1) Compulsory retirement of a Government servant on proportionate pension before the age of superannuation but on completion of service for the prescribed number of years according to the rules or on attainment of the prescribed age according to the rules does not amount to dismissal or removal from service within the meaning of Art. 311, although such compulsory retirement necessarily means the termination of service of the Government servant. **A 1957 SC 892 (895). (A 1954 Sau 146, Reversed.) ** A 1958 SC 36 (49) ** A 1954 SC 369 (374, 375) ** 1972 MP WR 384 ** A 1958 Bom 90 (92) (DB) ** A 1969 Orissa 37 (42) : 1969 Lab IC 28 (DB).** (Retirement under All India Services (Death-cum-Retirement Benefit) Rules (1956).) ** A 1960 Madh Pra 117 (118) (DB). (Notice contemplated by Rule 2 (2), Pension Rules is not a kind of notice required under Art. 311 — Notice and order of retirement need not be separate.)

[**But see A 1958 J and K 11 (12) (FB) ** A 1952 Pepsu 152 (159) (DB) ** A 1953 Pepsu 24 (24, 25).**]

(2) It has been held that in view of the "rule of pleasure" enunciated in Article 310, Clause (1), the Government has always the power to terminate the services of a Government servant by compulsory retirement on proportionate pension even before the age of superannuation, irrespective of any specific Service Rule permitting such a course. A 1957 Assam 77 (81) (DB) ** A 1956 Madh B 40 (43) (DB) ** A 1954 Madh B 54 (56) (DB) ** A 1943 Bom 268 (271) (DB).

(3) Retiring a member from service in public interest after attainment of age 55 and completion of 30 years service entitling him to pension proportionate to period of service standing to his credit is not a form of punishment. A 1969 Orissa 37 (42) : 1969 Lab IC 28 (DB).

(4) An order of retirement before the age of superannuation on proportionate pension pursuant to a policy of retrenchment is retirement in the normal course and not a removal within Article 311, Clause (2). A 1956 Madh B 40 (43) (DB) ** A 1954 Madh B 177 (180) (DB) ** A 1954 Madh B 54 (54, 55, 56) (DB).

(5) Civil Services (Classification, Control and Appeal) Rules, Rule 49 — Fundamental Rules (as amended in 1963), Rule 56 — Petitioners compulsory retired at age of 55 and not allowed to continue till age of 58 — Retirement not by way of punishment. A 1966 All 560 (562, 563) (DB).

(6) When a civil servant is compulsorily retired in accordance with Rule 27 of Bank of Patiala (Staff) Rules (1954) without, however, visiting him with any penal consequences but allowing him to enjoy all the benefits that had already accrued to him by remaining in service till the date of his retirement, Art. 311 (2) would not be attracted to his case. A 1963 Punj 345 (352, 353) (DB).

(7) Compulsory retirement of Government servant who had completed 30 years of service as it was found necessary in public interest — Failure to give opportunity to show cause did not render order unlawful as the employee was not retired by way of punishment — Order not infringing any legal right under the service Rules — Application under Article 226 held misconceived. A 1960 Madh Pra 252 (253) (DB).

(8) Hyderabad Civil Service Regulations (1337 F.) Reg. 305 — Complaint against member of Hyderabad Judicial Service for exhibition of temper and use of filthy language against practising vakil — Enquiry by Administrative Bench of High Court — Report finding him unfit for discharging judicial responsibilities — Member to retire compulsorily on proportionate pension on recommendation of High Court — Order of retirement not 'removal' and member not entitled to protection of Art. 311 (2). A 1964 Andh Pra 206 (213, 214, 215, 216) (DB).

(9) Compulsory retirement in terms of a specific Service Rule on proportionate pension does not involve the loss of any benefit already accrued. **A 1957 SC 892 (895) ** A 1954 SC 369 (375) **** (1980) 1 Serv LR 433 (443) (Delhi) ** (1971) 1 Lab LJ 155 (164) (DB) (Guj) ** A 1971 Punj 73 (76) : 1971 Lab IC 207.

(10) Civil Service Regulations (as adapted in U. P.), Article 465, Note 1 — Compulsory retirement under Art. 465, Note 1 is neither illegal nor unconstitutional — Article 13 of Constitution not applicable. **A 1965 All 142 (150) (FB).**

(11) Order of compulsory retirement under Rule 2 (2) of Liberalised Pension Rules (1950) differs from order of dismissal or removal in that it is not a form of punishment prescribed by rules and involves no penal consequences since person retired is entitled to full benefits of pension — Person retired under Rule 2 (2) has no funda-

Articles 310 & 311 — Note 93 (contd.)
mental right to be continued in employment. A 1968 Andh Pra 50 (58) (DB).

(12) Compulsory retirement under Rule 74 of Bihar Service Code — No forfeiture of pay or allowance or pension — Compulsory retirement does not amount to punishment or removal or dismissal — Order is not hit by Art. 311 (2). A 1962 Pat 40 (42, 43) (DB).

(13) Departmental enquiry against Government servant in progress — Past record of Government servant not satisfactory — Government can drop the enquiry and take action under Rule 56-A, Fundamental Rules —Such compulsory retirement is not punishment — Article 311 (2) not attracted. 1975 Lab IC 503 (504 to 506) (All) ** 1974 All Serv LJ 106 ** (1978) 2 Mad LJ 161.

(14) Order for compulsory retirement passed under Rule 465-A of U. P. Civil Service Regulations — Principles of natural justice do not apply to such an order. 1971 Lab IC 765 (All).

(15) When a member of the I. A. S. is compulsorily retired in terms of Rule 16 (3) of I. A. S. (Death-cum-Retirement Benefit) Rules, 1958 on his having attained the age of 50 years and this order does not cast any stigma on him, he cannot complain that he should have been afforded opportunity to be heard before passing of the aforesaid order. 1973 Lab IC 1190 (1197) (Punj). ** (1971) 1 Mad LJ 302.

(16) R. 16 All India Services (Death-cum. Retirement Benefit) Rules (1958), providing for compulsory retirement and fixing the age limit at 50 years or the qualifying service of 30 years, is quite reasonable and there is nothing arbitrary about it. The rule does not violate Arts. 311 (2), 14 and 18, Constitution. 1973 Lab IC 1190 (1197) (Punj).

(17) The petitioner Head-Constable was reduced in rank after enquiry as Constable for three years and before the expiry of three years he was compulsorily retired under Rajasthan Civil Services (Classification, Control and Appeal) Rules (1958), Rule 244 (2) — It was contended that by this order he was put to a loss as after three years if he had retired as Head Constable he would have received more pension — **Held,** the petitioner could not be held to be deprived of any earned benefit as he would get his pension at the rate prescribed according to the Rules in force at the time of his compulsory retirement. To get the pension at a particular rate cannot be termed as an earned benefit. (1977) 2 Serv LR 699 (702) (Raj).

(18) Merely because a person is a Government servant it does not mean that the ordinary relationship of master and servant is in any way extinguished. The employee entered the service on specific condition that either on his attaining the age of 50 years or 25 years qualifying service, it will be open to the employer to consider the case of the employee for compulsory retirement. Where therefore, on materials, which materials are found in the file, the employer decides to compulsorily retire, the petitioner cannot be heard to say that the adverse remarks should be communicated and he should be given opportunity to reform himself. (1978) 2 Mad LJ 198 : (1978) 2 Serv LR 780.

(19) A decision of a Committee to compulsorily retire an employee from service does not stand vitiated by bias merely because one of its members had recorded adverse remarks in the confidential report of the employee particularly when there is no evidence to show that the officer who recorded the remarks permitted his private or personal prejudice to colour his official opinion. (1971) 2 Mys LJ 579.

94. Compulsory retirement when dismissal or removal.— (1) Where the Service Rules themselves provide for compulsory retirement as a mode of punishment, such compulsory retirement would naturally be covered by the expression 'removal from service" and would entitle the Govt. servant to a reasonable opportunity to show cause against the action proposed to be taken. A 1957 Andh Pra 794 (804) (DB). ** A 1976 SC 1964.

(2) 'Removal' to fall within the purview of Article 311, should be by way of punishment or penalty and a compulsory retirement of a Government servant does not per se amount to 'removal' within the meaning of Article 311 when it is not by way of punishment or penalty. (1962) 64 Punj LR 469 (476) (DB) ** A 1962 All 328 (332, 333) (FB) ** A 1970 Guj 257 (266) : 1970 Lab IC 1595.

(3) Retirement of an officer compulsorily prior to the date of his superannuation contarary to the rules amounts to removal within Article 311 (2). A 1965 Orissa 81 (84) (DB). ** A 1970 SC 143.

(4) Tests relevant for finding out whether a given termination is removal or dismissal within the meaning of Art. 311 (2) are firstly, whether the action taken is, by way of punishment. To find this out it is necessary that a charge or imputation against the Officer is made the condition of the exercise of power or secondly whether by compulsory retirement the Offier is losing the benefit he has already earned, like he does by dismissal or removal and thirdly the compulsory retirement will be considered as removal under Art. 311 (2) if the rules do not fix both an age of superannuation and an age for compulsory retirement and the service of a Civil Servant is not terminated between these two points of time. A 1966 Mys 61 (65, 66) (DB). (Rule 293 of the Hyderabad Civil Service Rules (1954) does not infringe any of these tests.) ** A 1960 SC 1305 (1308, 1309) ** A 1969 Orissa 37 (42) (DB) ** (1964) 66 Pun LR 574 (575). ** 1972 WLN 1015 (Raj). (Rule 244 (2), Rajasthan Service Rules is not penal in nature and does not violate Article 311.)

(5) Compulsory retirement will amount to removal or dismissal from service when (1) the order in terms involves a stigma against the officer and (2) secondly when he loses the benefits already earned by his past service. A 1966 Pat 97 (108) (DB). (Compulsory retirement before superannuation — Note 1 to Reg. 465-A. C. S. R. not complied with — Second opportunity to show cause against proposed action is imperative — In absence of such notice order is invalid and ineffective.) ** A 1962 Raj 258 (263) (DB) ** 1976 Serv LWR 614 (616, 617) (Punj). (Order retiring the Government servant

Articles 310 & 311 — Note 94 (contd.)

compulsorily attaching an express stigma that his integrity is doubtful, the order amounts to dismissal from service and provisions of Art. 311 are attracted.)

(6) Railway Establishment Code, R. 2008, Clause (h) — The order of retirement of the railway servant can be sustained if prima facie, order does not contain express words from which a stigma can be inferred. If there are words which throw any stigma, then the order of retirement would amount to removal within the meaning of Art. 311. If, therefore, where the order does not disclose any reason at all, the validity of the order cannot be questioned. (1968) 1 Mad LJ 394 (396) ** **A 1967 SC 1264 (1266).** (Court cannot look into background to discover whether stigma could be inferred.) ** 1969 Lab IC 1027 (1029) (Mad).

(7) Compulsory retirement — Order of retirement stating that the employee is retired as he has outlived his utility — Order casts a stigma and amounts to punishment and is "removal" — Enquiry under Art. 311 (2) necessary before such order can be passed. **A 1967 SC 1260 (1262).** A 1965 All 142 (FB) **Overruled.** ILR (1963) 2 All 955, Affirmed.) ** 1963 All LJ 934 (942, 943) ** ILR (1979) 2 All 325: 1977 Lab IC (NOC) 9. (Surrounding circumstances cannot be looked into for determining whether any stigma was involved.)

(8) Compulsory retirement in public interest — Casts no stigma on public servant — Involves no punishment — Article 311 of Constitution is not attracted. **A 1975 SC 1487 (1492): 1975 Lab IC 1046** ** 1971 Lab IC 1162 (All). (1971 Lab IC 761 (All) **Overruled)** ** 1969 Lab IC 336 (337, 338) (All). ** 1978 Lab IC 1748 (1751) (Kant). (Order of compulsory retirement made in public interest on recommendation of High Court — Order legal and valid — Cannot be said to have been passed by High Court only.)

(9) Compulsory retirement after reasonably long period of qualifying service before prescribed age of superannuation — Order does not amount to dismissal or removal within the meaning of Art. 311 (2). (1968) 70 Pun LR 577.

(10) Under Punjab Civil Service Rules a Government servant can be made to retire on his attaining the age of 55 without any reason being assigned for it. To such a case Article 311 is not attracted but in case of order of retirement casting aspersion on the character of employee, order amounts to dismissal by way of punishment attracting Art. 311. (1968) 70 Pun LR 581 (585).

(11) Order passed under Rule 16 (3) of All India Services (Death-cum-Retirement Benefit) Rules 1958, requiring a Government servant to retire compulsorily and containing express words from which a stigma can be inferred, may amount to removal within meaning of Art. 311. A 1969 Orissa 37 (43) (DB).

(12) Compulsory retirement of employees ordered on ground of 'record of his service" being "found to be unsatisfactory" — Procedure under Art. 311 not followed — Such order casts stigma on employee — Order cannot therefore be passed without following procedure under Article 311 — Order hence cannot be sustained. (1969) 71 Punj LR 366 (369, 370).

(13) Orissa Service Code, Rule 71 (b) — Government servant made to retire on ground of inability to discharge duties efficiently — The reason amounts to a stigma and amounts to punishment — No opportunity given to him to meet such charge — Premature retirement illegal. 1969 Lab IC 369 (370) (DB) (Orissa).

(14) Person who substantively holds permanent post has right to continue in service subject to rule of superannuation and rule of compulsory retirement. If for any other reason that right is invaded and he is asked to leave his office, termination must mean defeat of his right to continue in service and it will be in nature of penalty and will amount to removal. If he has not attained age of superannuation and there is no minimum age prescribed under rules for compulsorily retiring any Government servant and most of the servants are retired after short period of service, such retirement would amount to removal. **A 1964 J & K 92 (95, 96, 97) (FB)** ** **(1968) 2 SCWR 773 (776)** ** **(1969) 2 SCC 120 (124).** (Rule not laying down long period of service). ** A 1961 Assam 74 (76) (DB).

(15) Where, a Government servant under his terms and conditions of service or under his contract of service has a right to continue in a post and his service is terminated by an order of compulsory retirement on the basis of a charge of misconduct or inefficiency or incapacity, it would be a case of punishment of removal or dismissal, even though there may be no loss of benefits already earned. 1963 All LJ 934 (942, 943).

(16) Misconduct or inefficiency furnish merely a background in the case of retirement and an enquiry, if held, is for the satisfaction of the authorities. But in the case of dismissal or removal they form the very basis of the order which is made. **A 1960 SC 1305 (1308).**

(17) Compulsory retirement of officer under service Rules for "administrative reasons" — After officer's own insistence to be supplied with grounds which led to the decision, certain charges were communicated to him — Officer allowed full pension — Fact that consideration of misconduct or inefficiency weighed with Government in coming to its conclusion, does not amount to any imputation or charge against officer — Order is not by way of punishment. **A 1960 SC 1305 (1308).**

(18) The date of compulsory retirement under Fundamental Rules, Rule 56 (a), must be determined on the basis of the service record and not on what the Government servant claims to be his date of birth. Until the record is so corrected, employee cannot claim that he had been deprived of the guarantee under Art. 311 (2) by having been compulsorily retired on attaining age of superannuation as determined on basis of entry of his date of birth in the service record. Where the application for rectification of service record as filed by Government servant concerned was itself not entertainable and such Government servant was compulsorily retired on such date of his actual superannuation without giving

Articles 310 & 311 — Note 94 (contd.)
him opportunity to prove his true age as claimed by him, the guarantee of Art. 311 (2) could not be claimed to have been infringed. **A 1971 SC 173 (173, 174): 1971 Lab IC 27.** (A 1967 Assam 13, **Reversed.**) ** 1976 Lab IC 1233 (1236) (DB) (Him Pra). (Wrong entry as to date of birth in service book can be corrected even at the stage when question of retirement is raised, provided there is no statutory provision prescribing limitation for such correction.)

[See also 1967 Cur LJ 70 (72) (Punj). (Civil servant retired from service, filing suit for mere declaration as to his date of birth — Plea that he should sue for being reinstated — Suit for mere declaration of birth date is maintainable.)]

[But see A 1963 Madh Pra 335 (336, 337) (DB). (Date of birth of Government servant in his service book based merely on surmise of Medical Officer.) ** A 1965 Orissa 81 (84) (A 1954 Nag 161 and A 1954 Trav-Co 32 held not good law in view of A 1964 SC 600 — Earlier compulsory retirement of officer after refixation of date of birth as given in Civil List amounts to removal.) ** 1967 Cur LJ 942 (949) (Punj).]

(19) Order of retirement based on disputed date of birth — Date of birth in service record changed behind employee's back and without any enquiry — Order premature according to original entry — Order amounts to removal from service — Order held invalid and illegal. 1975 Lab IC 842 (845) (Raj).

(20) Under service conditions the Appointing Authority had the power to retire an employee after he attains the age of 55 years on three month's notice without assigning any reason — Retirement without notice is invalid. (1964) 66 Punj LR 818 (822). (Three months' notice as required by rules not given — Notice of compulsory retirement held illegal and ineffective — Defect cannot be cured by paying three months' salary in lieu of notice.)

[But see (1976) 2 All LR 524: 1977 Lab IC (NOC) 76).]

(21) Petitioner appointed Additional Government Advocate for 3 years — New rule fixing 60 years as superannuation age — Services of petitioner terminated before his completing three years, under new rule — New rule held not retrospective and did not govern petitioner — Termination held was removal — Removal held illegal for failure to comply with provisions of Article 311 (2). A 1959 All 169 (176, 178) (DB).

(22) Obiter — If any Rule permits the appropriate authority to retire compulsorily a civil servant without imposing a limitation in that behalf that such civil servant should have put in a minimum period of service, the Rule would be invalid and the so-called retirement ordered under the said Rule would amount to removal of the civil servant within the meaning of Article 311 (2). **A 1964 SC 600 (617).**

(23) The Government servant was allowed to cross efficiency bar by order dated 20th July, 1973 with effect from 26th August, 1966 after taking into account only those entries which were awarded prior to 1966. The impugned order of compulsory retirement was passed after considering his overall performance and record of service including the adverse entries awarded in 1967-68, 1968-69 and 1969-70. **Held,** the contention that the order of compulsory retirement was passed after taking into account the adverse entries which stood waived was not correct. (1975) 1 All LR 304.

(24) Compulsory retirement of a Government servant — Servant crossing second efficiency bar only few months before the impugned order — No evidence to show that suddenly after crossing of efficiency bar there was any deterioration in quality of work performed by the servant — **Held** Order of compulsory retirement bad. **A 1980 SC 269: (1979) 2 Serv LR 781 (782).**

[But see (1978) 2 Mad LJ 406 (407). (Person retired in public interest recently allowed to cross efficiency bar and promoted — When retirement is not punitive but in public interest, permission to cross efficiency bar or promotion cannot come in way of compulsory retirement.)]

(25) Order of compulsory retirement amounting to punishment must comply with provisions of Article 311 — Order resulting in penal consequences would be one of punishment notwithstanding form of the order.

Whether an order is one of punishment or not will have to be determined in the light of the circumstances existing at the time the order was passed. 1971 Lab IC 1578 (1580, 1581. 1582) (Mad).

(26) Where in view of the Character Rolls for 1971-72 showing an officer to be a most undesirable person, the Review Committee recommended his compulsory retirement, and the Government relieved him on such recommendation in 1974, **Held:** that it was open to the Committee to consider the character roll that was available to them at the time of consideration, and the non-consideration of the subsequent character roll does not vitiate the recommendation. The fact that the officer had at one time served under one of the members of the Review Committee who had then dealt with him adversely in the course of his official business would not constitute bias and incapacitate him from being a member of the Review Committee. 1976 Lab IC 73 (Orissa).

(27) A person compulsorily retired is necessarily removed from service and if the order is attended by imputation or stigma which is cast upon him, it would amount to a penalty for giving protection under Article 311. Order regarding compulsory retirement passed as a result of enquiry containing allegation against the Government servant that he was found taking bribe and hence was dishonest and could not be retained in service definitely casts aspersion or stigma upon him and as such the order is a punishment within the meaning of Article 311 (2). 1972 Lab IC 1234 (1237) (Him Pra) ** 1973 Lab IC 249 (253, 254) (Bom) ** (1973) 1 Serv LR 1030 (Pat) ** 1972 Lab IC 283 (284, 285) (Punj) ** A 1970 Punj 459 (461) : 1970 Lab IC 1316.

Articles 310 & 311 — Note 94 (contd.)

(28) Compulsory retirement of District Judges on basis of opinion of Administrative Committee — Statement by State Government that corrupt and undesirable officials were being weeded out — Conclusion that District Judge was retired compulsorily by reason of stain attaching to his character, not justified. **1978 Lab IC 839 (848) (SC).**

(29) Order of early retirement — No material to show that employee was not efficient in service or physically or mentally unfit to discharge his duties — Order unsustainable. 46 Cut LT 555 : 1979 Lab IC (NOC) 22 (DB).

(30) Compulsory retirement — Service Rule permitting retirement of Government servant in public interest on "account of inefficiency and bad conduct" — Mere mentioning of the Rule in the order of retirement does not amount to stigma — Order held not illegal. 1978 Lab IC 1195 (1198) (DB) (Pat).

(31) If the misconduct or inefficiency of a Government servant is taken into account, merely as furnishing the background while passing an order of compulsory retirement it is not illegal but if they are the very foundation on which the order rests, it may be bad. For this whether the order of retirement is actually founded on an imputation, the service records of the Officer and other connected documents will not be examined by the Court and the Court will be content by considering the order itself. 1978 Lab IC 1195 (1197, 1198) (DB) (Pat).

(32) Compulsory retirement of petitioner — Adverse entries in character roll — Recommendation of review committee for compulsory retirement of petitioner in public interest — No allegation of mala fide against Review Committee — Order of compulsory retirement justified, unless mala fides on the part of the authority is established. (1977) 2 Serv LR 473 : 1977 Lab IC (NOC) 95 (Orissa).

(33) Compulsory retirement on ground of public interest during pendency of departmental proceedings held was by way of punishment — Order held, not sustainable. 1977 Lab IC 378 (All) ** 1976 Lab IC 61 (All).

[But see 1973 Lab IC 276 (280 to 282) (Delhi).. (Before conclusion of enquiry servant compulsorily retired — Order according to Rule 2046 (h) of Railway Establishment Code (Vol. II) — Order of retirement cannot be regarded as punishment.)]

(34) Retirement of I. A. S. officer ordered by Government of India in public interest during period of suspension which had been passed by Orissa Government (to which services were lent) because of pendency of police investigation — No pecuniary or other loss caused to petitioner — Order of retirement held did not amount to punishment. 1973 Serv LJ 468 (Delhi).

(35) Permanent Government servant holding post substantively working as teacher in a school — School transferred to a 'Mandal' — Mandal unwilling to absorb teacher — Government forcing him to retire without any enquiry — Held, it violates Article 311 (2). (1969) 10 Guj LR 76.

(36) Compulsory retirement of a Government servant in public interest — Where reputation arising out of the publicity of the charges or pendency of proceeding unconnected with suitability and integrity of the Government servant, held it cannot constitute legitimate material for forming opinion in public interest. **Held** further that where the order of retirement had its genesis in the charges and the pending proceedings, the order of compulsory retirement was illegal and void. (1979) 3 Serv LR 734 (740) (Delhi).

(37) Compulsory retirement in accordance with the valid rules framed in this behalf even without any enquiry does not amount to dismissal, removal or reduction in rank within Article 311 (2) although such retirement indirectly deprives such Government servant of the future emoluments and the quantum of pension as also exposes him to the impression that his such retirement is due to his record of service being unsatisfactory. 1973 Lab IC 249 (Bom).

(38) Compulsory retirement made under the Rules framed under Article 309, is not a penalty. Procedures of disciplinary proceedings and compulsory retirement are different and one does not cover or overlap the fields of the other. Therefore, even if an appeal is pending in this court in connection with the disciplinary proceedings against a Government servant or a criminal case is pending, the appropriate authority can pass an order of compulsory retirement under Rule 75 (aa) (i) of the W. B. Services Rules Part I in public interest. (1976) 1 Serv LR 723 (731) (Cal).

(39) Once a Government servant is allowed to continue in service beyond the age of 55 years after review of his work and conduct, it is not open to the State Government or the appointing authority subsequently to review its decision or to retire him compulsorily in the absence of any fresh material. It was not open to the Government to form a different opinion on the same material. 1976 Lab IC 66 (All).

(40) Bombay Civil Services Rules (1959), Rule 161 (C-1) (a) (as amended in 1971) — Order of retirement passed under the rule cannot amount to removal because prescription of minimum period of service of 20 years is reasonable. 1973 Lab IC 249 (Bom).

(41) The word 'removal' in Article 311 used synonymously with the term 'dismissal' generally implies that the officer is in some manner blameworthy or deficient. There is, however, no such element of charge or imputation directly in the case of compulsory retirement. Further dismissal or removal is a punishment and involves loss of benefit already earned. The officer dismissed or removed does not get pension which he has earned. In the event of compulsory retirement, the officer is entitled to the pension that he has actually earned and there is no diminution of the accrued benefits. 1973 Lab IC 249 (252, 253) (Bom).

(42) Compulsory retirement authorised by Service Rules is not dismissal. 1978 Lab IC (NOC) 8 (DB) (Cal).

Articles 310 & 311 — Note 94 (contd.)

(43) Purported retirement on grounds of mental illness — Non-compliance with Section 7 (2) (c) of Pensions Act (Chap. 55) — Breach of natural justice — Purported retirement was a nullity. (1979) 2 Malayan LJ 93.

(44) The order of compulsorily retiring a Government servant cannot be challenged as being one of punishment within Article 311 (2) on the ground that valuable right of retiring pension is lost where the Government servant could never have qualified himself for retiring pension by completing 25 years service even if he would have been allowed to continue till age of superannuation. 1971 Lab IC 1439 (1444) (All).

(45) Claim that person had been prematurely and unlawfully retired — Statement as to age given at time of joining service — Application to have date of birth amended turned down — Employees of Malayan Railway are in the service of the Government of the Federation to whom General Orders apply: when the Government used its discretion and declined to amend his date of birth he should have proceeded against the Government — Not having done so he cannot take action against the Railway. (1975) 1 Malayan LJ 123 (124).

95. Except where authorised by specific Rules, compulsory retirement before age of superannuation is dismissal or removal.— (1) Where a person's services are terminated in accordance with the Service Rules, as in the case of retirement on superannuation, or by way of compulsory retirement when the ordering of such compulsory retirement is permissible under the Service Rules, without necessity of basing the order on any misconduct, negligence, inefficiency or other disqualification of the officer, he cannot be said to be deprived of any office to which he has a right and in such cases, therefore, Art. 311, Clause (2) will have no application. **A 1958 SC 232 (238) ** A 1958 SC 36 (49) ** A 1957 SC 892 (895) ** A 1954 SC 369 (375) **** 1961 Raj LW 298 (304) (DB) ****** A 1958 Cal 657 (659) (DB).

(2) Public servant governed by Saurashtra Covenanting State Services (Superannuation Age) Rules (1955) — His compulsory retirement under Bombay Civil Service Rules (1959) before reaching age of 55 years, after States reorganisation — Not valid — Such retirement tantamounts to removal under Article 311 (2). **A 1970 SC 143 (145, 146).**

(3) After the age of 55 there is no right in the servant to be retained, even if he continues to be efficient. **A 1961 SC 1346 (1347, 1348, 1349).**

(4) The law in relation to the validity of the rules permitting compulsory premature retirement of Government servants has been well settled and need not be reopened. Whether or not the petitioner's retirement is in the public interest is for the State Government to consider. A 1968 Andh Pra 50 (60) (DB). (Liberalised Pension Rules (1950), Rule 2 (2).)

(5) Rule 244 (2) of Rajasthan Service Rules (1951) providing for compulsory retirement on completion of 25 years of qualifying service is not in contravention of Article 311 (2). (1965) Raj LW 44 (45) ** 1967 Raj LW 473 (474) (DB). (Order of compulsory retirement passed by delegatee of Government not in conformity with Article 166 — Order held not illegal.)

(6) Rule 56 (b) of the Rajasthan Services Rules which imposes a restriction on Government not to retire a Government servant under suspension on a charge of misconduct applies only to cases of Government servant attaining the age of superannuation and it does not apply to cases of compulsory retirement under Rule 244 (2). Though it is desirable not to retire a Government servant under Rule 244 (2) if he is under suspension on a charge of misconduct yet if an order is passed and is not tainted with malice, it is not hit by Rule 56 (b). A 1967 Raj 82 (84) (DB).

(7) Compulsory retirement — Mysore Civil Services Rules, R. 285, Note 1 — Compulsory retirement in public interest — It is not by way of punishment and does not cast any stigma on official retired — Government not under obligation to give opportunity of hearing. AIR 1969 Mys 248 (250): 1969 Lab IC 986.

(8) Under Article 186 of the Mandi Civil Service Regulations, a permanent public servant of the former Mandi State could be compulsorily retired or his services terminated provided he had completed 25 years qualified service. As Section 240 of the Government of India Act, 1935, did not apply to the former Indian State of Mandi, the public servant who has been compulsorily retired on 18th November, 1948 (that is before the commencement of the Constitution of India) cannot claim, as of right that a show cause notice should have been given to him before he was compulsorily retired. A 1959 Him Pra 32 (34).

(9) Retirement under service rule providing for compulsory retirement at any age whatsoever, irrespective of the length of service cannot necessarily be regarded as dismissal or removal. **A 1960 SC 1305 (1309).**

(10) The liability to retire earlier under Rule 161 of the Bombay Civil Service Rules is a term of service. The effect of the orders requiring a person to retire in pursuance of Rule 161 is not dismissal, removal or reduction. The orders are also not passed on the basis of any implied stigma such as inefficiency or incapacity or misconduct. The termination of service resulting from such orders is the termination of service simpliciter flowing from a condition of service and is not either a dismissal, removal or reduction within the meaning of Article 311. Article 311 (2) is not therefore attracted in such cases. (1963) 4 Guj LR 945 (952) (DB).

(11) An order passed in the name of the Governor by an Under Secretary to the Government, under Note 1 to Rule 285 of the Mysore Civil Service Rules, directing a Government Servant to retire compulsorily from service, cannot be held to be invalid for failure to give valid notice 'at least three months before date' as required by 'Note 1'. A compulsory retirement neither being a reduction nor removal nor dismis-

Articles 310 & 311 — Note 95 (contd.)
sal within the meaning of those expressions found in Article 311 the 'Note' must be considered as containing merely administrative instructions. It cannot have any binding force. The notice mentioned in the 'Note', therefore, cannot be regarded as a condition precedent to a valid compulsory retirement. Even assuming that the 'Note' is valid and binding on the Government, the expressions "shall" and "at least 3 months before that date" by themselves do not show that its requirements are mandatory. They can still be directory. 1962 Mys LJ (Supp) 437 (440, 441).

(12) Age of retirement raised from 55 to 58 in U. P. by amending Rule 56 Fundamental Rules — The appointing authority had power to require the Government servant to retire at any time by three months notice after he attains the age of 55 — Government servant retained in service after fifty five — Notice to retire him before attaining age of fifty eight — Proof of notice is only directive and does not control rule — Age of superannuation remains at 55 with option to continue up to 58 — Termination of service with notice does not attract Article 311 (2) as it is under the rules and not by way of punishment nor can the order be termed as dismissal or removal. (1968) Lab IC 990 (992) (All).

(13) Letter from Railway Board, dated 5-12-1962, communicated to all General Managers and other authorities regarding raising of age of superannuation from 55 years to 58 years — Para 6 of letter vesting power in appointing authority to compulsorily retire railway servant after he attains age of 55 years — Compulsory retirement under Para 6 does not amount to dismissal or removal as contained in Article 311 — Para 6 is not violative of Articles 309 and 310. 1968 Lab IC 1317 (1321) (Delhi).

(14) Under Rule 56 of Fundamental Rules age of superannuation raised to 58 — Compulsory retirement under Rule 56 (j) beforehand is not invalid — Rule 56 is not against safeguard given under Article 14 — Compulsory retirement does not amount to removal or dismissal. A 1969 Delhi 15 (18, 19) (DB).

(15) Fundamental Rules, Rule 56 (j) — Clarification dated 18-2-1965, issued by Government of India — Pendency of departmental enquiry on charges of misconduct — Order of compulsory retirement under Rule 56 (j), not passed as result of any finding in such enquiry — Order cannot be said to have been passed by way of punishment. 1969 Lab IC 338 (340) (All).

(16) Civil Services (Classification, Control and Appeal) Rules, Rule 19 — Fundamental Rules (as amended in 1963), R. 56 — Termination of service by compulsory retirement and termination by order of removal or dismissal by way of punishment — Difference between stated — Petitioners compulsorily retired at age of 55 and not allowed to continue till age of 58 — Retirement held not by way of punishment. A 1966 All 560 (563) (DB). (Power to retire held not exercised colourably — Nor could it be said that exercise of power was fraud on statute.)

(17) Retirement on attaining age of superannuation does not amount to compulsory retirement by way of punishment even though extension up to fifty-eight is denied — If a person is ordered to retire before fifty-five then it can be a punishment. 1969 BLJR 553 : 1968 Pat LJR 634 (636) (DB).

[See also A 1956 Trav-Co 35 (40). (Retirement on account of policy of State regarding age of superannuation or otherwise).]

(18) Where there is no specific Service Rule, providing for the compulsory retirement of a Government servant before the normal age of superannuation on his attaining a particular age or on his completing a service for a particular number of years, or where there is such a rule but a Government servant is compulsorily retired before attaining the age or completing the period of service indicated therein, the order of compulsory retirement will amount to punishment and hence, removal from service within the meaning of Article 311. A 1957 SC 892 (895) ** A 1957 Andh Pra 794 (804) (DB).

[But see A 1957 Assam 77 (81) (DB).]

(19) A permanent civil servant has a right to remain in service until he reaches the age of superannuation and if there is no rule made under Article 309 giving to the Government the power to order his compulsory retirement before he reaches the age of superannuation, then the Government servant cannot be so retired. If done, that retirement would amount to dismissal or removal within Article 311 (2). If it is done pursuant to a rule, it cannot be regarded as removal or dismissal. A 1964 Madh Pra 248 (251) (DB).

(20) Compulsory retirement of permanent Government servant — Government servant thereby losing his right to continue in service till age of superannuation — Order passed on the ground that he had outlived his utility — Order amounts to an order of punishment of removal. 1963 All LJ 934 (943) (DB).

(21) Premature retirement is definitely a form of punishment and comes within the purview of compulsory retirement under Rule 30 of the Kashmir Civil Service Rules. A Government servant cannot therefore be prematurely retired without there being good and sufficient reason as provided in the rules. Under Article 32 of the Kashmir Civil Service Rules which have the force of law, it is provided that no order of dismissal, removal or reduction shall be caused on a member of a service unless he has been informed in writing of the grounds on which it is proposed to take action and has been given adequate opportunity of defending himself. Where nothing of that sort has been done in the case and a mere, executive fiat has been issued and the person has been deprived of what was otherwise due to him, writ of mandamus will issue. A 1958 J & K 60 (62).

Articles 310 & 311 — Note 95 (contd.)

(22) The services of temporary hands who are governed by temporary service rules contained in Schedule IX to J. and K. Civil Service Regulation can be terminated by competent authority under Rule 5 of Schedule IX. Section 126 (2) of the State Constitution has no application to their cases unless the orders show that their services are terminated by way of punishment. **A 1964 J & K 92 (98, 99) (FB).**

(23) It cannot be urged that a compulsory retirement in any case does not amount to dismissal or removal under Article 311 (2), because it entails no forfeiture of the rights and benefits that have already accrued. A compulsory retirement, where a person had a right to continue in office except on ground of misconduct, negligence, inefficiency or other disqualification is a punishment. But a compulsory retirement, where a public servant has no right to continue in office, is not a punishment. The test is whether a right to continue in the post except for misconduct, negligence, inefficiency or other good and sufficient cause is claimed. A 1959 Andh Pra 251 (254) (DB).

(24) A permanent Government servant has a right to continue in service till the age of superannuation under the rules or until such time as his services are terminated by compulsory retirement in terms of a specific Service Rule, unless the post itself is abolished in the meanwhile. **A 1958 SC 36 (48, 49).**

(25) Pepsu Civil Service (Safeguarding of National Security) Rules, 1954 — Compulsory retirement of head constable on the ground of his being associated with other persons in subversive activities — Merely associating with persons who are engaged in subversive activities is not enough — Action taken on wrong interpretation of Rules — Writ issued quashing the order. A 1956 Pepsu 19 (26).

(26) No charge-sheet framed against applicant nor enquiry held — Order of retirement under Rule 2 (3) (ii) of M. P. New Pension Rules, 1951, for inefficiency — Applicant not lost any benefit which he had already earned till that date — Order could not be held to be by way of punishment of removal from service — Art. 311 not attracted. 1964 MPLJ 378 (380) (DB).

(27) Order for compulsory retirement for "good and sufficient reason" a phrase used in Rule 9, Kerla Civil Services (C. C. A.) Rules 1957 — High Court will not enter into question of sufficiency of reason or goodness of it — Order held was passed by competent authority and that there was opportunity given to officer to show cause. A 1959 Ker 201 (202) (DB).

(28) Though compulsory retirement per se does not attract Article 311 (2) even in cases of compulsory retirement before the age of superannuation, it is open to the Government servant to establish that it is resorted to mala fide or by way of penalty for some alleged misconduct. 1968 Lab IC 731 (733, 734) (Cal).

(29) State Government's resolution either raising or reducing age of compulsory retirement of its employees are executive instructions and not rules framed under Article 309. A 1971 Orissa 170 (172) (DB). (A 1968 Orissa 44 held impliedly overruled in A 1967 SC 1264 and A 1970 SC 1314.)

(30) Compulsory retirement on ground of physical incapacity — Amounts to punishment in the absence of service rule permitting such retirement as it entails premature end to employment of Government servant — Such premature retirement cannot be supported on doctrine of pleasure of Governor embodied in Article 310. A 1971 Madh Pra 20 (22) : 1971 Lab IC 68.

(31) Superannuation age raised to 58 under Rule 3.26 of Punjab Civil Service Rules — Notice compulsorily retiring an employee at the age of 55 according to Civil Service Rules — Does not amount to punishment — Neither the Punjab Civil Services (Punishment and Appeal) Rules nor Article 311 (2) of the Constitution of India are attracted. (1974) 1 Serv LR 728 (Punj).

96. Compulsory retirement based on charges of misconduct, negligence, etc., is dismissal or removal.— (1) Where, the order of compulsory retirement was passed against a Sub-Inspector of Police because he had been found guilty of misconduct and that he was not awarded full pension and gratuity to which he was entitled to under the rules, the compulsory retirement order amounted to order of removal within Article 311 and was by way of punishment. (1964) 66 Punj LR 574 (575).

(2) Where the order, though calling itself an order of retirement, is professedly based on charges of misconduct, inefficiency and the like, it would amount to a punishment, and hence, removal from service. A 1955 Mys 137 (137) (DB).

[See A 1958 SC 36 (49).]

(3) Compulsory retirement — Disciplinary Tribunal finding civil servant guilty of charges of corruption — Government accepting findings — Compulsory retirement suggested by Tribunal as punishment — Recommendation also accepted — It is not for High Court in petition under Article 226 to enquire into question as to reasonableness, adequacy or propriety of punishment. A 1961 Andh Pra 289 (292, 293).

(4) The duties of Depot Store Keeper are not of a supervisory nature and are purely of a clerical nature — Though described as a Depot Store Keeper, the incumbent discharges purely ministerial duties and is a Ministerial Railway servant and is entitled to be retained in service till he attains the age of 60 under Rule 2046 (4) of the Railway Establishment Code as amended in 1967. (1980) 1 Serv LR 274 (276) (Delhi).

(5) Where the delinquent officer who had not completed the term of service which would entitle the Government to retire him compulsorily, had been so retired on the proved charges of misconduct purely as a measure of punishment, Article 311 (2) applies to the case. A 1963 Mad 14 (15) (DB). (A. S. 112 of 1955 (Mad.) Affirmed.) ** 1980 Lab IC 130 (139) : (1980) 1 Cal LJ 15 (DB).

(6) Compulsory retirement of civil servant — Inquiry by Tribunal for Disciplinary Proceedings — Some of the charges of corruption held to have been proved,

Articles 310 & 311 — Note 96 (contd.)
the remaining leaving suspicion of corrupt practice — Recommendations by Public Service Commission agreeing with the findings of Tribunal and also mentioning that the evidence in the enquiry left suspicion about the Officer being corrupt — Order of compulsory retirement held could not be held to be illegal or passed merely on suspicion. **A 1966 SC 1827 (1830, 1831, 1832). (W. A. No. 78 of 1961, dated 1-11-1962 (Madras), Reversed.) ** 1972 Lab IC 627 (631) (SC).**

(7) Departmental proceedings — Order of compulsory retirement of Police Head Constable — Charge that he entered into contract with Block Development Officer without permission of police authorities while he was under suspension — Work of charitable nature for benefit of villagers — Government Officers permitted to participate in "Shramadan" drive — Permission under Rule 14 of Madras Police Officers Conduct Rules held was not necessary — Charge also of insubordination — Insubordination cannot be premised on solitary instance in form of an answer to a query during enquiry — Insubordination can be fitting only when servant is insulting or insubordinate to such a degree as to be incompatible with continuation of relation of master and servant — Order quashed. (1967) 32 FJR 286 (288, 291) (Mad).

(8) Civil Service (Safeguarding of National Security) Rules, 1949, Rules 3 and 4 — Engaging in subversive activity — Government servant associating with persons engaged in subversive activity — Taking interest in political activities of Communist party when it is not banned — Allegations do not amount to Government servant being engaged in subversive activity — R. 3 not attracted — Compulsory retirement in such circumstances amounts to removal from service by way of penalty — Government servant can maintain a petition under Article 226 of the Constitution. **A 1963 SC 1160 (1164, 1165).** (L. P. A. No. 23-D of 1957, dated 6-10-1960 (Punj), Reversed.)

(9) In cases of compulsory retirement where the order is not actually founded on any charge of inefficiency, misconduct or the like, the mere fact that the inefficiency, misconduct or the like is the motive of the Government in taking action will not make the order one of punishment so as to attract the provisions of Article 311. **A 1954 SC 369 (374) ** A 1957 SC 892 (895) ** A 1958 SC 36 (49) **** A 1954 Madh B 54 (54, 55, 56) (DB).

(10) Compulsory retirement of District Judges on basis of opinion of Administrative Committee — Statement by State Govt. that corrupt and undesirable officials were being weeded out — Conclusion that District Judge was retired compulsorily by reason of stain attaching to his character, not justified. **1978 All LJ 477: 1978 Lab IC 839 (SC).**

(11) The right of the Government to require a Government servant to retire after he attains the age of 55 years is an unqualified right but, for exercising that right the Govt. can examine the service record in a bona fide manner and take a decision in public interest, then there is no question of any punishment or stigma; whereas in cases where for one reason or the other the State Government is of the view that the Government servant concerned is liable to be punished for certain acts and omissions and action is taken by requiring him to compulsorily retire such orders can be questioned in a Court of law as being violative under Art. 311. (1979) 2 Serv LR 203 (208) (DB) (Pat).

(12) Appellant was found worthy of being permitted to cross the second Efficiency Bar only a few months before. Within a few months thereafter he was found unfit so as to deserve compulsory retirement. There was no evidence to show that suddenly there was such deterioration in the quality of the appellant's work or integrity that he deserved to be compulsorily retired. **Held** that the order of compulsory retirement deserved to be quashed. **A 1980 SC 269: (1979) 2 Serv LR 781 (782, 783).**

97. Compulsory retirement coupled with loss of benefits already earned is dismissal or removal.— (1) Where the action entails forfeiture of the earned benefits it is one of punishment, but where as in the case of compulsory retirement after 30 years of of qualifying service, a civil servant earns proportionate pension, the action cannot be one of punishment. **A 1960 Madh Pra 117 (118) (DB).**

(2) When it is proposed to take action against a servant by way of punishment and that will entail forfeiture of benefits already earned by him, provisions of Art. 311 apply. A 1969 Orissa 37 (42): 1969 Lab IC 281 (DB).

(3) Where the order of compulsory retirement, though provided for by a specific Service Rule, imposes any penalties in the form of the loss of benefits already earned the order would amount to one of punishment and as such would come within the scope of Art. 311. **A 1958 SC 36 (49).**

(4) Rule 67 has to be read as a whole. When so read, it can by no means be taken to confer an absolute right on the Government to refuse leave. Reading Rules 59, 67, 80 and 86-A Civil Service Regulations together, the only inference that can be drawn is that, even though it is not the right of a Government servant to claim leave due to him at a particular point of time, it is equally clear that the matter of grant of leave which a Government servant has earned is not a matter of gift pure and simple. An order of compulsory retirement passed in accordance with Rule 465 of the Civil Service Regulations having the effect of depriving the Government servant sought to be retired thereunder of the benefit of leave earned by him and due to him on the date of the order is an order visiting him with penal consequences, and Article 311 stands attracted. If the procedure required by Article 311 has not been followed, the order must be struck down as bad in law. ILR (1969) 1 All 646.

(5) Compulsory retirement by granting three months salary in lieu of notice under Rule 244 (2) of Rajasthan Civil Service Rules (1951) — Order is not bad merely because petitioner was not given a reasonable

Articles 310 & 311 — Note 97 (contd.)
opportunity of availing the earned leave — Loss of earned leave cannot be considered as evil consequence. 1976 Lab IC 718 (724) (Raj).

98. Compulsory retirement amounting to removal — No right to pension.— (1) Where an order though calling itself an order of compulsory retirement is really one of removal from service, the Government servant will not be entitled to proportionate pension but merely to compassionate allowance. A 1955 Mys 137 (137) (DB).

99. Alteration of superannuation rule — see Note 20.

100. Right of ministerial servant to continue in service till age of sixty.— (1) A ministerial servant of the Government cannot claim a legal right to continue in service after the age of fifty-five till the age of sixty, though the Service Rules may provide that he may be retired at fifty-five but should ordinarily be retained in service till sixty if he continues to be efficient. It is a matter resting within the discretion of the Government to retain him in service after the age of fifty-five. A 1956 Cal 93 (95) ** A 1959 Punj 503 (504, 505) (DB). ((1958) 60 Punj LR 277, **Overruled.**) ** A 1958 Orissa 202 (204) (DB).

(2) Railway employee who had declared himself as Anglo-Indian and had enjoyed privileges for Anglo-Indians and retired after attaining 55 years contending that he was a Christian and as such liable to retirement only after attaining 60 years — Order of retirement does not amount to punishment — Employee has no right to hold the post until 60 years. (1962) 2 Lab LJ 584 (586) (Andh Pra).

(3) Government servant holding temporary post in State P. W. D. with a privilege of continuing in service till the age of 60 transferred to Electricity Board with all benefits and conditions of service enjoyed in Government service — Board making the post permanent but relieving transferred government servant on his attaining age of 55 — Termination of service in such circumstances amounted to denial of benefits guaranteed to the transferred servant — Termination set aside and Board recommended to reconsider the matter. 1961 Ker LT 1139 (1140) (DB).

(4) Where the right to serve after fifty-five and till sixty (assuming such right to exist) is waived by a ministerial servant himself expressing a desire to retire at fifty-five and applying for leave preparatory to retirement, he cannot complain of want of reasonable opportunity under Art. 311. Clause (2) to show cause against his premature retirement. **A 1954 SC 584 (586).**

101. Compulsory retirement with retrospective effect.— (1) There is no illegality in the order of compulsory retirement of a Government servant from the date he was placed under suspension pending enquiry into his misconduct which came to be proved against him. 1964 Ker LT 180 (188) (DB). (Overruled on another point in A 1969 Ker 244 (FB).)

102. Reduction of pension as punishment.— (1) Grant of life disability pension to petitioner serving as clerk in Army, on recommendation of medical board — Pension cancelled subsequently after many years as a result of further medical examination — Petitioner has right to relief against cancellation under Art. 226. A 1962 Punj 503 (504, 505).

103. Extension of superannuation.— (1) Once the right of a permanent civil servant to hold the post comes to an end on attaining the age of superannuation no fresh right to hold the post is created in him merely because he is permitted to remain in service for a certain period. A right is not conferred upon him under which he can insist to hold the post till the expiry of the extended period of service. The mere fact that the Officers were permitted to remain in service vested the competent authority with an implied power to revoke the permission under which they continued to remain in service after superannuation. Unless the termination of their service is on ground personal to them and carries with it a stigma it cannot attract the provisions of S. 126 (2) of the State Constitution (corresponding to Art. 311 (2) of the Indian Constitution). **A 1964 J & K 92 (98) (FB).**

[But see A 1963 Mys 208 (209) (DB).]

(2) The Government notification, dated 15th August, 1956 on the basis of which extension is claimed contains nothing either express or implied which could persuade the view that the refusal of an extension must be preceded by an opportunity to establish the right to extension or to establish the existence of the condition on the fulfilment of which alone an extension could be granted. **A 1968 Mys 116 (118, 119) (DB).**

(3) Refusal of an extension cannot be equated with a removal — Extension amounts to retention in service, and the right to such extension must be acquired under Government Notification of 15th August, 1956, on the formation of the opinion by the appropriate authority that the conditions on the existence of which alone an extension could be granted exist. **A 1968 Mys 116 (118) (DB).**

(4) Petitioner a patwari entitled to continue in service under the Service Conditions up to the age of 65 if he was not found unfit after the age of 60 — Services of the patwari extended after the age of 60 but further extension was refused even though he had not attained the age of 65 and even though he was not found unfit for service and was made to retire — **Held** the service conditions did not permit the services of the petitioner being terminated otherwise than in accordance with Art. 311 (2). 1968 Cur LJ 523 (525).

(5) Retention of service of civil servant beyond date of superannuation for purpose of holding departmental enquiry cannot be said to be on public grounds — Such action is permissible under Rule 73 (f) Bihar Service Code only if the civil servant is suspended before his date of compulsory retirement. **A 1966 Pat 227 (229) (DB).**

(6) West Bengal Civil Service Rules, R. 75 (a) — Retention of service for the purpose of conducting a departmental enquiry is not proper and extension of service beyond date of compulsory retirement for this purpose is illegal. **A 1966 SC 447 (449).**

104. "Reduction in Rank".— (1) The expression "rank", in Art. 311 (2) has reference to a person's classification and not his particular place in the same cadre in the hierarchy of the service to which he belongs. Therefore, losing

Articles 310 & 311 — Note 104 (contd.)
some places in the seniority list in the same cadre, does not amount to reduction in rank, within the meaning of Art. 311 (2). A 1962 SC 1704 (1710) ** A 1970 Punj 415 (416, 417) : 1970 Lab IC 1300 (FB). (Reversion not involving penal consequences is no reduction in rank.) ** 1974 Lab IC 1135 (Bom) ** 1973 All LJ 389. (Reversion of an officiating employee based upon evaluation of his performance is no punishment by rank reduction.) ** (1971) 2 Andh WR 406 ** (1971) 2 Serv LR 453 (Delhi) ** (1970) 1 Cut WR 349 ** A 1968 All 276 (278, 279). (Petition challenging an order which has resulted only in loss of seniority is not maintainable under Art. 311.) ** 1979 Lab IC 781 (783) (DB) (Punj). (Revocation of revised scale before its implementation — Does not entail reduction in rank.) ** 1975 Lab IC 331 (J & K). (Reduction in pay does not result in reduction in rank.) ** 1973 Serv LC 583 (Delhi) ** (1972) 1 Cut WR 962 ** (1971) 2 Cut WR 785 (DB) ** A 1970 Punj 315 (319 to 321) : 1970 Lab IC 1009. (The reversion from a higher post to a lower post necessarily involves reduction in emoluments and that alone cannot be termed as a penal consequence.) ** ILR (1969) 1 All 530.

(2) 'Reduction in rank' means reduction from a higher to a lower rank or post and not merely losing places in rank or cadre — For punishment of forfeiture of approved service resulting in loss of higher salary or reducing chances of promotion to higher post remedy lies under relevant service rules and not under Art. 311 (2). A 1971 SC 766 (769, 771) : 1971 Lab IC 481. (A 1959 Orissa 167, Overruled.) ** A 1970 SC 77 ** (1976) 2 Serv LR 747 (752) (Pat).

(3) As the Government would have already taken into account the nature of duties, responsibilities and the status of different posts before classifying them and would have indicated the classification by the fixation of different salaries, or pay scales, the Courts should be well advised in regarding the pay or the scale of pay of a post as the principal criterion to determine the rank of the post. It would not be advisable, for the Courts to ignore the classification made by the Government as indicated by the emoluments fixed by the Government and try to determine afresh the rank of a particular post by having regard to considerations other than the pay especially because these considerations have already been taken into account by the Government in fixing the pay or the pay scale of a particular post. ILR (1971) 1 Delhi 754.

(4) The Government is well within its rights to withdraw the war-service concessions erroneously given to its employees earlier by wrong interpretation of the Punjab Government Service (War) Amendment Rules and thus change the dates of their confirmation. If owing to some bona fide mistake, the Government has taken a decision regarding the confirmation of an officer, it can certainly revise its decision at a subsequent stage, when the mistake comes to its notice. The mistake can be corrected and it cannot be said that it would be allowed to perpetuate even when the same is discovered. The consequent reduction of the officer could not amount to reduction in rank and would not attract the applicability of Article 311 of the Constitution. Such a reduction is the necessary result of any routine administrative decision. It is only when an officer brings his case within the purview of Art. 311 of the Constitution that he can attack the legality of any order passed by the Government, which might adversely affect his career in Government service. A 1970 Punj 241 (250, 251) (FB).

(5) Reduction in rank — Reduction of pay amounts to reduction in rank and attracts Article 311 (2). 1979 Lab IC 520 (524) (DB) (Cal).

(6) The expression 'grade promotion' occurring in Audit Instruction No. 3 under Fundamental Rule 23 does not debar a Government servant from retaining his old pay until he had promotion to a next higher grade. Held, on facts, that the petitioner's subsequent fixation on a lower salary by the Registrar was not justified and, that being so, the petitioner must be held to have been reduced in rank. A 1960 All 193 (198).

(7) Reversion from post of deputation to parent department — Survey and assessment of performance is permissible — Such action not punitive — Hearing not necessary. 1978 Lab IC 914 (916) (DB) (Ker). ((1976) 2 Serv LR 395 (Ker), Reversed.) ** A 1977 SC 629 (633) ** 1978 Lab IC 1191 (1194) (Guj) ** 1973 Lab IC 1385 (1387, 1388) (Punj) ** (1969) 5 Co-op LJ 1 (Andh Pra).

(8) Reversion — Eighteen month's rule incorporated in Railway Board's Circular dated 21-5-1956 — Disciplinary proceeding under Rule is required to be adopted when basis of reversion is unsuitability or unsatisfactory performance of work — Rule does not apply when reversion is directed on administrative ground. 1978 Lab IC 1013 (1020) (DB) (Cal).

(9) Railway Board's Circular, D/- 21-5-1956 and subsequent Circulars — Reversion from officiating post — Eighteen months Rule in Circulars — Order of reversion after 18 months officiation made on administrative grounds — Disciplinary procedure is not required to be adopted. 1978 Lab IC (NOC) 58 (Cal). (Civil Rule No. 927 (W) of 1963, D/- 18-8-1967 (Cal), Reversed.)

(10) Reduction in rank — Headmaster holding post temporarily being a seniormost teacher — No appointment order issued — Reversion to substantive post could not be said to be bad — Article 311 (2) not attracted. A 1976 Pat 267 (270).

(11) Order of Chief Minister confirming a public servant does not create any ... in favour of the servant when it is not expressed in the name of the Governor and is not communicated to the employee — Consequently employee cannot challenge his reversion to substantive post on basis of such order when the order is rescinded and the temporary post on which the employee has been appointed is abolished. A 1979 SC 220 (226).

(12) Reversion must follow rule "first come last go" when reversion is due to exigencies of service. 1974 Serv LJ 1 (Punj).

(12A) Order of reversion, though administrative, can be reviewed by High Court if it is arbitrary. A 1971 Guj 39 (41) : 1971 Lab IC 168.

(13) An enquiry into the charges against a Kanungo candidate could be dispensed with only if the Deputy Commissioner records reasons that it is not reasonably practicable to

Articles 310 & 311 — Note 104 (contd.)
hold such enquiry. Where no such reasons had been recorded but the Deputy Commissioner was led to believe that no such inquiry was necessary as the petitioner was a mere candidate and not Government servant and his belief was wrong in as much as the petitioner was a Government servant, his removal amounted to reduction in rank and in such a case the procedure prescribed by Art. 311 (2) should have been followed. 1969 Cur LJ 17 (Punj).

(14) The fact that a civil servant charged with fraud and misappropriation of Government funds, voluntarily admits his guilt and refunds the amount does not absolve him from the penalty of reduction in rank to a lower post. 1979 Lab IC (NOC) 122 (Kant).

(15) Posts and Telegraphs Manual Vol. 4, Rule 60 — Rotational Transfer Posts — Wireless Licence Inspector — By virtue of correction slip No. 457, D/- 20-1-1965 of Government of India holders of those Inspectors' posts selected from clerks through competitive examination are entitled to continue in them and cannot be reverted — Revision to posts of clerks amounts to demotion and is violative of Art. 311. 1972 BLJR 973 (Pat).

(16) Reversion to parent post — Officiating Radio Station Officer of Police reverted to his substantive post of First Grade Wireless Operator after crossing efficiency bar in officiating post — No illegality — No legal right to hold Officiating Post acquired by merely crossing efficiency bar — Reversion does not amount to reduction in rank. 1980 Lab IC (NOC) 91 (All).

(17) Petitioner putting in 12½ years of service as Accountant cannot be reverted on sole ground that he had not passed accounts examination prescribed under subsequently introduced rule not having retrospective effect. 1973 Serv LJ 378 (379) (DB) (Orissa).

(18) Reversion — Reversion is not necessarily reduction — But when employee suffers penal consequences, he is entitled to protection under Art. 311. (1978) 2 Cal LJ 184.

(19) Reversion — Railway Khalashi after due tests promoted and appointed as typist as stop gap arrangement — Later, order issued of his having been absorbed as typist against permanent vacancy — Order being unconditional, there can be no reversion without following procedure under Art. 311 (2). (1978) 2 Cal LJ 353.

(20) Reduction in rank — Reduction in lower stage of time scale or reduction to a lower time scale tantamounts to reduction in rank within Art. 126 (2) — Such an order of reduction passed without compliance to mandatory provisions of the State Constitution cannot be sustained. 1972 J & K LR 783.

(21) The petitioner who was the Chief Engineer in the Irrigation Department of Haryana Government was transferred as General Manager of Haryana State Minor Irrigation Corporation. There was no change in the emoluments. He was required to do the same work which he did while in State service. Status of petitioner not reduced in any manner. (1980) 1 Serv LR 381 (388) (Punj).

(22) The list prepared under Regn. 5 is subject to annual revision and review. The appointment of a promoted officer in the Indian Administrative Service, Indian Police Service is plainly distinct and separate from the fact of his name appearing in the Select List, which is subject to annual variation. Thus, the inclusion of the name of an officer in the Select List does not confer any right on him to be appointed to the Indian Administrative Service, Indian Police Service. His substantive post is in the State Cadre. His reversion to his substantive post is also not reduction in rank nor does it cause any evil consequences to him. If he had no right to hold a post, it cannot be said that his reversion to his substantive post had resulted in any evil consequences. Therefore, if the name of a temporary promotee officer is altogether removed from the Select List, and he is reverted to his substantive State Post, there can be no grave evil consequence to him so as to entitle him to a relief from the High Court, merely on that ground. 1969 All WR (HC) 641.

(23) Reversion — Lower Division Clerks promoted expressly to officiate as U. D. clerks and until further orders — Promotees do not acquire any right to hold the post of U. D. clerks — Reversion does not amount to reduction within meaning of Article 311. A 1970 Mys 238 (240) : 1970 Lab IC 1295.

(24) There is no legal right to promotion. Reversion from the officiating post to the substantive post does not amount to a penalty even though the State Government reverted the petitioner on the recommendation of the Public Service Commission made after taking into consideration his confidential records and the Character Roll that he was unsuitable for promotion. A 1973 Cal 220 (227) •• 1971 Cur LJ 887 (Punj).

(25) Promotion of a Government servant to higher officiating post, irregular — Hardships to officers senior to promotee — Correction of mistakes by Government resulting in reversion of that Government servant — Article 311 (2) held not attracted. 1971 Cur LJ 887 (Punj).

(26) Order imposing cut in pension — Not one of reduction in rank falling within purview of Article 311 (2) — It, however, adversely affects the civil servant and such an order could not have been passed without giving him a reasonable opportunity of making his defence. A 1976 SC 667 (669).

(27) Where the petitioner, who was promoted against the quota reserved for the members of the Scheduled Caste on basis of entry in his service book whereunder he was noted as boatman by caste, was reverted on subsequent discovery that boatman was not Scheduled Caste without considering a Caste Certificate filed by him showing that he belonged to the community of Gokhas which is a Scheduled Caste in the Scheduled Castes Order, and without giving him an opportunity of being heard, the order of reversion was illegal and must be quashed. (1970) 36 Cut LT 134 (DB).

105. Suspension is not reduction.— (1) Suspension does not amount to reduction in rank and Article 311 is not attracted — Government servant is not entitled to opportunity of explanation. A 1963 Punj 298 (311) (DB) •• (1964) 66 Pun LR 1227 (1229) •• A 1969 Orissa 224 (225) : 1969 Lab IC 1221 (DB).

(2) The petitioner was not treated on duty while on suspension from service pending departmental enquiry and period of suspension was treated as leave without pay. This was held not to amount to reduction in rank. A 1962 Raj 239 (240) (DB).

Articles 310 & 311 — Note 105 (contd.)

(3) The consequences of suspension are different from consequences of order of reduction and do not per se attract Art. 311 (2). (1967) 14 FLR 449 (452) (Cal).

(4) An order of suspension is not by way of penalty. All that it does is to make the person affected refrain from discharging his functions in a particular office for a certain period. ILR (1961) 11 Raj 892 (898) (DB).

(5) As the Civil Service Rules make a clear distinction between suspension and reduction in rank, suspension will not be reduction in rank, for the purpose of Art. 311, Clause (2), though under Rule 49 of the Civil Service (Classification, Control and Appeal) Rules, suspension is one of the penalties that may be imposed on a Government servant. A 1954 Madh B 49 (52) (DB).

(6) The fact that while under suspension a Government servant is not considered for promotion to a higher post or rank available does not mean that there has been a present reduction in his rank, grade or post. A 1954 Madh B 49 (52) (DB).

106. Reduction must be by way of penalty.— (1) In order to constitute 'reduction in rank' within meaning of Art. 311 (2), two elements must co-exist; (1) there must be a physical degradation in rank (2) such degradation must be ordered by way of penalty. (1967) 14 FLR 449 (451) (Cal).

(2) Compulsory retirement — Original order void as passed before completion of qualifying service — Cannot be validated retrospectively. 1978 Lab IC 342 (344) (Raj).

(3) When no stigma is cast on the officer nor does the order of reversion say anything regarding his conduct his reversion from officiating post cannot be said to be by way of punishment but administrative routine — Mere reduction of emoluments would not make the order penal. 1973 Lab IC 62 (67) (Raj).

(3A) Where an order of reduction is passed to rectify mistake committed in giving promotion and the order is not by way of penalty — Sub-section (2) of S. 126 of the Constitution of J. and K. is not attracted. 1974 J & K LR 409 (418).

(4) Services of petitioners placed at the disposal of Election Department temporarily in the beginning but subsequently their appointments in the department regularised — Petitioners later on given promotions in such department — Promotions being quite in accordance with rules and regulations framed from time to time — Held petitioners could not be deemed to be on deputation — Reversion of petitioners sought to be made on some extraneous grounds i. e. with object of benefiting respondents — Such reversion held amounted to penalty and was invalid as petitioners were not found inefficient in performance of their duties. ILR (1974) Him Pra 78.

(5) In order to find out whether an order of reduction or dismissal is penal or not, Court has to apply two tests : (1) If Government servant has right to particular rank, then the very reduction from that rank will operate as a penalty for he will then lose the emoluments and privileges of that rank. (2) (a) If the Government servant has no right to particular rank, his reduction to substantive lower rank will not ordinarily be punishment. (b) But the mere fact that the servant has no title to the post or rank, does not mean that an order of reduction of a servant to a lower post or rank can in no circumstances be a punishment. The real test is to find out if the order also visits the servant with any penal consequences. (1967) 14 FLR 449 (452, 455) (Cal) °° A 1969 Orissa 215 (217) : 1969 Lab IC 1118 (DB) °° A 1964 Cal 265 (268, 269, 270, 271) °° A 1958 Cal 559 (562, 563) (DB) °° 1971 Lab IC 101 (103, 104) (Assam).

(6) Where the Government servant was not reverted on an honest appraisal of his work by the authority competent to do so under the relevant rule but on the basis of local complaints accepted as true without any enquiry or notice to the Government servant, that fact will go a long way to establish that the reversion was by way of punishment. 1976 All Serv Rep 408 (414) : (1976) 2 Serv LR 395 (Ker).

(7-8) If a particular Government servant is entitled to hold a substantive post in a category of service his demotion to a lower category entailing evil consequences will prima facie mean a penalty to which the provisions of Art. 311 (2) would be attracted. A 1969 Andh Pra 118 (123) °° ILR 1976 Him Pra 655 (668, 670). (Even a temporary servant who has no right to a particular post gets protection of Art. 311 if his reversion from his temporary officiation to his substantive post is found by way of punishment.)

(9) Where the reversion of the petitioner employee who was promoted ad hoc was in the course of administrative routine and not as a result of any incident or conduct of the petitioner, the reversion did not amount to punishment. The petitioner promoted ad hoc had no right to continue in the ad hoc promotion merely because there was a vacancy to occupy. 1973 Serv LJ 921 (Delhi).

(10) A reduction in rank, which is not by way of punishment does not attract the provisions of Art. 311. A 1961 All 316 (318) °° A 1961 Ker 203 (207) (DB) °° 1979 WLN 596 (610) : 1980 Serv LR 182 (DB) (Raj) °° 1977 WLN (UC) 384 (389).

(11) Northern Railway Discipline and Appeal Rules for Non-Gazetted Railway Servants, Chap. IV and Chap. VI, Rr. 51 and 53 — Withholding of increment affecting future increments and seniority is not reduction in rank. A 1967 All 112 (114).

(12) Some of Class IV messengers given work of dusting operator with extra allowance — Subsequently a distinct and higher category of dusting operators created — Work and special allowance of messengers discontinued — No reduction in rank. (1974) 1 Serv LR 340 (Andh Pra).

(13) Reduction to a lower post or on lower emoluments by way of punishment would amount to reduction in rank. A 1962 Raj 239 (240) (DB) °° A 1971 SC 998 (1001, 1002) : 1971 Lab IC 721 °° A 1970 Madh Pra 162 (165, 166) : 1970 Lab IC 992.

(14) "Reduction in rank" means reduction from a higher to a lower rank or post and not merely losing places in rank or cadre — For punishment of forfeiture of approved service resulting in loss of higher salary or reducing chances of promotion to higher post remedy

Articles 310 & 311 — Note 106 (contd.)
lies under relevant service rules and not under Art. 311 (2). A 1971 SC 766. (A 1959 Orissa 167, Overruled.)

(15) The right to hold the post should flow either from the terms of contract of employment or from the rules governing the conditions of service. The service rules provide that when there are two claimants to a post and one of them is confirmed on that post the other may appeal against the confirmation and have it set aside. It follows that under these rules, the confirmation of the former is subject to an administrative appeal and, if it is set aside in appeal as contemplated by the rules there is or can be no question of punishment. Therefore where the main argument in support of the petition is that the petitioner had been confirmed on a post and so he had a right to hold that post and his reversion to a lower post must per se be regarded as punishment the argument is not sound. 1965 MPLJ 990 (991, 992) (DB).

(16) If a particular Government servant is entitled to hold a substantive post in a category of service, his demotion to a lower category entailing evil consequences will prima facie mean a penalty to which provisions of Art. 311 (2) could be attracted. A 1969 Andh Pra 118 (123).

(17) Person holding permanent post appointed to higher post by "selection" — Reversion to permanent post by way of punishment — Article 311 is attracted. A 1964 All 528 (529, 530) (DB). (A 1958 All 656, Reversed.)

(18) Every demotion involves transfer from a higher to lower post and in its turn entails transfer from one place to another. The transfer of an employee after he is demoted by way of punishment is only consequential and it cannot be regarded as punishment. A 1967 Cal 29 (33).

(19) Reduction to a lower post being a punishment under Rule 49, Civil Service (Classification, Control and Appeal) Rules, the transfer of a Government officer from a gazetted to a non-gazetted post, though in a different department, would be a reduction in rank. A 1956 Manipur 34 (37).

(20) The transfer from a higher post to a lower post or to one carrying lower salary will not amount to "reduction in rank" unless such transfer is made as a penalty or punishment. A 1958 Mad 53 (64) °° (1957) 61 Cal WN 815 (823) (DB) °° A 1956 Madh B 172 (173, 174) (DB).

(21) Transfer to post carrying same scale of pay and rank but not the same status — Posting does not amount to reduction in rank. A 1967 SC 1864 (1867) °° 1971 Lab IC 1592 (1594, 1595) (Madh Pra). (Transfer of railway guard to stationary duties in the same pay scale — Not reduction in rank when there is no loss in substantive pay even though there is loss of mileage allowance adversely affecting pension.)

(22) Transfer of Enforcement Traffic Wing from Transport Department to Police Department — Offer of equivalent posts in Police Department — Mere chance of promotion, held, not a condition of service — No question of prejudice arising — Order of transfer held to be not illegal. 1970 Lab IC 366 (369 to 373) (J & K).

(23) Where after termination of disciplinary proceedings, Government servant was posted to another department on a post carrying a higher scale of pay, but he was given his original scale of pay it was held that the order was one penalising the employee and hence bad under Art. 311. A 1968 Manipur 16 (19) : 1968 Lab IC 150.

(24) Where after an enquiry against a Government servant holding gazetted post of an Information Officer the enquiring officer recommended that his pay be reduced by two stages in his present pay scale and the reduction was to remain effective for a period of three years but the punishing authority passed an order of demotion to next lower grade and accordingly he was adjusted as Assistant Information Officer, there was no reduction in rank. 1972 J & K LR 202.

(25) According to Rule 49, C. S. (C. C. A.) Rules, reduction to lower time scale necessarily involves reduction in rank. Hence a District Judge is bound by virtue of Rule 55 of the said Rules read with S. 240 (3), Government of India Act (1935) to formulate specific charges and give the Nazir a reasonable opportunity of defending himself not only in respect of charges but also in respect of the proposed punishment. ILR (1954) Cut 684 (704) (DB).

(26) Employee holding post in substantive and permanent capacity — Acceptance by Government of recommendation of Pay Rationalization Committee enhancing pay scale of that post — Employee is entitled to new scale — Change in designation of post with reduction in pay scale — Amounts to reduction in rank — Compliance with Art. 311 (2) is necessary. 1969 Lab IC 1412 (1413) (All).

(27) Reduction resulting from a normal administrative decision to correct a mistake does not involve any penalty — Article 311 (2) not attracted to such case. A 1967 Delhi 67 (68) °° 1978 Lab IC (NOC) 45 (Madh Pra).

(28) Officiating Tahsildars in State of Pepsu confirmed as Tahsildars although no posts were available for confirmation — Supernumerary posts of Tahsildars created subsequently by Rajpramukh of Pepsu, to provide liens for confirmed Tahsildars — Merger of Pepsu with Punjab by virtue of operation of States Reorganization Act — Subsequent order of successor (Punjab) Government cancelling previous order of confirmation — Article 311 (2) not attracted. A 1964 SC 521 (524, 525, 526, 527).

(29) The transfer of a civil servant from a permanent post in one department or service to another permanent post in another department or service without the consent of the civil servant concerned does not amount to a reduction in rank when there is no reduction in the scale of pay or in the grade. A 1957 Raj 230 (231) (DB).

(30) Punjab Police Rules (1934), Rr. 12.2 (3); 13.16 (2); 13.12 (1) — Inter se seniority of all officiating Inspectors of Police — Confirmed Senior Sub-Inspector officiating as Inspector — Reverted to substantive post though other officiating Inspectors unconfirmed and junior to him permitted to officiate as Inspectors — Order of reversion did not affect his seniority in service — Order was not one made by way of punishment — Principle of 'last come first go' not applicable to civil service posts. (1974)

Articles 310 & 311 — Note 106 (contd.)
76 Pun LR 166. (Observations in (1971) 2 Serv LR 304, held not good law in view of decision in 1969 Serv LR 655 (SC).)

(31) Reversion — Petitioner temporarily appointed as Malaria Inspector by Deputy Director of Public Health — Petitioner allotted to Zilla Parishad and joining duty there — On 26th August, 1967 petitioner given notice terminating services and giving him option to join in lower post carrying lower pay and directing him to communicate his acceptance immediately — Deputy Director withdrawing notice on 19th September, 1967 — By order dated 22nd September, 1967, Malaria Officer reverting petitioner to lower post from 1st Oct., 1967 — Petitioner declining offer and reporting on duty under protest and reserving right to challenge reversion — Report contending that petitioner had accepted offer — Offer cannot be said to have been accepted — Offer must be deemed to have been withdrawn — Petitioner could not be reverted except by punishment after enquiry — Malaria Officer could not pass order of reversion — Petitioner can claim pay of post of Malaria Inspector. 1970 Mah LJ (Notes) 18.

(32) Where the petitioner held the post of Inspector-General of Police, Himachal Pradesh, his appointment and transfer to the post of lower rank of D. I. G., C. R. P. Delhi, amounted to reduction within meaning of Art. 311 (2) even though it did not involve reduction in pay as the same involved not only reduction in rank but also penal consequences viz., loss of powers, privileges, status, seniority and future chances of promotion. 1969 Serv LR 576 (609) (Delhi).

(33) To allege misconduct against a Government servant and then to stigmatise him as "not fit" for working in the higher post could appear, on the facts and circumstances of a particular case, to be more vindictive than just and fair. His sudden reversion could be held to amount to an unjustified stigma which could not be said to be "devoid of an element of punishment". The reversion order was punitive and passed contrary to rules of natural justice embodied in Art. 311 (2). A 1976 SC 1766 (1773) : 1976 Lab IC 1146.

(34) Reduction in rank — On attainment of age of retirement of Devaswom Commissioner, appointment of Deputy Devaswom Commissioner as acting Devaswom Commissioner and simultaneously posting him on other duty having same pay etc. — That is no reduction in rank. 1972 Lab IC 1244 (1245, 1246) (Ker).

107. Tests for determining whether reversion amounts to reduction in rank and illustrative cases.— (1) In determining whether a particular order of reversion amounts to the reduction in rank it is not only the form or the wording of the particular order which is to be treated as conclusive but it is the substance of the matter which has to be determined after consideration of the totality of the circumstances. If the real intention is found to be to penalise or punish the official then notwithstanding the form of the order the reversion would be held to amount to reduction in rank. 1966 Cur LJ 318 (339) (Punj) ** A 1966 Andh Pra 116 (117, 118) (DB) ** A 1963 Andh Pra 412 (415) (DB) ** A 1967 Punj 145 (147).

(2) Reversion by itself to the substantive post is not a reduction in rank and it does not involve any punishment. The servant has no right to continue to hold an officiating post, his tenure by its very nature being temporary and at the will of the Government. Unless penalties also are expressly imposed when reversion is ordered the reversion cannot be a reduction in rank. A 1959 All 135 (139, 140) (DB).

(3) In the case of an officiating employee Government have simultaneously two powers to effect his demotion : (i) under the rules or contract of service and (ii) by way of punishment. In the second case Government must launch a regular formal enquiry under Art. 311 (2). ILR (1966) Cut 503 (539) (DB) ** 1969 Lab IC 68 (77) (Tripura) ** A 1966 Orissa 173 (179) (DB) ** A 1965 Punj 491 (492, 493).

(4) Tests for holding that reduction is punitive are : (1) whether the servant had a right to the post or rank or (2) whether he has been visited with evil consequences. ILR (1966) Cut 503 (526) (DB) ** ILR (1968) Cut 394 (397) (DB).

(4-A) Articles 311, 226 — Reversion by alteration in rank in original seniority list without notice to Government servant — Order held liable to be quashed. 1971 Lab IC 410 (410, 411) (Mys).

(5) In considering the circumstances of each case the motive of the relevant authorities in reverting the official concerned is wholly irrelevant but the mind or the intention to inflict punishment or to revert in ordinary course would certainly be relevant. The mere fact that it is found that it was the official's unsatisfactory work which resulted in his reversion, will not vitiate the order. To such a case Article 311 (2) will not apply. 1966 Cur LJ 318 (339) (Punj).

(6) A normal order of reversion would be by way of punishment :

(i) if it is expressed to be so;

(ii) if evil consequences ensure from the order as direct result thereof;

(iii) if a stigma is cast on the official by an order of reversion beyond the mere finding of the officer being not suitable to hold the higher post. 1966 Cur LJ 318 (336) (Punj) ** (1967) 2 Mys LJ 582 : 12 Law Rep 647 (650) (DB) ** (1966) 68 Punj LR 882 (885).

(7) No stigma can be said to be attached to an order of reversion where, subsequent to the order and in reply to the querry of employee he is told that the reason was that "his work was found unsatisfactory by competent authority." (1968) 72 Cal WN 817 (821).

(8) Where a person holding a substantive appointment in a lower rank is posted to a post in a higher rank in an officiating capacity and is then reverted to his original substantive post, such reversion will not amount to "reduction in rank" within Article 311, Clause (2) unless the order of reversion provides or entails any further consequences of a penal nature such as loss of seniority, stopping of promotion, etc., or is based on charges of misconduct etc., against

Articles 310 & 311 — Note 107 (contd.)
the Government servant. A 1958 SC 36 (49) °° A 1958 All 741 (746) (FB) °° A 1966 Andh Pra 116 (117, 118, 119) (DB) °° (1964) 66 Punj LR 344 (346) °° ILR (1966) Cut 503 (545) (DB) °° A 1967 Punj 145 (147) °° (1968) 72 Cal WN 817 (821) °° 1965 Punj LR (Supp) 625 : ILR (1966) 1 Punj 84 (123) (DB) °° A 1967 Punj 139 (143) (DB). (Reversion from officiating post to substantive post in the lower cadre is not punishment if the incumbent is found unfit to continue in officiating higher post — Reversion does not amount to a 'reduction' within the meaning of Article 311 (2). C. W. No. 1506 of 1964, dated 9-9-1965 (Punj), Reversed.) °° A 1964 Cal 265 (269, 270) °° ILR (1957) 9 Assam 223 (234) (DB) °° A 1969 Assam 112 (116) : 1969 Lab IC 1192 (DB) °° A 1967 Andh Pra 353 (362) (DB).

(9) Indian Police Service — Member reverted from higher officiating post of Superintendent of Police to substantive junior post of Asst. Superintendent of Police for unsatisfactory conduct — Reversion amounted to reduction in rank. A 1964 SC 423 (429, 431, 433, 434, 435, 436) : (1964) 4 SCR 598. (A 1962 Punj 516, Reversed.)

(10) Where a cadre officer in the junior scale of pay was promoted to officiate in a post in the senior scale of pay and was thereafter reverted to his substantive post while other cadre officers junior to him continued to officiate in posts in the senior scale of pay, it would only indicate that the action taken against the cadre officer so reverted was only by way of penalty or punishment. A 1968 SC 754 (759).

(11) In reverting a person officiating in higher service no reasons need be recorded. All that the Explanation (iv) to Rule 13 of the Central Civil Services (Classification, Control and Appeal) Rules, postulates is that even if a person after trial was found unsuitable for such higher service, grade or post, or on administrative grounds unconnected with his conduct, it should not be regarded as a penalty. It does not follow from this that reversions which are not specified within this clause automatically constitute a penalty. A 1966 Andh Pra 116 (118) (DB).

(12) Although the Government may have a right to transfer a person who holds an appointment to a higher post only on an officiating basis to a lower post at any time purely at its will and pleasure without assigning any reasons for its action, where the Government chooses to order such transfer as a penalty and bases the order on a charge of corruption, misconduct, negligence, inefficiency, etc., against the Government servant, the order will amount to one of punishment and would constitute an order of reduction in rank against the officer within the meaning of Article 311, Clause (2). A 1958 SC 36 (49) °° A 1958 Cal 623 (624) °° A 1957 All 70 (73) °° A 1956 Madh B 172 (173) (DB).

(13) Where a clerk in the Collectorate holding a permanent post was appointed to a higher post of Panchayat Inspector as a result of 'Selection' and was drawing a salary higher than what he was drawing as a clerk and the nature of duties in the two posts was different, his reversion from the higher post to his permanent post amounts to a reduction in rank. Where in the above case it is clear from the facts of the case that the reduction was by way of punishment, the provisions of Article 311 are attracted. A 1964 All 528 (529, 530) (DB). (A 1958 All 656, Reversed.)

(14) Where the order of reversion provides for or entails under the Rules any penal consequences in the form of loss of benefit already accrued, over and above the mere reversion to the lower post, the order of reversion will amount to a punishment and will constitute reduction in rank. A 1958 SC 36 (49).

(15) If the order of reversion entails or provides for the forfeiture of his pay or allowances or the loss of his seniority in his substantive rank or the stoppage or postponement of his future chances of promotion, the order would amount to one of punishment and hence would constitute a reduction in rank. A 1958 SC 36 (49) °° A 1956 Madh B 172 (173, 174) (DB) °° A 1966 Tripura 8 (11) °° 1966 Cur LJ 318 (339) (Punj).

(16) The petitioner, railway clerk, was selected to a higher post in an officiating position in Vigilance Department. There his work was considered to be good for which he was given a number of commendation certificates. Later on, on an anonymous complaint challenging his integrity a departmental enquiry was started against him and he was reverted to his parent Department without complying with the provisions of Article 311. The reversion was not due to the fact that the Vigilance Department was going to be wound up and that the real incumbent of the post that he was holding had come back : Held, that the order of reversion was hit by Article 311. A 1967 Punj 145 (147).

(17) Every reversion or reduction in rank by way of reversion, does to a certain extent affect the chances of promotion. After all, a person might be found inefficient to discharge a particular post, but when he is sent back to his substantive post, he may prove his efficiency with regard to the substantive post or by his subsequent display of merit establish his efficiency entitling him to promotion. In other words, the future right of promotion that must be affected is something which must not be indirect or remote but must arise directly out of the order of reversion. A 1958 Cal 546 (550).

(18) A civil servant is not entitled as of right to be promoted from a lower rank to the higher rank and once he is reverted to a lower rank, then his promotion is governed by the rules regulating promotions in his service. Promotion to a post is done according to seniority and efficiency. An officer cannot also claim that as he crossed the efficiency bar in the substantive grade and as the Head of the Department gave good reports about him, the Government was bound to promote him. The matter is one in which the discretion and judgment of the officer or authority concerned must prevail. His decision may be open to review by an administrative agency. But it cannot appropriately be a matter for judicial review. A 1960 Madh Pra 216 (217) (DB).

(19) Order reverting Officiating Sub-Inspector of Police to his substantive post of Assistant Sub-Inspector — Order though not stating specifically so had the effect of removal of the petitioner's name from the District Approved List of Assistant Sub-Inspectors expected to be suitable for promotion as Sub-Inspectors, maintained under Rule 742 of the Police Regulation — Removal of his name from the Approved List was done in an illegal manner. (1964) 8 Fac

Articles 310 & 311 — Note 107 (contd.)
LR 331 (333) (Cal) ** 1966 Cur LJ 896 (898) (Punj).

(20) In a case where the Education Department having the material to prove as a fact that the teachers who were promoted to the selection grade were in the knowledge of the condition imposed on their promotion that they would have to refund the difference of salary between the time scale and the selection grade in a certain contingency, omitted to produce such evidence, then, it could not be held that the teachers had knowledge of such condition. Therefore an order directing refund of the difference in salary was a penal or evil consequence of the reversion and hence the reversion was not maintainable because provisions under Article 311 were not followed. A reversion accompanied by an evil or penal consequence would amount to reduction in rank, within Article 311 (2). 1966 Cur LJ 813 (816) : 70 Punj LR 621 (DB).. (A 1964 SC 521, Dist.)

(21) Petitioner, State Cadre officer of Indian Administrative Service — Promotion to tenure post under Government of India — Reversion to State Service before expiry of tenure period — Reason for reversion, unsatisfactory performance — **Held**, that reversion could not be sustained as he had been reduced in rank with a stigma upon him without following procedure of Article 311 (2). **A 1970 SC 77 (Prs. 11, 12, 14, 16). (A 1969 Cal 180, Reversed.)**

(22) Petitioner, Motor Vehicle Inspector promoted as Traffic Manager for period of three months on trial basis — Order of reversion to post of Motor Vehicle Inspector after petitioner had worked as Traffic Manager for seven months — No notice given to petitioner before reversion — Order of reversion passed on ground that Public Service Commission had not accorded approval to appointment of petitioner as Motor Vehicle Inspector in unqualified terms. Held, order would undoubtedly mar all future chances of promotion of petitioner and contravened provisions of Article 311. (1968) Lab IC 1590 (1592, 1593) (Punj).

(23) Appointment of petitioner as temporary Lower Division Clerk approved by Public Service Commission — Subsequently petitioner promoted as U. D. C. and becoming an approved probationer — Order reverting petitioner to L. D. C. on ground of non-consultation with Public Service Commission for appointment as U. D. C. or even confirmation as L. D. C. and on the ground that he did not pass any test. There was no rule compelling petitioner to pass any test — Order not sustainable. (1963) 2 Lab LJ 766 (768, 769) (Andh Pra).

(24) Promotion to higher cadre in Secretariat Department — No departmental examination for promotion is prescribed by rules — Person promoted to higher cadre cannot therefore be reverted to lower post for not passing departmental examination. (1966) 8 Law Rep 522 (534) (DB).

(25) Confirmation of approved probationer in substantive post — Subsequent reduction to lower rank on interpretation of relevant Rules — Probationer not qualified to hold substantive post under relevant rules — The question still was whether action based upon interpretation of Service Rules had resulted in a penal consequence — Though the order did not expressly purport to be reduction in rank in truth and reality it was so. **A 1963 Andh Pra 450 (452).**

(26) Petitioner charge-sheeted for making representation direct to higher authorities against his immediate superior — Explanation offered by petitioner — Matter not pursued — Reversion to lower post — Order of reversion assigning no reasons — **Held**, dominant motive was to punish petitioner — Order of reversion held was vindictive and mala fide — Non-compliance with provisions of Article 311 (2) held rendered order of reversion illegal. A 1964 Punj 528 (529, 530).

(27) A substantive pro tempore appointment under the Hyderabad Civil Services Regulations is not a temporary appointment. Hence a substantive pro tempore appointment confers on the officer concerned a right to the post subject only to the superior lien of another officer in whose place he may have been appointed. Reversion of an officer appointed on a substantive pro tempore basis without complying with the provisions of Article 311 will therefore be invalid. A 1964 Andh Pra 491 (494, 495, 496) (DB).

(28) Where a Government servant, with lien on his permanent post, is promoted temporarily and on probation to a higher post, lien on which is retained by another employee, reversion of such Government servant without making an enquiry as contemplated by Article 311 (2) is not invalid. The promotion being temporary and on probation and since the reversion does not entail evil consequences or any stigma, the case does not fall under Article 311 (2). 1969 Lab IC 68 (76, 77) (Tripura). (A 1964 Andh Pra 491, Distinguished.)

(29) Where an officer appointed on probation is allowed to continue in the same post even after the expiry of the period of probation, without extension of such period, he may well be deemed to have been confirmed and he acquires a lien to that post and his subsequent appointment to a post carrying a lesser scale of pay would amount to reduction in rank offending Article 311. A 1962 Him Pra 41 (42, 43).

(30) When the order reverting an employee shows that he is not qualified, although this is not a fact then the basis of the order itself being incorrect the order cannot be sustained. Even if the employee was a temporary servant, he was eligible to all the protection given by the article. 1965 Kash LJ 179 (189).

(31) Termination of service according to terms of contract or conditions of service — Appointment of Government servant to another department not on deputation — Termination of services requiring one month's notice — Reversion to original department — Notice essential — Non-compliance — Order of reversion illegal. A 1963 Him Pra 54 (56).

(32) The petitioner was placed under grade I by order dated 24-10-1949. His probation was declared to have been completed satisfactorily on 27-2-1953 and he was also given certain increments. The effect of what was alleged to be refixation of seniority was undoubtedly demotion of the petitioner from grade I to grade II which carried lesser pay resulting in loss in his salary. Held that the demotion of the petitioner operated as reduction in rank. (1960) 2 Lab LJ 387 (389) (Andh Pra).

(33) An order of reversion is in its immediate effect bound always to be a reduction in rank. Even a reversion from a higher but temporary or officiating rank to a lower substantive rank is in a sense a reduction. But such orders of re-

Articles 310 & 311 — Note 107 (contd.)

version are not always 'reduction in rank' within the meaning of Article 311. If the officer is promoted substantively to a higher post or rank, he gets a right to that particular post or rank and if he is afterwards reverted to the lower post or rank which he held before, it is a "reduction in rank" in the technical sense in which the expression is used in Article 311. The real test in all such cases is to ascertain if the officer concerned has a right to the post from which he is reverted. If he has a right to the post then a reversion is a punishment and cannot be ordered except in compliance with the provisions of Article 311. If, on the other hand, the officer concerned has no right to the post, he can be reverted without attracting the provisions of Article 311. But even in this case, he cannot be reverted in a manner which will show conclusively that the intention was to punish him. The order itself may expressly state that the officer concerned is being reverted by way of punishment. In fact the order may in various other ways cast a stigma on the officer concerned. In all such cases, the order is to be taken as a punishment. Sometimes again, the order of reversion may bring upon the officer certain penal consequences like forfeiture of pay and allowances or loss of seniority in the subordinate rank or the stoppage or postponement of future chances of promotion; in such cases also the government servant must be regarded as having been punished and his reversion to the substantive rank must be treated as a reduction in rank. In such a case Article 311 will be attracted. **A 1974 SC 423 (428, 429) : 1974 Lab IC 353.**

(34) Reversion — Adverse inference — Court's order to produce confidential character roll of reverted government servant, not complied with by Government — Adverse inference can be drawn that confidential roll contained nothing that would justify reversion. (1978) 2 Cal LJ 184.

(35) Scope — Protection under Art. 311 (2) is not against harsh words but it is against hard blows — Order passed subtle but quite effective in causing penal consequences — Order held can be set right under Article 311. (1978) 2 Cal LJ 184 (213).

(36) Reduction in rank — Confirmed employee — Acceptance of pay scale of lower post under threat of removal from service amounts to reduction in rank. 1978 Lab IC (NOC) 141 (Him Pra).

(37) Order of reversion of Government servant stating that he was found unfit — Held to be order of punishment — Compliance with requirements of Article 311 was necessary. A 1964 SC 449 and 1974 Lab IC 353 (SC), Followed. 1974 All LJ 741 : (1975) 1 Serv LR 200 : 1975 Lab IC 34 (36).

(38) Order of reversion of Government servant to lower rank affects his emoluments and status — It is not beyond pale of Article, merely because it was not specifically passed by way of punishment. (1972) 38 Cut LT 1101.

(39) If the employee has a right to a particular rank, then the very reduction from that rank operates as a penalty attracting Art. 311 (2). 1972 Lab IC 115 (117, 118) (Pat).

(40) Reduction in rank — Non-compliance of Article 311 (2) — Effect — Hyderabad Cadre and Recruitment Rules do not contemplate temporary promotion — G. O. Ms. 497 G. A. D. (Andhra) D/- 7-4-1960 — Effect of — Reserve Inspector promoted temporarily as Assistant Commandant contrary to guarantee under Section 115 (7) States Reorganisation Act — Subsequent reversion to substantive post on account of his past record cast a stigma on the petitioner it was undoubtedly by way of punishment and as it was not preceded by a notice and enquiry as contemplated by Article 311 (2) the order was invalid. 1975 Lab IC 1524 (1527 to 1529) (Andh Pra). (1971 Lab IC 30 (FB) (Andh Pra), Dist.)

(41) Reduction in rank — Reversion of Government servant without giving any reasons — But Government stating in counter-affidavit that he was not found fit by Public Service Commission — Reversion held amounted to reduction in rank and order is bad in absence of compliance with procedure laid down in Art. 311 (2). **A 1971 Andh Pra 1 (24) : 1971 Lab IC 30 (FB).**

(42) 'Reduction in rank' — Meaning of — Petitioner working as Additional District Magistrate (Judicial) in temporary capacity — Petitioner relieved of that office for fault and appointed as Judicial Officer simpliciter on lower scale of pay — **Held**, petitioner was reduced in rank within meaning of Article 311. ILR (1969) 1 All 530.

(43) Fireman in grade 'C' — Promoted on officiating basis to substantive post in grade 'B' — Qualified for confirmation in terms of Railway Board Circular No. 4434 — Review of fireman's service not conducted under — Railway administration cannot revert fireman to grade 'C'. 1980 Lab IC (NOC) 54 (All).

(44) If an order of reversion is made as a result of adverse entries in the service record of an incumbent it would amount to punishment and would attract the provisions of Art. 311, reversion being founded on these entries. 1975 Lab IC 285 (288, 289) (All).

(45) Assistant Police Prosecutor — Promotion as officiating Police Prosecutor styled as ad hoc — Reversion after five years — If by way of punishment — **Held** : An ad hoc appointment is made for a limited period of time, when an emergency or a sudden exigency of service calls for an appointment or in circumstances when it is not possible to make a regular appointment. The appointment in the present case though styled as ad hoc was not in fact ad hoc because it was made on a vacancy caused in a substantive post and therefore the petitioner had a right to the post and could not be reverted without complying with Art. 311 (2). (1974) 1 Serv LR 358 (Him Pra).

(46) Prima facie a person who has been appointed on an ad hoc basis can be reverted if his work is unsatisfactory because this is the same thing as saying that he is not suitable. But at the same time, if the defence of that officer is that his work is not unsatisfactory but other factors outside his control are operating then the allegation concerning the person being unsatisfactory are really allegations concerning some other factors. Therefore this is a case of punishment and not merely the case of a person being found unsuitable for the post.

Held further that the petitioner could be reverted straightway if found unsuitable. Once allegations of misconduct had been made, this should have formed the subject-matter of an enquiry and Article 311 was applicable in view

Articles 310 & 311 — Note 107 (contd.)
of the allegations made against the petitioner and his defence against these allegations contained in reply to the show cause notice. The test, it was held, is not the form of the order but its real contents. (1979) 81 Punj LR (D) 126 (132, 133).

(47) Where the order reverting the deputationist to parent department was simpliciter but the reason given for reversion in the written statement before High Court was that the deputationist was found unfit to continue in service and the departmental communication also contained similar remark the reversion must be held by way of punishment, Art. 311 is attracted. 1978 Serv LWR 37 (41) (Punj).

• (48) Reversion — On complaints and vigilance report officiating Deputy Collector reverted as Tahsildar without opportunity of defence — Reversion void. (1976) 2 All LR 497 : 1977 Lab IC (NOC) 30.

(49) Where the order of reversion, ex facie shows that it was passed solely on the ground that disciplinary proceedings are pending it might amount to inflicting a punishment even before the charges are held proved. This procedure is contrary to law and also violative of the provisions of Article 311 and the principles of natural justice. 1977 All Serv LJ 410 (411) (Andh Pra).

(50) The fact that there is an act of misconduct preceding the order of reversion and proximate to the order of reversion, does not necessarily lead to the inference that the order was made on the ground of misconduct and not on other grounds such as inefficiency. 1975 Lab IC 1698 (1699) (Goa).

(51) Appellant who stood first in selection test promoted in an officiating capacity to the post of Driver Grade A, a selection post — While on duty appellant's engine failed and the train was stopped — Appellant was charge-sheeted for that engine and called upon to show cause against penalty of reduction — Appellant submitting his explanation stating that failure was not due to his negligence but due to defect in the engine — Without giving him any opportunity of being heard, he was reduced to lower grade and a warning as to its recurrence was issued to him and he was also suspended from service for some time without any inquiry — It could not be said that the impugned order did not entail any evil consequences to the appellant — Penalty was imposed on the appellant in violation of statutory rules and, as such illegal — Order of reversion was accordingly, illegal and void and not binding on the appellant. (1975) 79 Cal WN 403 (DB).

(52) Petitioner holding post of Vice-Principal of I. T. I. on probation for one year — Government reverting him on appraisal of confidential report of his work for nine months — Reversion of petitioner on basis of incomplete period is illegal. 1974 Serv LWR 522 (Punj).

(53) Petitioner promoted on ad hoc basis — Enquiry against petitioner instituted in which petitioner was exonerated — Enquiring Officer recorded adverse remarks and on his recommendation petitioner was reverted — Held, that reversion of petitioner was a measure of punishment and hit by Art. 311. (1974) 1 Serv LWR 934 (Punj).

(54) Pending disciplinary proceedings delinquent promoted to higher post — Actual enquiry though not held charges were held proved on a consideration of the files — Final order of reversion passed after lapse of long period of seven years from framing of charges — Order held could not be sustained. A 1971 Mad 170 (174) : 1971 Lab IC 452.

(55) P working as Assistant Station Master — Selection of P as Section Controller — Subsequent confirmation of P in that post — On finding P physically unable to carry out duties of Section Controller, appointment of P as Asstt. Station Master in same pay scale — Subsequent promotion of P as Station Master — Held, even though alternative equivalent appointment as Asstt. Station Master was made available to P by reason of his physical condition, his rank in higher position, earned by selection, could not be subordinated to rank of his erstwhile seniors in parent post. (1969) 1 Mys LJ 175.

(56) Promotion of servant to higher rank on temporary basis — Reversion 'pending' enquiry into certain allegations — No show cause notice served before reversion — Enquiry dropped later — Held, order of reversion being intimately connected with enquiry was penal in nature and was hit by Article 311 (2). 1980 Lab IC (NOC) 73 (Punj).

(57) Reversion — Temporary employee — Order of reversion of a senior temporary employee without reverting his juniors should not necessarily be branded as an order entailing penal consequences. A 1977 Punj 153 (FB).

(58) Reduction in rank — Reversion from temporary post to substantive post — If the evidence is that the order is not 'a pure accident of service' but an order in the nature of punishment Article 311 will be attracted — Held, the order of reversion to be in the nature of punishment in view of peculiar features of the case. 1971 UJ (SC) 508.

(59) Temporarily promoted employee reverted solely on ground that decision on continuance of his service after superannuation was pending — Reversion invalid. A 1971 Guj 39 (40, 41) : 1971 Lab IC 168.

(60) Reversion to parent department — Fifteen days prior notice, in terms of conditions of service in the order of initial temporary appointment not necessary. A 1977 SC 585 (587). (L. P. A. No. 363 of 1969, D/- 29-8-1969 (Punj), Reversed.)

(61) The rule of natural justice is applicable only in those cases wherein the person adversely affected by the order of reversion has a right to hold the higher post from which he is reverted. If no such right exists in his favour and his promotion to the higher post is found to be void ab initio, then the ratio of the decisions as regards the applicability of the principle of natural justice cannot be invoked. (1979) 2 Serv LR 693 (711, 712) (DB) (Him Pra).

(62) Reduction in rank — Petitioner a reader appointed on probation as Director — His reversion to post of reader is not reduction — Petitioner could not have been straightway appointed in a substantive capacity under the relevant provisions of the University Act — Court could also not issue direction to the University to extend probationary period. A 1978 Raj 72 (FB).

(63) Reversion from higher officiating appointment — Government Servant not deprived of his right to be considered again for promotion — Article 311 (2) not attracted. 1977 All LJ 187 : 1977 Lab IC (NOC) 33.

Articles 310 & 311 — Note 107 (contd.)

(64) Reversion — Person officiating as fireman in Railway in stop-gap vacancy — Person was not selected or empanelled in select list for promotion — Railway Board's Circular D/-21-6-1956 barring reversion of officiating persons with over eighteen months officiating service applied to such persons who were selected and empanelled for higher job — Circular will not help those who were not selected but continued to officiate for more than eighteen months. 1977 SLJ 490 (All).

(65) Reduction in rank — Reversion of senior Officer from officiating post to substantive post as against retention of his juniors without any justifiable ground for discrimination violates Articles 16 and 311. 1975 Lab IC 285 (289 to 293) (All).

(66) Reversion from officiating post to substantive post — Order stating that servant was not yet fit for promotion — Reversion amounts to punishment of reduction in rank as the order clearly casts a stigma on the servant and also affects his future chances of promotion — Article 311 attracted. 1974 Lab IC 353 (SC), Followed; A 1964 SC 1854, Distinguished. 28 Fac LR 291 : 1975 Lab IC 122 (123, 124) (All).

(67) Where an appointment is made on officiating basis and subsequently the reversion is made as per the terms of appointment, such reversion does not amount to reduction in rank by way of punishment. Where a person is not a Government servant but an employee of only a statutory body, Article 311 of the Constitution is not attracted.

Merely because the persons junior to the petitioner have not been reverted does not mean that there has been any discrimination and the Articles 14 and 16 of the Constitution are not attracted at all. 1975 (1) Serv LR 502 (Delhi).

(68) Promotion cannot be claimed as of right. A Government servant occupying higher post in substantive capacity has alone a legal right to occupy the post and he cannot be reduced in rank without an opportunity of being heard as provided in Article 311. 1975 MPLJ 45.

(69) Reversion from officiating post — Reduction in pay whether amounts to reduction in rank. ILR (1974) 2 Cal 373.

(70) Reduction in rank — Ad hoc appointee — Reversion because of pendency of disciplinary proceedings — Reversion amounts to reduction in rank within Article 311 (2). 1975 Lab IC 276 (279, 281, 282) (Him Pra).

(71) Ad hoc or officiating appointments — Reversion from — Amendment Rules of 1973 — Held that the intended reversion would be bad, because the promotions made under the old rules, even though called 'ad hoc' were not liable to be cancelled merely on the ground that the promotees had not yet been confirmed in their posts. On the other hand, these promotions were regularly made in accordance with the rules. (1975) 1 Serv LR 580 (DB) (Delhi).

(72) Every reversion from a higher rank, may it be temporary or officiating, is reduction in rank; but each such order cannot be said to be invalid for the non-compliance with the procedure provided in Article 311. This Article steps in only when the reversion is by way of punishment. An order of reversion simpliciter from a higher, but not a substantive, post does not amount to a reduction in rank by way of punishment. It is an accident of service. 1975 MPLJ 45 (DB).

(73) The person confirmed does not acquire any special status by virtue of the confirmation. An order of confirmation if passed under some mistake can certainly be revised with a view to correct the mistake, such an order being an administrative order does not amount to reduction in rank and does not attract Article 311. (1975) 2 Serv LR 222 (Him Pra).

(74) Indian Police Service (Cadre) Rules (1954), Rule 9 — Non-cadre police officer appointed to cadre post — Continuing to hold the post for over 96 months — Case not covered by Rule 9 (1) (a) or (b) of IPS Cadre Rules — During this period no report contemplated by sub-rule (2) made — Petitioner working for over 8 years as S. P. and as he belonged to a joint police service covering some 3 States, was suddenly asked to report to another of the States covered by the service — He was curtorily appointed as Dy. S. P. in that new State — Order of appointment not saying anything beyond that he was appointed to that post — While he was so demoted several others junior to him in service appointed to cadre posts — Such appointment tried to be justified as ad hoc — Petitioner otherwise qualified to be promoted within Regn. 4 of Indian Police Service (Appointment by Promotion) Regulations, 1955 — Order appointing him as Dy. S. P. was one of reversion by way of punishment — No opportunity of being heard afforded to him before taking the decision — Order was bad in law and hence quashed. ILR (1975) Him Pra 214.

(75) Reversion of the servant to the lower grade with the penal consequence of having to pay back portion of the salary earned by her, amounted to reduction in rank and the same having been done without any notice to her amounts to violation of principles of natural justice and violation of Article 311 and hence cannot be justified. A 1958 SC 36, 1965 Cur LJ 402 (Punj) and 1966 Cur LJ 813 (Punj), Relied on. 1972 Cur LJ 319 (Punj).

(76) Order of reversion of social scientist who was on probation — Orders based on entries as to unsatisfactory working of employee recorded in character Roll — Employee not even informed — Failure of natural justice — Provisions of Article 311 (2) attracted. 1970 Lab IC 593 (Delhi).

(77) When a Government servant has right to a post or to a rank either under the terms of the contract of employment, express or implied, or under the rules governing the conditions of his service, the termination of the service of such a servant or his reduction to a lower post is by itself and prima facie a punishment for it operates as a forfeiture of his right to hold that post or that rank and to get the emoluments and other benefits attached thereto. 1970 Lab IC 639 (646, 647) (Tripura).

(78) Reversion or Repatriation — It must be to original post — Petitioner in certain scheme in Agricultural Department — That scheme along with other schemes transferred to Horticulture Department — Later on, certain schemes retransferred to Agricultural Department but not the scheme in which petitioner was posted or working on the date of repatriation — Repatriation held was not possible in the case of petitioner — Held further that although Government had power to transfer

Articles 310 & 311 — Note 107 (contd.)
servants from one post to another under Article 162 and Rule 20-A of the Mysore Civil Services Rules, there was no transfer in the instant case and the repatriation being on wrong assumption was vitiated. 1970 Lab IC 467 (467, 468) (Mys).

(79) Permanent Head-Constable who was promoted to temporary cadre of Sub-Inspector Armed Police by selection reverted to his previous post on the ground other than of inefficiency or gross dereliction of duty — Reversion amounts to reduction in rank under Article 311 (2). 1970 All LJ 1083.

(80) Reduction in rank — Officiating Tahsildar (Tagai Accounts) reverted on discontinuance of that post, to his substantive post of Naib Tahsildar — Reversion held not a punishment or penalty so as to attract provisions of Article 311 (2) — He has no right to contend that he should not be reverted as long as there were other officers junior to him officiating, particularly when such posts were seniority-cum-merit posts. (1969) 2 Lab LJ 505 (DB) (Bom).

(81) Civil servant officiating in higher post — Reversion to substantive post on ground of ineligibility for the post — On facts, held order was in violation of Article 311 (2) as it entailed evil consequences on petitioner. 1969 Serv LR 400 (Punj).

(82) Reversion — Clerk acquiring diploma — Promotions given — Subsequent reversion on ground of withdrawal of recognition to diploma — Legality.

Held, that the withdrawal of recognition to the diploma had no relevance to the question whether A should be continued in the post of a Chief Officer. There was no prescription of any diploma for the acquisition of eligibility for appointment or promotion to the post of a junior sanitary inspector when A was promoted to that post.

If the reversion must fail on the ground that it is based upon an irrelevant ground, the fact that the post from which there was a reversion was being held temporarily is no ground on which the order of reversion could be defended. 1970 Lab IC 903 (904) (DB) (Mys).

108. Instances where reversion does not amount to reduction in rank.— (1) Sub-Treasury Officer officiating in post of Superintendent of Surveys — Suspension followed by dismissal of officer — Suspension and dismissal set aside by Judicial Commissioner — Reinstatement to post of Superintendent of Surveys — Reversion to the post of Sub-Treasury Officer with retrospective effect by same order of reinstatement because the post of Superintendent was filled by another officer approved by U. P. S. C. — Reversion did not entail penal consequences — Order not illegal. A 1970 SC 864 (365, 366) •• (1968) 72 Cal WN 817 (821).

(2) Person officiating in higher post reverted to original post on being found unsuitable for officiating post — Reversion is not punishment and is not a reduction in rank. A 1962 SC 794 (796, 797) •• 1977 Lab IC 1959 (Bom). (The absence of communication of adverse entries to the Government servant concerned does not prevent the authority concerned from taking those confidential reports into consideration while determining the suitability of the Government servant for promotion.)

(3) Reversion of an officiating incumbent to his substantive post does not amount to reduction in rank. A 1964 All 356 (358) •• A 1972 SC 2170 (2171) : 1972 Lab IC 1280 •• 1973 Lab IC 1257 (1257, 1261) (HP).

(4) Where the Government servant was promoted on the basis of a panel framed by a Selection Board on an implied term that, if he proved himself unsuitable, he would be reverted back to his substantive rank and on his failure to prove suitability was reverted. Mere recital of such ground in the order would not render the order penal. ILR (1976) 2 Cal 261 (267).

(5) Applicability — Reversion of Government servant to parent department — Not in nature of punishment. (1973) 1 Serv LR 532 (Delhi).

(6) Article 311 (2) does not deal with the question of pension at all. The reduction in pension is not equivalent to reduction in rank. Reduction in rank applies to a case of a public servant who is expected to serve after the reduction. A 1960 SC 247 (251).

(7) Reduction in rank must be a reduction in rank in praesenti and not any loss of prospects of future advantage. Withholding of increment or of promotion or stoppage at the efficiency bar or reduction to a lower stage in time scale are all instances of loss of prospects of earning more than what the employee may be earning at the time. The reduction to a lower post or on a lower emolument by way of punishment would amount to reduction in rank as contemplated in Article 311 of the Constitution. A 1958 Raj 239 (240) (DB).

(8) There is no forfeiture of any right where a person is reverted from a higher post on which he was officiating. The reversion cannot be described as reduction in rank by way of punishment and provisions of Article 311 (2) will not be attracted. The fact that the servant stands to suffer loss of higher salary is not the test for seeing whether the order of reversion is one passed by way of penalty. If the Government, after considering the suitability of a particular incumbent who had not by then acquired the right to hold the post, reverts him to his substantive rank or terminates his services, in case he is temporary, in accordance with the service rules, then that action cannot attract the provisions of Article 311. The crux of the matter is whether it can be inferred, that the Government really intended to take disciplinary action against the Government servant concerned. Whether a particular termination or reversion would amount to punishment within the meaning of Article 311 (2) would depend upon the facts of each case and such determination will ultimately depend upon the action taken by the Government which finally leads to the order of termination or in a case of officiating appointment to an order of reversion. 1966 Raj LW 262 (269) •• A 1963 All 358 (360, 361).

(9) The words "reduction in rank" mean degradation in rank or status of an officer, in physical sense and by way of penalty — A appointed as teacher-in-charge — Subsequently B appointed as senior teacher-in-charge without interfering with A's rank — A not reduced in rank. 1963 (6) Fac LR 42 (44) (Cal).

(10) Where a person holds no permanent appointment in Government service at all but holds only a post on an officiating basis and is then transferred to a lower post, there is clearly no reduction in rank. A 1957 Raj 81 (84) (DB).

Articles 310 & 311 — Note 108 (contd.)

(11) Inasmuch as a person holding a higher post in an officiating capacity has no right to that post, it is immaterial for what reason he is reverted, as he cannot be said to be "reduced" in rank when he has no right to the higher post at all. 1958 Jab LJ 187 (199) °° A 1957 Raj 81 (82) (DB).

(12) 'Reduction in rank' in Art. 311 (2) means reducing to a lower rank due so some personal default of the Officer. A fortiori the same word in other statutory provisions should be similarly construed. If the initial appointment to the post be not valid, no question of reduction in rank would arise, nor would a notice be required in such a case. The order in question was not one of reduction but of setting aside something which was not according to the rule, and for this, the relevant part of the rule does not require notice. The words 'the authority or person concerned' in the Proviso to S. 36 (1) of the Madras District Municipalities Act (V of 1920), should not be construed as entitling both to be heard, the word 'or' in the Proviso is obviously meant to be alternative but not cumulative. Notice would not be required when the reason for the order is not the conduct of the person claiming the notice. Also loss to him would not require notice if he be deprived of what he is not legally entitled to. (1959) 2 Andh WR 482 (483, 484). (A 1956 All 460, Not followed.)

(13) Order of reversion — On face of it not containing stigma — Confidential report cannot be gone into to find if stigma was there. A 1969 Madh Pra 216 (218) : 1969 Lab IC 1211 (DB) °° A 1971 Guj 39 (40) : 1971 Lab IC 168.

(14) Government servant officiating in higher post — Reversion to lower post for administrative reasons or unsuitability — Not a reduction in rank by way of punishment — Article 311 (2) not attracted. A 1969 Cal 180 (193) : 1969 Lab IC 409 (DB) °° (1969) 1 SCWR 922 (925). (Reversion on the ground of unsuitability.) °° A 1971 All 375 (376, 377) : 1971 Lab IC 976 (FB) °° A 1971 Andh Pra 1 (21, 22) : 1971 Lab IC 30 (FB) °° 1968 Lab IC 854 (856, 857) (Punj). (Order not affecting employees' chances for promotion — Reduction is not punishment.) °° A 1966 Raj 8 (11) (DB) °° ILR (1966) 1 Punj 84 (122) °° A 1962 Punj 476 (477) °° (1957) 2 Mad LJ 515 (516) °° 1979 Serv LJ 727 (734, 735) (Delhi) °° 1979 Lab IC (NOC) 130 (J & K) °° (1976) 1 Serv LR 295 (306) (DB) (Pat) °° 1976 Serv LJ 535 (538) (Madh Pra) °° 1974 Lab IC 917 (918) (J & K) °° 1973 Lab IC 1085 (1088) (Gauhati) °° 1971 Lab IC 349 (350) (DB) (All) °° A 1971 All 122 (128, 129) : 1971 Lab IC 293 °° 1970 Lab IC 446 (458) (Delhi) °° 1969 Serv LR 782 (Delhi). (Mere reversion for failure to satisfy the test of efficiency and removal of name from list E maintained under Punjab Police Rules is not a reduction in rank at all within the meaning of Art. 311 (2).)

(15) Service Rule requiring that Member of State Forest Service cannot hold in substantive capacity post of conservator of Forests or that superior to it — Person holding substantive post of Dy. Conservator of Forests occupying post of Conservator of Forests in officiating capacity — Person not allowed to continue as Conservator of Forests — No reduction in rank. A 1969 All 370 (374) (DB).

(16) Transfer of petitioner from officiating post to post of substantive grade with all other emoluments — Transfer neither by way of punishment nor leaving any stigma on his future career — Transfer could neither violate provisions of Sec. 577 (e), nor could it amount to reduction in rank or demotion. 1964 All LJ 965 (968).

(17) Appointment by mistake to higher post — Order modified by State Government on representation and another person appointed — Not a punishment and not a reduction in rank of the person promoted by mistake. A 1963 All 316 (318) °° 1977 SLWR 435 (446) (Punj) °° 1975 Lab IC 1015 (All) °° (1973) 2 Serv LR 726 (Punj).

(18) Upgradation of Post — Ad hoc fitment of employee in the upgraded post — Retransfer to substantive post — Not reduction in rank. (1978) 1 Kant LJ 188 : 1978 Lab IC (NOC) 146.

(19) Reversion to parent department — Deputation without any fixed tenure — Reversion at the stage which he held 17 years back — Reversion as such is not illegal but is a serious infirmity. (1975) 1 All LR 462.

(20) Reduction in rank — Fixation of pay — Correction of error — Does not amount to any punishment — Fixation of pay is the normal exigency of service. (1973) 1 Serv LR 192 (All).

(21) If a person holds a particular post and is temporarily taken to a higher post, he cannot be said to hold the higher post. The reversion, therefore, from a higher post to a lower post, whatever may be the reason, does not afford the safeguard which is provided under Article 311. A 1958 Raj 245 (246, 247) (DB).

(22) Where the petitioner, officiating as Head Draftsman, was reverted to his substantive post as an administrative measure in pursuance of a regulated policy of the Government controlling the promotion of draftsmen and was inspired by the test of seniority-cum-merit and not as a penalty or punishment, the High Court in its discretion under Article 226 should not interfere with such an order. A 1960 Punj 65 (66).

(23) Member of Indian Police Service in junior scale of pay officiating in higher post in senior scale — He can be reverted after trial in the higher post or for administrative reasons — Such reversion is not reduction in rank. A 1964 SC 423 (429).

(24) Reduction in rank — Reduction resulting from normal administrative decision to correct a mistake — No penalty involved — Article 311 (2) not attracted. A 1963 Cal 563 (565) (DB) °° (1966) 1 Lab LJ 265 (270) (DB) (Mys).

(25) The transfer of a person, appointed substantively or on an officiating basis to a temporary post, from such post to a lower post will not per se amount to a reduction in rank within the meaning of Article 311. A 1958 SC 36 (48) °° A 1957 SC 886 (887) °° A 1958 All 741 (746) (FB) °° A 1957 Andh Pra 794 (807) (DB) °° 1977 Lab IC 529 (Punj).

(26) Reversion from a post temporarily held by a Government servant does not per se amount to reduction in rank when the appointment held by him is not a substantive appointment. But this is a rule of presumption and

Articles 310 & 311 — Note 108 (contd.)
open to rebuttal and can be rebutted by the surrounding circumstances on the record. A 1966 Orissa 173 (179, 180) (DB) •• A 1958 Raj 245 (247) (DB).

(27) Where an order of reversion from a higher post to which employee was promoted temporarily sometime back did not deprive him of future chances of promotion, from the mere fact that he was subsequently superseded by other persons, it could not be said that he was reduced in rank, and no relief could be given to him against his alleged supersession. (1966) 12 Fac LR 264 (271) (Cal).

(28) Government servant holding higher rank on temporary basis — Reversion to substantive post — Juniors allowed to continue in the higher post — Order reverting casting no stigma — Order, held, could not be quashed. A 1969 Orissa 215 (218, 219) : 1969 Lab IC 1118 (DB).

(29) Reversion of a Government servant from an officiating post to his substantive post notwithstanding that his juniors are retained in the higher posts does not by itself amount to a reduction in rank. ILR (1966) Cut 503 (546) (DB).

(30) Even a substantive appointmenet to a temporary post does not create a lien in favour of the person appointed in regard to such a post, and he can be transferred to a lower post at the mere will of the Government. A 1958 SC 36 (42) •• A 1955 Punj 229 (230, 231) (DB).

[But see A 1954 Ajmer 22 (23).]

(31) Appointment of non-cadre officer to cadre post — Appointment on ground that no cadre officer was available — Reversion of non-cadre officer when such cadre officer became available — Reversion cannot attract Article 311. A 1965 Ker 84 (88) (FB).

(32) Conditional promotion — Subsequent reversion held not reduction in rank. A 1965 Ker 233 (236). (A 1964 SC 600, Disting.)

(33) Reversion of promoted civil servants — Servants can continue to remain by promotion only so long as posts are available — After disappearance of vacancies, order putting promotees to their original posts is innocuous and justified. A 1968 All 279 (281) : 1968 Lab IC 1030.

(34) Reversion of promoted civil servant — When a servant is not entitled to a rank to which he is promoted and in fact was appointed by mistake if that mistake is corrected on representation of adversely affected servant, right of promoted servant cannot be said to be taken away from him. A 1968 All 279 (281, 282) : 1968 Lab IC 1030.

(35) Persons provisionally promoted under Rule 31 of Kerala State and Subordinate Services Rules, 1958 reverted after duly selected candidates became available — Article not applicable since reversion was not by way of penalty. A 1966 Ker 262 (264).

(36) Temporary appointment in higher grade — Transfer to substantive lower grade — Transfer held did not amount to reduction in rank. A 1962 All 413 (419, 420, 421) (DB).

(37) Servant confirmed on a post — Confirmation set aside in appeal as contemplated by rules — There is no question of punishment — There is no reversion attracting Article 311. A 1967 Madh Pra 79 (80) (DB).

(38) Where a person is reverted from his higher officiating post to his substantive post in order to be dismissed from service, the reversion to the substantive post will not amount to reduction in rank as it is only of a preliminary or intermediate character, and does not constitute in itself the punishment intended to be inflicted. (1957) 61 Cal WN 815 (826) (DB).

(39) Reversion on account of promotion of some senior officer to the post is no reduction in rank. A 1963 Orissa 164 (165, 166) (DB). (A 1958 SC 36, Disting.)

(40) Government servant promoted on deputation for stipulated period — Reversion to his substantive post prior to expiry of period — It will not constitute dismissal, removal or reduction in rank within Art. 311 (2) even if motive behind such action is to punish the servant for misconduct, negligence or inefficiency. 1969 Lab IC 721 (723) (Cal).

(41) Reversion from post on which no lien held — Resultant loss of pay — Not in the nature of penalty — Show cause notice not necessary — Article 311 not violated. A 1963 Him Pra 54 (55) •• 1971 Lab IC 905 (906) : 1971 All LJ 1287.

(42) 'Reduction in rank' — Government servant losing two places in seniority and also losing two steps in his time-scale by forfeiture of two years of his pay permanently — Not a case of 'reduction in rank' under Art. 311 (2). A 1968 Punj 7 (10) : 1968 Lab IC 44 (FB). (ILR (1954) Cut 684 and A 1959 Orissa 167, Not Foll.)

[See also (1977) 2 Serv LR 850 (861) (Delhi). (Adverse remarks not communicated — Reversion illegal.)]

(43) Applicability — Order passed under service rules reinstating Government servant and regularising period of his suspension and dismissal — Order resulting in denial of part of emoluments and grade increments which he would have drawn had he not been suspended or dismissed — Held, Art. 311 (2) was not attracted, as the order could not be regarded as reduction in rank within Art. 311 (2). 1968 Cur LJ 247 (255).

(43A) Reversion of Government servant — Statement in reversion order of Government servant that he has failed to pass departmental examination does not cast any stigma on him — Statement not requiring any explanation from him — Question of affording him opportunity does not arise. 1973 Lab IC 1425 (1429) (All).

(44) Reduction in rank due to fixing Government servant's proper place in service in accordance with service rules — Reduction not being by way of penalty — Article 311 not attracted. A 1968 Ker 234 (237) (FB).

(45) Reduction in rank — Withdrawal of powers of Civil Judge Class I and asking him to exercise powers of Civil Judge Class II — No reduction in rank. A 1976 MP 25 (FB).

(46) Central Government equating the posts of Senior Assistant Conservators of Forests allotted from the former Mysore State with that of the Deputy Conservators of Forests allotted from the former States of Bombay and Hyderabad and the posts of the Assistant Conservators

Articles 310 & 311 — Note 108 (contd.)
of Forest and Sub-Assistant Conservators of Forests allotted from the former State of Mysore and that of the Assistant Conservators of Forests allotted from the former State of Madras with the posts of Assistant Conservators of Forests allotted from the former States of Bombay and Hyderabad. **Held**, it could not be said that the decision of the Government resulted in reduction of the rank of the petitioners from the Mysore State. (1965) 2 Law Rep 385 (391) (DB) (Mys).

(47) Even assuming that the servants of the Devaswom Board are Government servants, when their reversion is not made as measure of punishment for any misconduct on their part and the same has been brought otherwise than by way of punishment, they cannot claim protection under Art. 311. 1959 Ker 21 (23) (DB).

(48) Petitioner holding substantive post of Sub-Inspector temporarily promoted as Circle Inspector — Selection for promotion to Circle Inspector's posts from cadre of Sub-Inspectors made by Departmental Promotion Committee and petitioner reverted to substantive post as result of selection — **Held**, that rules did not enjoin Promotion Committee to record reasons for its decision and in absence of any whimsical, arbitrary or mala fide exercise of power in matter of selection Court had no right to interfere — **Held** further, even though, as contended, action might have affected petitioner in matter of seniority in his substantive rank and his future chance of promotion, there was no imposition of punishment so as to attract Article 311. 1966 Ker LT 1163 (1166, 1167, 1168).

(49) Temporary Moharir appointed and promoted as temporary Revenue Clerk — He can be reverted to his original post. (1966) 12 Fac LR 264 (269) (Cal).

(50) Reversion — Promotion on provisional or temporary basis — 2nd Fireman Gr. C promoted as Diesel Assistants — Reversion — Appointment being provisional, reversion was valid. 1979 Lab IC 627 (632) (DB) (Ker).

(51) Where a constable officiating as Assistant Sub-Inspector, claiming to have been appointed as a literate constable, who had not passed examination for Assistant Sub-Inspectors, was reverted to his substantive post of constable, reversion was held to be not unjust. 1969 Lab IC 496 (498) (Pat).

(52) Probationer officiating in higher post and continuing therein after expiry of period of probation — Reversion to original post for unsatisfactory work is permissible under Service Rules — Article 311 (2) does not apply to such cases of reversion. **A 1962 SC 1711 (1715).**

(53) Article 311 has no application when an order of reversion from superior post is passed, not by way of punishment but for other reasons which are not personal to and which have nothing to do with the work of the servant. A 1963 Orissa 164 (165) (DB).

(54) Where the Government servant had no right as such to hold the post in Class I service and his promotion to officiate in Class I service was only to test his suitability or otherwise for being retained in Class I service and the promotion committee on a review or consideration of his work came to the conclusion that he was not suitable for being continued in Class I service and reverted him to his substantive post in Class II retaining his seniority or rank with no penal consequences as his emoluments and other benefits in Class II were not touched his reduction to Class II was not a punishment and therefore the provisions of Article 311 were not attracted. A 1968 Andh Pra 283 (288) : 1968 Lab IC 1186.

(55) Punjab Service of Engineers, Class I, P. W. D. (Irrigation Branch) Service Rules (1966), Rr. 5 (7) (b), 8 — Non-constitution of screening committee within prescribed period by Government — Government cannot take the plea of automatic reversion of officer after expiry of three months from date of enforcement of rule. 1969 Lab IC 795 (800) (DB) (Punj).

(56) Reduction in rank — Government servant in higher post of technician terminated and offered lower post of Instructor by orders of same date — Servant joining lower post after termination of service — Effect — Acquiescence in termination order and acceptance of fresh appointment — No reduction in rank — Article 311 does not apply. ILR (1974) Him Pra 1051.

(57) Where the Government transferred the Block Education Officers as Masters after upgrading the posts of Block Education Officers and prescribing a higher qualification therefor, the transferred employees could not be said to have been reverted on transfer merely because they held administrative posts when, before upgrading, the posts of Block Education Officers and Masters were at par and interchangeable and intertransferable. 1978 Lab IC (NOC) 85 (Punj).

109. Mala fide order of reduction.— (1) Mala fide does not necessarily involve a malicious intention. It is enough if the aggrieved party establishes that the authority making the impugned order does not apply its mind to the matter in question or that the impugned order is made for a purpose or upon a ground other than what is mentioned on the face of the order. 1968 Lab IC 735 (739) (Cal). (Where an allegation of mala fides is made by a delinquent officer in a departmental enquiry, the Enquiry Officer should allow the officer to adduce evidence in support of his contention. Especially where such allegations are supported by documentary evidence, it is necessary that such allegation should be controverted or denied by means of affidavits to be filed by persons against whom the allegations have been made. It is not correct on the part of the Enquiry Officer to disallow the delinquent officer to adduce evidence in support of those charges.) ** A 1964 Cal 265 (272).

(2) Probationer — Officiating in higher post for more than probationary period — Reversion to original post by way of punishment — Order mala fide — Non-compliance with Article 311 (2) — Reversion is illegal. **A 1962 SC 1711 (1715, 1716). (A 1957 Punj 191, Reversed.)**

(3) Termination order — Penal character or mala fide nature of order should be proved strictly. Mere suspicion, even if strong is not sufficient. (1965) 11 FLR 127 (130) (Cal).

(4) Before charging a person with disobedience, a disciplinary authority must be sure of a prima facie case against such person. To charge a person with disobedience, without

Articles 310 & 311 — Note 109 (contd.)
being so sure, reveals a fault finding mind and a mala fide disposition. Further in a case where the person charged had not shown cause but had asked for being relieved from showing cause, it is of utmost necessity that disciplinary authority examine case with greater care, before he makes up his mind about guilt of the person. An order which does not show any such care, was one not made in good faith and offends against principles of natural justice. (1962) 1 Lab LJ 317 (323) (Cal). (Prayer for extension of time for reporting at a particular office, with sickness as cause — Time extended — Before its expiry, issue of show cause notice and order of dismissal quashed.)

(5) When an authority is vested with a power but he is required to consult an advisory body before taking its decision, the responsibility for the decision or the final action that emerges is that of the authority who is entrusted with the power. If the authority concerned fails to apply its mind and to exercise its discretion, the order will be vitiated by mala fides. Where the Government mechanically acted upon the advice given by the Public Service Commission and reverted the petitioner from his officiating higher post to his substantive lower post without applying its mind to the credentials and the exceptional record of the petitioner upon which they had acted for a long time and to the question whether there were any changed circumstances furnishing a consideration for a contrary decision. Held, that the impugned order of reversion was invalid owing to mala fides. A 1964 Cal 265 (272, 273, 274).

(6) Merely to say that an order or action taken by the authority is mala fide has no meaning. When mala fide is alleged, the particulars and details of facts on which it is based or the reasons upon the basis of which it is urged have to be stated in the petition so as to enable the authority concerned to have an opportunity to give a proper reply to any such allegation. Mere allegations without giving opportunity to meet them would go against the principles of natural justice. Question whether Government authority applied its own mind or mechanically followed advice of advisory body depends on facts and circumstances of each case. A 1968 Punj 324 (327) (DB). (Where at no stage the petitioner ever averred that the order made by the State Government in his case was not a decision of it on consideration of the relevant aspects of the case but that it was a mere acceptance of the advice of the Punjab Public Service Commission, and nothing more, and the State Government had no adequate opportunity to give a reply to any such matter at the proper stage it was not just and appropriate to accept the contention raised for the first time in Letters Patent Appeal.)

(7) According to Art. 320 (3) (b) a State Service Commission has to be consulted in making appointments and on the suitability of candidates promoted. It is a constitutional duty which a Public Service Commission performs. Even if it is considered as a provision not enforceable in a Court, yet the advice given under it is entitled to due respect and it is an eminently relevant consideration for the State Government in promoting or continuing the promotion of an officer. If after considering the advice and the other relevant materials the State Government takes a decision, it cannot be said that the decision is mala fide. A 1968 Punj 324 (328) : 1968 Lab IC 980 (DB).

(8) If any party wants to invoke the jurisdiction of the High Court on the allegation that the State or its Officers were actuated in superseding his claim on the ground of mala fides, then that party should put forward his case in the clearest possible terms. He must mention in his affidavit not merely accusations but reasons in support of those accusations. He must also substantiate those grounds by necessary evidence. (1963) 2 Mys LJ 248 (249) (DB).

(9) Malice would vitiate the exercise of any statutory power. But it has to be established by sufficient materials. When an officer is promoted to a higher rank in an officiating capacity, he is on trial in that higher capacity and it is for the competent authorities to assess his performance and not for the Court in writ proceedings. (1968) 72 Cal WN 817 (822).

(10) An enquiry against an employee is not tainted with bad faith at its inception just because the employee is asked in the charge-sheet itself to show cause why he should not be punished or because the enquiring officer had been required to hold the enquiry on receipt of the employees' written statement. The charge-sheet merely suggests that in view of the charges made against the employee, he is to show cause why he cannot be awarded any of the three modes of punishment contemplated by Art. 311 and if at the enquiry the enquiring officer is satisfied that the charges are baseless there is no question of punishment. As such, it cannot be said that the enquiry was started with the sole object of punishing the employee. The enquiry is not therefore tainted with bad faith at its inception. The enquiring officer must hold the enquiry to submit a report even when the written statement of the employee is so convincing that the charges automatically fall to the ground. Hence if the enquiring officer is asked to hold the enquiry after receiving the written statement, it does not show that the enquiry is tainted with bad faith at its inception. A 1967 Cal 29 (30).

(11) Reversion — Mala fides — Plea of — Particulars of grounds should be given — Plea raised for first time in Letters Patent Appeal not acceptable — (Letters Patent (Lah), Cl. 10). A 1968 Punj 324 (327).

(12) Reversion — Officiating employee under suspension reverted during pendency of departmental enquiry — Nothing incriminating against employee came to light during the period of suspension — Order of reversion biased — Article 311 violated. 1977 SLWR 416 (Punj).

110. Reversion from officiating post on ground of incompetency or unfitness.— (1) In cases of reversion from officiating higher post to a substantive lower post on the ground of incompetency to hold the higher charge, reversion is only a matter of ordinary administrative course and not a punishment, so as to amount to a "reduction in rank". A 1958 Cal 623 (624) •• A 1971 Orissa 217 (217) : 1971 Lab IC 1143 •• (1957) 61 Cal WN 849 (855) •• A 1956 Cal 662 (667) •• A 1956 Madh B 172

Articles 310 & 311 — Note 110 (contd.)
(173, 174) ** A 1956 Nag 113 (115) (DB) ** (1955) 59 Cal WN 859 (866, 867) (DB) ** A 1954 Cal 383 (385). (Reversion for inefficiency is in normal course and not punishment.) ** A 1969 Punj 131 (133) : 1969 Lab IC 573 ** A 1968 Punj 324 (326) : 1968 Lab IC 980 (DB). (Removal from the 'May be tried list' for promotion could not be said to be by way of penalty; as it had no effect at all.) ** 1968 All LJ 737 (740).

(2) Reversion from officiating post to substantive post — Motive behind reversion not relevant. A 1974 SC 423 (430) : 1974 Lab IC 353.

(3) State Cadre Officer of Indian Administrative Service — Promotion to tenure post under Government of India → Reversion to State Service before expiry of tenure period — Reason for reversion, unsatisfactory performance — Reversion amounts to reduction in rank involving stigma — Non-compliance with Article 311 (2) — Order not sustainable. A 1970 SC 77 (Prs. 13, 16).

(4) Reduction in rank → Reversion of one out of several officers from officiating post to substantive post — Adverse entry in character roll as basis for reversion — Order amounts to reduction in rank → Order is also discriminatory and violative of Arts. 14 and 16 of the Constitution. A 1974 SC 423 (431, 432) : 1974 Lab IC 353.

(4A) Reversion from officiating post to substantive post allowing juniors to retain their officiating posts — Procedure under Article 311 not followed — Even notice to show cause not issued → Order held liable to be quashed. 1975 Serv LWR 641 (DB) (Punj).

(4B) Reversion to substantive post for committing irregularities in work — Order is of penal character and non-compliance with Article 311 (2) would render it invalid. 1978 Serv LR 302 (Punj).

(5) Reversion — State employee selected for service under Central Govt. on probation — Reverted to parent department being found unfit — Order of reversion has penal consequences — Hence hit by Article 311, as no opportunity was given to him to show cause against proposed reversion. 1977 Cur LJ (Civil) 347 (Punj).

(5A) Reversion — Officer holding superior post in officiating capacity — Reversion to substantive post mala fide or for collateral purpose or by way of penalty → Compliance with Article 311 is necessary. A 1971 SC 1224 (1228).

(6) Person officiating reverted for unsatisfactory work — Reversion does not amount to reduction in rank — Government has a right to consider suitability of person to hold position to which he had been appointed to officiate and it is entitled for that purpose to make enquiries about his suitability — Losing some places in seniority list is not tantamount to reduction in rank. A 1966 SC 1529 (1532, 1534, 1535). (W. P. No. 531 of 1961, D/- 12-12-1962, Reversed.) ** A 1970 Orissa 12 (15) : 1970 Lab IC 50 (DB). (Such an order of reversion was not satisfactory, did not involve any stigma and did not attract Art. 311 (2).) ** 1965 All LJ 819 (822, 823).

(7) Where an order of reversion of a person who had no right to the post, does not show ex facie that he was being reverted as a measure of punishment or does not cast any stigma on him, the Courts will not normally go behind that order to see if there were any motivating factors behind that order. The Supreme Court observed that the whole position in law was confusing. It is time that the whole question was considered de novo and it would be better for all concerned and avoid a lot of avoidable litigation if it should be held that the reversion of a probationer from a higher to a lower post, or the discharge of a probationer, or the discharge from service of a temporary servant cannot be questioned except on the basis of mala fides in the making of the order. A 1975 SC 2292 (2294, 2295) ** (1974) 78 Cal WN 618.

(8) Where a person is reverted from an officiating post to his substantive post on the ground of unsuitability, he cannot be said to be reduced in rank. (1955) 59 Cal WN 859 (867) (DB) ** A 1960 Punj 244 (247). (Reversion on being found not up to the mark after trial.) ** 1978 Lab IC 759 (760) (DB) (Pat) ** 1975 MPLJ 45 (57) (DB) ** 1971 All LJ 260 (DB) ** (1971) 1 Serv LR 784 (Punj).

(9) Permanent Head Constable who was promoted to temporary cadre of Sub-Inspector Armed Police by selection reverted to his previous post on the ground other than of inefficiency or gross dereliction of duty — Reversion amounts to reduction in rank under Article 311 (2). 1970 All LJ 1083 (DB).

(10) Reversion — Petitioner senior most Principal serving on ad hoc basis — Work not unsatisfactory — Allegation of financial irregularities and stoppage of increments previously — Held, subsequent reversion without any inquiry was hit by Art. 311. 1977 Lab IC (NOC) 142 (Delhi).

(11) Cadre Officer in junior scale promoted to officiate in senior scale reverted to substantive post on the ground of unsuitability and non-cadre officer appointed in his place — Not a penalty. A 1968 SC 754 (759).

(12) Rule 49 of the Civil Services (Classification, Control and Appeal) Rules enumerates different forms of punishment. Reversion to the substantive rank is not one of the prescribed punishments. This may take place under the rules in the ordinary course. An employee may in a given case be reduced for proved unfitness or incapacity. ILR (1957) 9 Assam 223.

(13) Where the petitioner who was Office Superintendent in the office of the District Magistrate was reverted to the post of a clerk on the ground that he was not up to the mark but just before four or five days before the reversion order was passed he was regarded by the District Magistrate as very efficient. Held, that it must be inferred that the reversion order was by way of penalty on the ground that he was held not up to the mark. A 1959 Tripura 2 (4).

(14) All the relevant factors have got to be considered, for finding out as to whether even in the case of a Government servant who is holding an officiating post, an order of reversion to his lower substantive post does or does not amount to reduction in rank. If the order of reversion entails the postponement of the Government servant's future chance of promotion, then, such reversion must be only after

Articles 310 & 311 — Note 110 (contd.)
compliance with the provisions of Article 311. A 1965 Mys 164 (166, 167) (DB). (Government servant reverted from higher officiating post to his substantive lower post without giving any reason for reversion — Subsequently he was informed that reversion was on account of confidential report unfavourable to him — Reversion resulted in postponement of his further promotion for one year and his juniors became his seniors — Held, that reversion amounted to reduction in rank for purpose of article and order of reversion without giving reasonable opportunity to show cause against such reduction in rank was illegal.)

(15) Even in the case of a civil servant who is officiating in a higher post, reversion to a substantive post which involves a stigma and a penal consequence amounts to reduction in rank within the meaning of the article. A reversion which imperilled future chances of promotion entails penal consequences. Where in reverting an officiating Aval Karkun to his substantive post of a clerk an imputation is made against him that his work was unsatisfactory and his record was not good, it is a clear stigma on his work as an Aval Karkun and entails penal consequences, as his future chances of promotion would undoubtedly stand imperilled. If the person was not yet found eligible for confirmation, it might have been possible for the conforming authority to desist from making the confirmation, and the postponement of confirmation in that way would not have amounted to a reduction in rank. But when the confirming authority did not stop with the postponement of the confirmation, but reverted him to his substantive post on the ground that he had not given a good account of himself as an Aval Karkun and that his record in that post was not good, the reversion is a punishment, and so a reduction in rank. And since it was not made after affording a reasonable opportunity the impugned order cannot be sustained. 1968 Lab IC 838 (840) (Mys) (DB).

(16) Indian Police Service — Member reverted from higher officiating post of Superintendent of Police to substantive junior post of Assistant Superintendent of Police for unsatisfactory conduct — Order entailing loss of pay as well as loss of seniority and affecting future chances of promotion — Amounts to 'reduction in rank' within Art. 311 (2). A 1964 SC 423 (428, 429, 430, 431, 433, 434, 435, 436). (A 1962 Punj 516, Reversed.)

(17) Engine driver found medically unfit for the post being absorbed in another post carrying less emoluments does not amount to reduction in rank within meaning of Art. 311 (2). A 1966 Pat 184 (186) (DB).

(18) P working as Assistant Station Master — Selection of P as Section Controller — Subsequent confirmation of P in that post — On finding P physically unable to carry out duties of Section Controller, appointment of P as Asstt. Station Master in same pay scale — Subsequent promotion of P as Station Master — Held, even though alternative equivalent appointment as Asstt. Station Master was made available to P by reason of his physical condition, his rank in higher position, earned by selection, could not be subordinate to rank of his erstwhile seniors in parent post. (1969) 1 Mys LJ 175 (177) (DB).

(19) Punjab Educational Service (Provincialised Cadre) Class III, Rules (1961), Rule 6 — Proviso to R. 6 (3) prohibits extension of period of probation beyond three years — Probationer officiating in permanent post — Allowed to continue in that post after expiry of three years — No express order of confirmation passed — He must be deemed to have been confirmed in that post — Subsequent removal from service without following procedure in Punjab Civil Services (Punishment and Appeal) Rules, 1952 or conforming to constitutional requirements of Article 311 is invalid. A 1968 SC 1210 (1212, 1213).

(20) Appointment on probation to Punjab Civil Service — Requisite probationary period over — No formal order extending the probationary period — Enquiry consisting only of charge-sheet and explanation of civil servant — No further proceedings undertaken — Reversion to substantive post — Order of reversion, held, did not amount to punishment — Civil servant could not, by virtue of the probationary period being over, claim to have a substantive appointment — Reversion by itself did not amount to punishment. A 1968 SC 1089 (1095). (L. P. A. No. 157 of 1959, D/ 7-1-1963 (Punj), Reversed.)

(21) Appeal by petitioner against order dated 4-9-62 promoting two of his colleagues as Head Assistants, on recommendation of Departmental Promotion Committee, in preference to petitioner who was seniormost Assistant in Department — Appeal allowed by Lieutenant Governor on 2-2-66 inter alia on ground that promotion committee had adopted procedure of selection on basis of merit-cum-seniority instead of seniority-cum-merit — Order of Secretary dated 1-4-66 appointing petitioner as Head Assistant with immediate effect in pursuance of appellate order — Lieutenant Governor's successor reviewing his predecessor's order on 17-6-66 and holding that correct way to carry out that order was to refer matter afresh to Selection Committee — In pursuance of order petitioner reverted as Assistant on 2-7-66 — Held, on construction of order dated 2-2-66, that petitioner was entitled to be appointed as Head Assistant with effect from 4-9-62 and order of Successor Lieutenant Governor was liable to be quashed — Held, further, assuming petitioner was appointed Head Assistant in officiating capacity by order dated 1-4-66, the reversion from officiating rank in pursuance of illegal order dated 17-6-66 amounted to reduction in rank within meaning of Art. 311 (2) and provisions thereof not having been complied with, order of reversion was unconstitutional and void. A 1967 Him Pra 34 (37, 38).

(22) Reversion on ground of adverse remarks — High Court can examine those remarks in details to find out the motive behind reversion. 1980 Raj LW 188 (200) (DB).

(23) Adverse entries — Communication to concerned person before taking it into consideration for purpose of promotion — Necessary on principles of natural justice except in exceptional cases. 1979 Lab IC (NOC) 141 (Cal).

111. Demotion on ground of financial stringency.— (1) Petitioner confirmed in the post of Headmaster of Primary School — Reversion to post of Asstt. Master with lower salary on account of financial stringency — The order of demotion deprived the petitioner of a higher

Articles 310 & 311 — Note 111 (contd.)
salary, as such it amounted to punishment even though the reduction is not on account of misconduct on his part but due to financial stringency — Petitioner entitled to protection granted under rule at page 193 of District Board Manual. A 1956 All 460 (461, 462).

112. Extension of probationary period — See also Note 7.— (1) An order of the Government imposing a penalty upon a person who is no longer in its service is a nullity. An order, however, passed by the Government with respect to the service term of its servant merely extending his probation does not amount to imposition of penalty within the meaning of the Civil Services (Classification, Control and Appeal) Rules. ILR (1963) Andh Pra 1130 (1135).

(2) It is permissible for an appointing authority to extend the period of probation for the purpose of enabling it (the appointing authority) to decide whether the person appointed to a service, class or category, is fit for the full membership. An order extending the period of probation does not amount to imposing a penalty on the Government servant. In such a circumstance it is not correct to say that either Art. 311 (2) of the Constitution or R. 17 (b) of the Civil Services (Classification, Control and Appeal) Rules has been violated as no charges were framed and no opportunity given to the said servant to defend himself. ILR (1963) Andh Pra 1130 (1137, 1139, 1140) •• 1979 Raj LW 562 : 1980 Lab IC (NOC) 24.

(3) Where the extension of the probation is not one made before the expiry of the first period of probation, Rule 26 of General Rules for State and Subordinate Services does not apply. Hence there can be no question of giving a notice to the employee before passing an order of extension. ILR (1963) Andh Pra 1130 (1137).

(4) Where the rules governing service conditions of probationers do not bar extension of of period of probation from time to time, the appointing authority can do so until it concludes that the probationer has given satisfaction and is fit for confirmation. 1978 Lab IC 232 (233) (Delhi).

(5) An order passed against an employee in Government service to the effect that until he has been declared to have satisfactorily completed his probation, he does not become a full member of the service, and to continue him as a probationer till the date of his retirement cannot be urged to be in the nature of reduction in rank. Such an order is neither a case of dismissal nor removal. The order does not constitute a punishment within the meaning of Article 311 (2). Equally inapplicable is R. 17 (b) of Civil Services (Classification, Control and Appeal) Rules. ILR (1963) Andh Pra 1130 (1139).

(6) Held, on facts that from Rr. 26 and 27 of the Madras State Subordinate Service Rules it cannot be inferred that the appointing authority can, without reference to probation or the tests of qualifications acquired during the probation, declare the suitability of the probationer for the full-membership of the service and thereafter by implication arising out of any deeming clause to have made the probationer occupy the substantive post. Any order of an appointing authority declaring the probationer to have satisfactorily completed the probation when he has not passed the tests, is invalid and also inoperative and has no legal force to enable the probationer to have his promotion of binding nature on the Government so as to render the Government in any way bound by that order of declaration. When, as a qualification for the suitability of a probationer for full membership, the process prescribed under Rule 26 has become imperative the appointing authority cannot ignore a part of the rules and make use of another part. It is impossible to hold that the petitioner had been legally holding the substantive post and that by reason of the impugned order he was reduced in rank, or has been punished in any manner. A 1963 Andh Pra 357 (359, 360, 361, 362) (DB).

(7) Probationer — There is no automatic confirmation after expiry of probationary period. A 1961 All 450 (455, 456) (FB). (A 1959 All 536 and ILR (1959) 1 All 226, Overruled.)

(8) Probationer — Expiry of initial probation period — No order of termination or confirmation passed — Employee continues only as probationer. ILR (1971) Cut 408.

(9) Municipal employee appointed on probation for six months — Probationary period extended — Eventually service terminated — Extension of probationary period held was on probationary basis in absence of contrary rule — Extension did not amount to confirmation in permanent post. 1971 Lab IC 519 (520) (DB) (Cal).

(10) The stopping of increments of a probationer whose period of probation is extended under Rule 28 of the General Rules for State and Subordinate Services cannot be called in question as it is expressly stated in the rule that such a stoppage cannot be treated as a penalty. ILR (1963) Andh Pra 1130 (1140).

(11) Reversion long after completion of probation period without compliance with Article 311 (2) needs to be quashed. It violates Rule 6 of Punjab Consolidation of Holdings State Service Class III (Executive Service) Rules 1962. A 1969 Punj 324 (327, 330) : 1969 Lab IC 1236.

(12) Held on facts that though the appointment to a permanent service on probation can be terminated at any time during the period of probation, after the expiry of the period of one year, the petitioner did not continue as a probationer but became a permanent servant and therefore was entitled to all the protection guaranteed by the Constitution; the orders extending the period of probation and discharging the petitioner were illegal and should be quashed. There was no provision of the Mysore Civil Service Rules (1958), which form the conditions of service of the petitioner, empowering the Government to extend the period of probation; nor did the order of appointment by virtue of which the petitioner held his office enable the Government to extend the period of probation. A 1966 Mys 65 (67, 70, 71) (DB).

(13) Confirmation — Appointment of public servant on one year's probation — Confirming authority empowered to confirm with approval of State Government — Confirming authority issuing orders of confirmation from date of appointment — State Government issuing orders to change confirmation date from date of expiry of probation period — Subsequently confirming authority extending probation period from time

Articles 310 & 311 — Note 112 (contd.)
to time — Public servant, held, confirmed from the date of expiry of probation — Subsequent orders of extension of probation, held, amounted to removal of permanent servant, without proper procedure and hence bad. 1970 Lab IC 1488 (1491) (Punj).

(14) Central Government laid down as a matter of policy that the period of probation should not be more than 4 years and embodied this decision in circular dated 16-3-1973. Officer gets automatic confirmation after the expiry of four years' period. In view of this the order purporting to be passed under Rule 12 of the Indian Police Service (Probation) Rules, 1954 terminating the services of the petitioner after the expiry of probation period is illegal and hence liable to be set at naught. (1978) 2 Serv LR 618 (621) (Guj).

(15) Probationers — Participation in Provident Fund by itself is not indicative of confirmation. 1978 Lab IC 232 (233) (Delhi).

113. Officiating appointments and temporary posts.— (1) Even in the case of a temporary post, where the termination of service or transfer to a lower post is actually resorted to as a measure of punishment, for some misconduct, negligence, inefficiency, etc. the action of the Government would amount to a dismissal of removal from service in the one case and to reduction in rank in the other, so as to attract the application of Article 311. A 1958 SC 36 (49) •• A 1957 SC 886 (887) •• A 1958 All 741 (746) (FB).

[But see A 1972 Him Pra 131 (134, 135).

(2) So far as the precariousness of the appointment is concerned, there is no difference between a substantive appointment to a temporary post and one on an officiating basis to such post. In both cases, the service is terminable at the mere will of the Government, the only difference is that in the case of a substantive appointment there used to be certain advantages with regard to pay and leave. A 1958 SC 36 (42).

(3) The expression 'reduction in rank' is not restricted in its application to cases of persons who are reduced from permanent posts. Officiating employees also may not be punished by reduction in rank without having any opportunity of being heard. ILR (1957) 9 Assam 223 (234) (DB).

(4) Where a petitioner is appointed to a higher post on an officiating basis, then under the general law the implied term of such appointment is that it is terminable at any time on reasonable notice by the Government and, therefore, his reduction does not operate as a forfeiture of any right and cannot be described as reduction in rank by way of punishment. A 1963 All 415 (421).

(5) Where the order of reversion simply says that the petitioner is reverted to his substantive post, there is no stigma attached to the order, and an order of reversion from an officiating appointment does not constitute reduction in rank to attract Article 311 (2), without more, because by an officiating appointment the Government servant acquires no title to the higher appointment. But it may attract Article 311 (2) if it entails penal consequences, in addition to the reversion e. g., stopping his future chances of promotion, loss of seniority in his substantive rank or forfeiture of pay which he has already earned. If the order does not entail any such consequences it would not attract Article 311 (2) even if the motive for reversion is some misconduct or inefficiency or unsatisfactory work of the employee. (1968) 72 CWN 817 (820, 821) •• 1979 Lab IC 869 (876) (Raj).

(6) Reduction in rank — Petitioner temporarily put to officiate in higher grade as a stop gap measure — No right granted to claim in future over seniors and for higher grade unless selected — Reversion to substantive scale without stigma — On the other hand petitioner put in higher scale — Order does not amount to reduction in rank by way of punishment — Article 311 (2) does not apply. A 1971 Pat 18 (20) : 1971 Lab IC 184.

(7) Patwari candidate officiating as such for more than three years in a temporary vacancy as stop-gap arrangement — Reversion without complying with Article 311 (2) — Legal — Not entitled to claim confirmation as he was not appointed against a permanent vacancy. (1972) 74 Punj LR 797.

(8) Where a person, temporarily appointed for a fixed period to officiate in a post, is reverted to a lower rank before the expiry of such period and nothing in the appointment order permits such premature termination, the reversion is illegal. Such employee had acquired a right to hold the post till the expiry of that period and his service cannot be prematurely terminated unless he is guilty of misconduct, negligence, inefficiency or other disqualifications and proceedings under the rules read with Article 311 (2) are taken. A 1969 Orissa 61 (63) : 1969 Lab IC 293 (DB).

(9) Temporary appointment is not different from officiating appointment — Government servant appointed in higher post 'to act until further orders' — Appointment is a temporary one. A 1964 Cal 265 (274, 275, 276).

(10) Mere reversion from a temporary post does not per se amount to reduction in rank. ILR (1966) Cut 503 (525) (DB).

(11) Temporary posts — Reasonable opportunity to show cause against proposed action must be given even to temporary civil servant. (1967) 69 Pun LR 482 (483).

(12) There is nothing in the wording of Article 311 (2) that the protection guaranteed thereunder was to be extended only in case the proposed reduction in rank was permanent. The clause is unqualified, and will apply even when the reduction in rank is temporary. A 1963 Mys 193 (196, 197).

(13) Officiating at higher rank — Reversion to substantive post — Such reversion is not demotion or reduction in rank or penalty — Notion of a person officiating implies with it the term that he has no legal right to that post — Not penal. A 1966 Cal 402 (408) (DB). (A. F. O. O. No. 369 of 1958, D/- 4-5-1965 (Cal), Reversed; A 1954 Nag 229 Held overruled by A 1962 SC 794.)

(14) The appointment, whether substantive or on an officiating basis, to a temporary post will not create any right to the post and the Services of a Government servant so appointed can be terminated at any time at the mere will and pleasure of the Government without alleging or proving any charge against the Government servant. A 1958 SC 36 (42, 49).

Articles 310 & 311 — Note 113 (contd.)

(15) Temporary appointment to higher post — Reversion — Not violative of Art. 16 — Alleged seniority does not confer right to the post. 1974 All India Serv Rep 209 (Punj).

(16) Even in the case of a temporary post where the service has ripened into what is called under the Civil Service Rules, quasi-permanent service, the Government servant cannot be removed arbitrarily from service without being given an opportunity to show cause against such removal. **A 1958 SC 36 (42).**

114. Reversion from officiating post to permanent post not reduction where incapacity is only background or motive and not basis of reversion.— (1) Where the order for reversion is not based on any charges of misconduct, inefficiency, etc., but has only been promoted as a matter of fact by reasons connected with such misconduct, inefficiency, etc., the misconduct, inefficiency, etc., would only constitute the motive behind the Government's order and not its basis and it is only in cases where the misconduct, inefficiency, etc., constitute the basis of the Government's order, it would amount to punishment. **A 1958 SC 36 (49) °° A 1957 SC 892 (894) °° A 1954 SC 369 (375) °° A 1974 SC 423 (430) : 1974 Lab IC 353.**

[But see A 1955 Trav-Co 12 (13, 14) °° A 1952 Orissa 285 (289) (DB).]

(2) Reversion from officiating post to substantive post — Reversion based on adverse remarks and resulting in evil consequences — Reversion held amounted to punishment within Art. 311. 1975 Lab IC 1464 (1467 to 1469) (Orissa).

(3) Officiating Government servant is also entitled to protection of Art. 311 (2) — Reversion from P. E. S. Class I (Officiating Service) to P. E. S. Class II on enquiry conducted not with a view to find suitability of the Government servant but to investigate allegation against him held amounted to reduction in rank within Article 311 (2). **(1971) 2 SCJ 566 : 1971 Lab IC (N) 1 (SC).**

(4) Government servant officiating in higher rank — Reversion to substantive rank pursuant to service rules occasioning no stigma on career — No cause for offence although promotion was to test his suitability to higher rank — Motive of employer has no relevancy if reversion order innocuous — Order not hit by by Art. 311 (2) of Constitution. 1970 Lab IC 957 (958, 959) (Tripura) °° 1977 Lab IC (NOC) 33 (All) °° **A 1974 SC 1317 (1318 to 1320) : 1974 Lab IC 858 °° 1971 Cur LJ 887 (Punj).**

(5) Ad hoc promotion for six months — No extension granted — Not a case of reversion as the incumbent was never appointed on regular basis and had no right to the post. (1973) 75 Pun LR 878.

(6) The reversion from a temporary post held by a person does not per se amount to reduction in rank and so far as the temporary servants, probationers and servants holding posts in officiating capacities are concerned, they stand on a different footing. In case of an appointment to a permanent post in a Government Service on probation or on an officiating basis, the servant so appointed does not acquire any substantive right to the post and consequently cannot complain, any more than a private servant employed on probation or on an officiating basis can do, if his service is terminated at any time. Mere deprivation of higher emoluments as a consequence of reversion cannot amount to the "evil consequences" referred to in the second test in Dhingra's case; they must mean something more than mere deprivation of higher emoluments. That being so, they include for example, "forfeiture of substantive pay, loss of seniority, etc." Reversion from a temporary post held by a person does not per se amount to reduction in rank because the temporary post held by him is not his substantive rank. (1964) 1 Mys LJ 422 (429, 438) (DB) °° 1970 All LJ 78.

(7) Government servant sent on deputation for stipulated period — He has no right to hold that post for all times — Reversion to his substantive post in parent department from higher officiating post before expiry of stipulated period — It is not case of punishment even though the servant lost benefit of appointment to higher rank and necessary loss of some higher pay or allowances or even of promotion. 1969 Lab IC 721 (724) (Cal).

(8) Recall of Government servant from foreign service before expiry of specified period to his parent department in lower rank and with lesser emoluments not prohibited as recall is justified under the Punjab Civil Services Rules. **A 1970 Punj 322 (331) : 1970 Lab IC 1016 (FB) °° A 1971 Punj 113 (131) : 1971 Lab IC 320.**

(9) **Held,** on facts of the case that the impugned order of reversion was not passed by way of punishment and did not amount to reduction in rank so as to attract the provisions of Article 311 (2). A 1967 Punj 139 (143) (DB). (C. W. No. 1506 of 1964, dated 9th September, 1965 (Punj), **Reversed.**) °° 1977 WLN (UC) 190 (Raj).

(10) Where a Government servant holding a substantive appointment in a lower rank is appointed in an officiating capacity to a higher post and then reverted to his lower substantive post in the ordinary course of administration, such reversion will not amount to a punishment and will, therefore, not amount to a reduction in rank within the meaning of Article 311, Clause (2). **A 1958 SC 36 (42)** °° 1958 Jab LJ 187 (199) (DB) °° A 1957 All 70 (72, 73) °° A 1957 Andh Pra 254 (255) (DB) °° A 1957 Assam 143 (144, 145) (DB) °° (1957) 61 Cal WN 849 (854, 855) °° (1957) 2 Mad LJ 515 (516) °° (1966) 1 Lab LJ 879 (882) (Punj). (Reversion without assigning reason — Notify way of punishment.) °° (1964) 1 Mys LJ 422 (433) (DB). (Reversion from temporarily officiating gazetted post to non-gazetted original permanent post.)

[But see A 1952 Orissa 285 (289) (DB) °° 1970 All LJ 530.]

(11) Simple reversion from an officiating post under the terms of appointment does not amount to reversion by way of punishment merely because a report against the affected servant was also taken into consideration while effecting reversion. 1971 Lab IC 905 (906) (All).

(12) Reversion from officiating higher post to substantive post of clerk — Order making no reference to work or conduct of the Government servant — Order not jeopardising his chances of promotion in future or emoluments as a clerk — Order not punitive and does not attract Article 311 (2). A 1971 Punj 312 (314, 315) : 1971 Lab IC 876.

(13) U. P. Police Regulations, Paragraphs 406 (a), 534 and 537 — Head Constable not entitled

Articles 310 & 311 — Note 114 (contd.)
to post of Sub-Inspector according to seniority as of right — Head Constable promoted as Sub-Inspector on probation — Probationer found unsuitable and reverted to substantive post of Head Constable — Reversion alleged to be result of ex parte enquiry by which entry of misconduct was made in probationer's training sheet and integrity certificate was withheld — **Held** subsequent reversion though impelled by prior ex parte enquiry could not amount to reduction in rank as prior enquiry was not conducted to impose any of the three punishments mentioned in Art. 311 — Use of word 'unsuitable' could not also render order of reversion as one by way of punishment. (1966) 2 Lab LJ 75 (80) (All).

(14) When a Government servant has a right to a particular rank, the very reduction from that rank operates as a penalty to attract Article 311 (2), as he then loses the emoluments and privileges of that rank. When he is appointed to a post on officiating basis, he does not acquire any substantive right to that post so that he cannot complain if his service is terminated at any time. Article 311 (2) would not apply where a Government servant had been promoted to a higher post on officiating basis and thereafter reverted to his substantive lower post. The motive or ground behind reversion is immaterial in such cases. Though his future chances of promotion would be indirectly affected by such reversion on account of inefficiency or unsuitability, it is not sufficient to attract Article 311 (2). If however there is anything in the order of reversion which would stand in the way of his earning future promotion by subsequent, display of merit, it is undoubtedly a penal consequence. A 1966 Tripura 8 (11).

(15) Where while reverting the Government servant from his officiating promotional post the record of service up to the date of his initial promotion alone was considered, he had a right to be considered for promotion on every one of the latter occasions, when his juniors were promoted, on the basis of record of service in the officiating post which he held on promotion. 1976 SLWR 490 (493) (Punj).

(16) Reversion from officiating post does not debar the Government servant for further promotion for ever. If his work and conduct has improved during the later period his claim for further promotion could be considered. 1976 SLWR 586 (589) (Punj).

(17) Where a Government servant's service record in his officiating rank has been found to be throughout indifferent and unsatisfactory, his reversion to his substantive post is not as a measure of punishment but only on administrative grounds. Article 311 of the Constitution is not attracted. When a person is given an officiating post to test his suitability to be made permanent in it later, it is an implied term of the officiating appointment that if he is found unsuitable, he will have to go back. In the instant case, the action taken by the authority in reverting him to substantive post is in accordance with such terms. It is in no way a punishment within the meaning of Article 311. The fact that persons junior to him have been promoted to higher ranks while he remained in the same post is not a criterion because it is but a natural consequence of his reversion. 1963 Lab IC 854 (856, 857) (Punj). (A 1965 Punj 491, Disting.) ** (1967) 2 Mad LJ 297 (299). (Reversion on ground of unsuitability — Does not amount to penalty.) ** **A 1977 SC 1617 : 1977 Lab IC 847** ** **(1971) 79 ITR 143 : A 1969 NSC 21** ** A 1970 Orissa 12 (14, 15) : 1970 Lab IC 50.

(18) Reversion of officiating Civil and Sessions Judge to substantive post following his explanation to service record notings — Article 311 or 16 not attracted — Opportunity given to him to explain is not inquiry into charges but it is only for ascertainment of his suitability for the post. A 1971 All 512 (513 to 515) : 1971 All LJ 1059.

(19) Post held on provisional basis — Reversion to substantive post — No reduction in rank — Article not attracted — Confidential report regarding suitability to higher post — Notice of, need not be given — Order of reversion casting no aspersion, could not be attached — (Civil Services). 1969 Cur LJ 58 (65) (Punj).

(20) In case of reversion of a Government servant from an officiating post to substantive post without any stigma on him notice to the servant in pursuance of rules of natural justice is not necessary. 1971 Lab IC 905 (907) (All).

(21) Kerala State and Subordinate Service Rules (1958), Rule 10 (b) (ii) — Petitioner provisionally appointed as Panchayat Executive Officer — Reversion to original post on ground that on verification character and antecedents of Petitioner were found not to be acceptable to Government — Article 311 would not apply as there was no dismissal or reduction in rank within the meaning of Article. A 1965 Ker 149 (150, 151).

(22) Where an impugned order merely states that the Government servant is reverted from his officiating appointment to substantive appointment, it contains no stigma. An order of reversion from an officiating appointment does not constitute reduction in rank to attract Art. 311 (2), without more, because by an "officiating appointment', the Government servant acquires no title to higher appointment. (1968) 72 Cal WN 817 (820) ** (1967) ILR 46 Pat 1288 (1290) (DB). (Reversion even though based on confidential report will not amount to punishment for purposes of Article 311 (2).)

(23) When an order of reversion from an officiating post to a substantive post on grounds of unsuitability does not impute any misconduct and does not visit any additional penal consequences it cannot attract Article 311 even if it is in lieu of departmental proceeding which was not possible in the case. 1973 Lab IC 1085 (1090) (Gauhati).

(24) Indian Administrative Service (Cadre) Rules, Rule 9 — Promotion from substantive post in State Civil Service to cadre posts of senior scale of IAS — Promotion is in officiating capacity — Simple reversion does not attract Article 311. **A 1974 SC 1898 (1899, 1900) : 1974 Lab IC 1277.**

(25) Promotion of government servant on officiating basis — Reversion to substantive post — Article 311 (2) is not attracted. **A 1972 SC 1329 (1331) : 1972 Lab IC 665.**

(26) Promotion Order not mentioning whether appointment is substantive or officiating — Reversion to original post — Rescission of — Re-

Articles 310 & 311 — Note 114 (contd.)
scission order making it clear however that appointment is officiating — Reversion to original post again — Prior opportunity of hearing not given — Plea of violation of Article 311 (2) — Before deciding its maintainability, Court must determine whether initial appointment was substantive or officiating — Guarantee under Article 311 (2) cannot be deprived of by subsequent order explaining that appointment is officiating. **A 1971 SC 1224 (1227).**

(27) Probationer in the post of Tahsildar submitting false travelling allowance bills and not passing departmental examinations — Order reverting him to substantive post after an enquiry — Order not punitive in character, enquiry being merely to ascertain if conditions for determining the probation exist — Enquiry cannot be treated to be one under Rule 55 (3) of Civil Services (Classification, Control and Appeal) Rules, which prescribes procedure for enquiry under Rule 14 of Subordinate Revenue Executive Service (Tahsildar) Rules — Article 311 not infringed. **A 1966 SC 1842 (1845, 1846, 1847).** (A 1963 All 377, Reversed.)

(28) Where the State Government has in the case of a doubtful record of service of a Government servant provisionally or temporarily promoted him to a higher post, it is not precluded from reverting the officer to his substantive post after it has before it, the advice of Public Service Commission in that respect which it considers along with record of service of officer. A 1968 Punj 324 (328) : 1968 Lab IC 980 (DB). (Removal of name from 'may be tried list' for promotion has no effect at all and such an action could not be said to amount to reversion accompanied with penalty.)

(29) Reversion from officiating to substantive post — Petitioner cannot complain — On facts held, there was no violation of Fundamental Rule 113 also. A 1969 Cal 525 (529, 530, 531) : 1969 Lab IC 1334 (DB). (1968) Lab IC 320 (Cal), Reversed.)

(30) Reversion within 5 years on administrative grounds, of an officiating Superintendent of Police to his substantive post does not amount to 'punishment'. **A 1971 SC 1580 (1584) : 1971 Lab IC 956.**

(31) The petitioner who was a lecturer, was appointed by the State Government as acting junior professor on 19th September, 1957. On 23rd August, 1958, she was reverted to her former post as a lecturer : **Held** (i) that the petitioner's appointment was only on a provisional or temporary basis and that it must be deemed to have been made subject to the general order of 27th November 1956, (ii) that the order applied also to appointment by promotion from subordinate service; (iii) that the order applied to appointment made by the State Government and that the petitioner was appointed by the State Government under the Kerala University Act; (iv) that the appointment by selection did not by itself import permanency in the tenure of the service of the candidate chosen; (v) that the appointment having been made provisionally and therefore on officiating basis, the rule in Dhingra's case, A 1958 SC 86, Applied; (vi) that the reversion of the petitioner not being by way of punishment, Article 311 (2) was not attracted; (vii) that the petitioner could not complain that she was being discriminated against. A 1960 Ker 260 (261, 262).

(32) It cannot be said that where an appointment to a higher post is only on an officiating basis, the transfer to a lower post can never be a reduction in rank. There can be a "reduction in rank," even in such cases in certain circumstances. (1955) 59 Cal WN 859 (866) (DB).

(33) Temporary servant in officiating post — Reverted to substantive post being found unsuitable to continue in officiating post — Unsuitability only motive and not foundation of order — Protection of Article 311 (2) not available. 1977 Lab IC (NOC) 46 (DB) (Him Pra) •• 1979 Lab IC 768 (770) (DB) (Pat) •• 1975 Lab IC 1022 (1024) (All) •• ILR (1974) Cut 1397.

(34) The petitioners were Head Constables who were promoted as officiating Assistant Sub-Inspectors of Police without having passed the Intermediate School Course. They were reverted on the ground that intermediate pass Head Constables had become available and the petitioners were being reverted as being untrained.
Held, that the order of reversion of the petitioners could not be quashed because they were holding the posts of Assistant Sub-Inspectors of Police in an officiating capacity and their reversion to their substantive rank was not by way of punishment nor cast any stigma on them. They had no right to the officiating posts and since better qualified persons became available, according to Rule 13.9 of the Police Rules, the order of reversion was legal. **A 1970 Punj 481 (490) : 1970 Lab IC 1397 (FB).**

(35) Reduction in rank — Reversion from officiating higher post to substantive post in parent department on ground of unsuitability is not punishment of reduction in rank. 1971 Lab IC 1267 (1272, 1273) (Delhi).

(36) "Reduction in rank" — Promotion of person in substantive permanent post to officiate on a higher post as a stop-gap local arrangement — Order reverting him to original substantive post is not "reduction in rank". (1975) 1 All LR 302.

(37) Even where an employee had no substantive right to post or rank from which he has been reverted, Article 311 (2) may be attracted if besides, physical degradation or reversion to lower post, order for reduction also visits the Government with penal consequences. A 1966 Tripura 8 (11).

(38) If a Government servant was holding a particular post in his parent department and was sent to another department on deputation, on his reversion from that department to his parent department, he becomes entitled according to Bombay Government Circular dated 31-10-1950, not only to all increments which he would have secured in his parent department but also to the restoration to him of every one of the higher posts which he would have in normal course of events occupied in his parent department had he remained in it, without having been deputed to another. An order placing him on lower position contrary to the circular, was quashed. A 1962 Mys 146 (149, 152) (DB).

(39) Transfer from a specified statutory post to other post cannot be made — Petitioner who was permanently appointed as Registrar of Rent Controller's office under West Bengal Act XII of 1956 by way of promotion cannot be transferred as a Certificate Officer under Bengal Act VIII of 1918 a post with lesser pay, —

Articles 310 & 311 — Note 114 (contd.)
Payment of difference in pay was only to get over the condition presented by R. 24 (1) of W. B. Service Rules. A 1967 Cal 285 (287, 289, 290) (DB).

115. Retrospective reversion.— (1) In the process of fixing seniority, the petitioners who were senior clerks were promoted to the posts of Asstts. but were subsequently reverted to the position of senior clerks. The order of reversion was made to operate retrospectively. As a result of the impugned order, they became liable to refund the difference between the emoluments drawn by them as Assistants and the emoluments to which they would be entitled as senior clerks: Held, that the reversion order entailed penal consequence and amounted to a punishment. The order would not have amounted to penalty if it were to have operated prospectively. If no opportunity, much less a reasonable opportunity was afforded to the petitioners to show cause against the order of reversion that portion of it, which gave effect to it retrospectively, was in conflict with the provisions of Cl. (2) of Art. 311 of the Constitution of India. A 1960 Him Pra 24 (26, 27, 28).

(2) Reduction in rank — May amount to punishment or may be an innocuous thing — Police Sub-Inspector promoted to selection grade — Misconduct in investigation — Reversion with retrospective effect during period of probation — Order amounts to punishment only so far as it was retrospective — Order quashed only to that extent — Punjab Police Rules (1934) (as applied to Himachal Pradesh), Rr. 13, 18, 16, 4. A 1962 Him Pra 35 (37, 38, 39, 40): (1962) 1 Cri LJ 721.

(3) Surveyor and Draftsman-cum-surveyor treated at par in matters of pay scale — No proof that they belong to same class of service and perform exactly same duties — Guarantee of equable treatment under Articles 14 and 16 held not available on ground of being differently treated — Reduction in pay of scale of post of surveyor — But petitioner, a surveyor allowed provisionally to draw pay in higher scale — Subsequent reduction on lower pay with retrospective effect and order for return of overpayment — Order resulted in evil consequences — Article 311 (2) attracted — He could not be reduced in rank otherwise than in compliance with Article 311 (2). 1969 Cur LJ 4 (17).

(4) Provisional promotion of teachers — Subsequent reduction on lower pay with retrospective effect and order for return of overpayment — Held, Article 311 (2) was attracted as the order for return for overpayment was not included in terms of conditions of service it amounted to punishment. A 1966 Punj 46 (48, 49). (A 1963 Cal 563, A 1964 SC 521 and A 1958 Mad 53, Disting.)

(5) Sub-Treasury Officer officiating in post of Superintendent of Survey — Suspension followed by dismissal of officer — Suspension and dismissal set aside by Judicial Commissioner — Reinstatement to post of Superintendent of Survey — Reversion to the post of Sub-Treasury Officer with retrospective effect by same order of reinstatement dated 7-6-1957. Held that the order dated 7th November, 1960 passed by the Chief Commissioner was not illegal. The reversion of the appellant from 7th June, 1957 to his substantive post did not entail forfeiture of his pay or allowances or loss of seniority in his substantive rank or stoppage or postponement of his future chances of promotion. There was no ground for thinking that the order was made maliciously, the reason for reversion being that since 7th June, 1957 another officer approved by U. P. S. C. was occupying the post of the Superintendent of Surveys. A 1970 SC 364 (365, 366).

(6) Decision by Cabinet to abolish post from 28-9-1974 taken on 14-12-1974 — Incumbent, holding the post on probation intimated since 28-9-1974 and relinquishing the post on that date, Incumbent reverted back to his substantive post, Incumbent held entitled to difference in pay from 28-9-1974 to 14-12-1974 calculated according to rules. 1977 Lab IC 759 (Orissa).

116. Abolition of post and reversion to lower rank.— (1) Where the post held by a Government servant is abolished and on such abolition he is appointed to another post of a lower grade or carrying a lower salary or scale of pay, there is no question of his being reduced in rank. A 1957 Pat 555 (559) (DB).

(2) "Dismissal" — Mala fides — Termination of services of permanent employee upon abolition of post held by him — Termination vitiated by mala fides, influenced by extraneous considerations and offended Article 14 of Constitution — It would amount to dismissal from service. 1969 Serv LR 850 (Punj).

(3) Abolition of post — Right of incumbent, cannot be said to be adversely affected — It is neither dismissal nor removal nor reduction in rank — Stray case of accommodation, cannot be basis of equality of treatment in terms of Arts. 14 and 16. 1978 Lab IC (NOC) 187 (Guj).

(4) Affording of opportunity against order of reversion — Not necessary when reversion is due to abolition of temporary post. 1969 Lab IC 1435 (1438) (Punj).

(5) Civil servant — Abolition of post bona fide — Consequential losing of post by civil servant — Not dismissal or removal within the meaning of Art. 311 — Civil servant entitled to similar position in any other department Government considers proper. 1979 Lab IC 1287 (1292); (1979) 1 Cal LJ 200.

(6) Reversion due to abolition of post — Abolition of post made arbitrarily, mala fide or as a mask of some penal action within the meaning of Art. 311 (2) — Such abolition is ineffective and liable to be quashed. 1975 Serv LJ 419 (Delhi).

(7) Abolition of post — Person occupying such post has no right to continue. 1979 Lab IC (NOC) 51 (Kant).

(8) Abolition of post — Incumbent holding post on probation, reverted to his substantive post — Art. 311 (2) is not attracted — Probationer acquired no right to the post, so long as he was not confirmed. 1977 Lab IC 759 (766) (DB) (Orissa).

(9) Petitioners in substantive posts of Vice-Principals appointed temporarily as principals — Reversion on the ground that many posts of principals were being proposed to be abolished — Validity. 1978 Lab IC 1596 (Delhi).

(10) An order of the Chief Minister confirming a public servant does not create any right in favour of the servant concerned when it is not expressed in the name of the

Articles 310 & 311 — Note 116 (contd.)
Governor and is not communicated to the employee. Consequently, the employee cannot challenge his reversion to his substantive post on the basis of such order when the order is subsequently rescinded and the temporary post on which the employee has been appointed is abolished. **1978 Lab IC 1765 (1771), (SC).**

117. Integration of services upon abolition of former Indian States and on reorganisation of States.— (1) Petitioner, the District Welfare Organiser in former Vindhya Pradesh, allowed to continue in the same post in M. P. after reorganisation — Integration list District Welfare Organiser, post in V. P. equated with post of Circle Organiser in M. P. — Petitioner's posting as Circle Organiser in M. P., held did not amount to reduction in rank so as to attract Art. 311 (2) and it was also not by way of punishment. A 1966 Madh Pra 134 (135) (DB).

(2) When one State is absorbed in another whether by accession, conquest, merger or integration, all contracts of service between the prior Government and its servants automatically terminate. Thereafter those who elect to serve in the new State and are taken on by it, serve on such terms and conditions as the new State may choose. This is nothing more than an application of the principle that underlies the law of master and servant, when there is a change of masters. So, on the merger of Manipur State, with the Union territory of India, the service conditions of the employee of the erstwhile State of Manipur prior to the merger came to an end. A 1968 Manipur 58 (61): 1968 Lab IC 1065. (It is also doubtful whether such an employee can take advantage of Article VIII of the Manipur Merger Agreement as he was not a party to the agreement and as the agreement was only between the two high contracting parties viz., the erstwhile Sovereign of Manipur and the new Sovereign State of India. **Held,** however, the Article VIII does not apply to the petitioner as he was not a permanent employee of the erstwhile State of Manipur.) ** 1972 Lab IC 402 (405) (Madh Pra).

(3) Officiating Tahsildars in Pepsu confirmed and provided lien in supernumerary post — Merger of Pepsu State with Punjab — Successor State has power in view of Section 116 (2), States Reorganization Act to deprive them of permanent status — Article 311 (2) not attracted. **A 1964 SC 521 (524, 525, 526).**

(4) The right of the new State to absorb or not to absorb any servant of the previous State cannot be questioned in a municipal Court. Even as a permanent employee of the State he has no rights which he can claim against the new State in a Municipal Court because all such engagements lapse with former sovereignty and it is in the discretion of the new State whether to recognize them or not. If the servant was a permanent employee of the erstwhile State either he had to be absorbed in the permanent post or not at all. It is illegal to convert his claim into one for a temporary post and compel him to qualify for a permanent post by appearing before Union Public Service Commission. Where such a permanent servant continued to be treated as a permanent servant and take his pay as such servant in the new State for several years after integration, he must be taken to have enjoyed the benefits of Art. 311. He could not be removed from service except under its terms. If he is to be removed from service, he is entitled to the benefit of Art. 311. A 1959 Madh Pra 136 (139, 140, 141) (DB).

(5) An appointment to a post on an officiating basis for no fixed period, can give to the servant so appointed no right to that post, and his service in that post can be terminated, unless it has ripened into a quasi-permanent service under the service rules. A reduction in rank by way of punishment only, can attract the operation of Article 311 (2). If a Government servant is appointed to a post on probation, or on officiating basis, the service in that post being liable to be terminated such termination of service does not per se amount to punishment. The real test is to find out whether the order for reduction in rank visits the Government servant with any penal consequence. A mere loss of seniority would not amount to a reduction in rank within Art. 311 (2). Where the petitioner had before his promotion to the higher post on officiating basis, held a higher rank in his substantive post and others had been assigned higher ranks over him on integration of services, as a result of reorganisation of States, it would be too unrealistic to say, that the reduction in his rank in the substantive post itself, is the direct consequence of his termination of service in the post in which he was officiating. A 1960 Ker 231 (232, 233, 234).

(6) Reduction of a servant of a State from a post on which he was previously confirmed is only a test for ascertaining whether he was or was not reduced in rank as a measure of punishment. It is not of universal application. It has to be considered with due regard to facts and circumstances of each case whether reduction in rank was by way of punishment. 1961 MPLJ 579 (585, 586) (DB). (Petitioner erstwhile Gwalior State employee, was fixed as Head clerk in the office of Director of Education of Madhya Bharat during integration in Education Department — On his representation M. B. Government ordered him to be made Office Superintendent — Government reviewed its order and cancelled its previous order and appointed S (whose claim was said to have been overlooked) to the post of Office Superintendent without giving petitioner an opportunity to be heard — **Held** that the petitioner could claim to serve only on such terms and conditions as the new State of Madhya Bharat chose to give him, (as Head clerk by the final order) and that Article 311 (2) was not attracted as there was no reduction in rank by way of punishment.)

(7) Ad hoc promotion of Sub-Inspectors of Police as Circle Inspectors, when they were transferred from Hyderabad State to the new State of Mysore as result of States Reorganisation Act — Reversion, on permanent incumbents coming back — Reversion, whether reduction in rank — As promotion on officiating basis is generally according to seniority, subject to fitness for promotion juniormost person re-

Articles 310 & 311 — Note 117 (contd.)
verted is usually person promoted last. **A 1966 SC 175 (178, 179, 180, 181).**

(8) An officer appointed to a higher post on an officiating basis has no right to continue in that post and can be reverted to his substantive post for administrative reasons. **A 1964 SC 1361 (1365).** (ILR (1961) 11 Raj 260, **Reversed.**)

(9) Person holding certain substantive post in former Indian State — Merger of such State in Orissa — Person must prove that his former substantive post was recognised expressly or impliedly by the new State — Entries in service book were merely a mechanical reproduction of entries prior to merger without sanction of competent authority. A 1962 Orissa 189 (190).

(10) Article 16 of Covenant creating United State of Madhya Bharat — Absorption in the service of the new State — Mere continuation in service from before formation of new State does not amount to such absorption. A 1954 Madh B 54 (57) (DB).

(11) Officer from old regime appointed on temporary basis — His previous service must be deemed as having been terminated and he must be regarded as re-employed. A 1956 All 10 (11).

(12) On the formation of Union of M. B., some officers of the Covenanting States were retrenched and compulsorily retired without being absorbed in the service of the new State in pursuance of the administrative policy — It was held that the provisions of Arts. 14 and 16 were not violated. A 1954 Madh B 177 (181) (DB).

(13) Petitioner in permanent service of integrating State declared surplus to requirement by new Government — Subsequent absorption of petitioner in permanent service on condition that period of discontinuance could be treated as of leave — Petitioner accepting offer — After retirement petitioner claiming salary for period of discontinuance of service — **Held** that Clause (16) of the Covenant of the Covenanting States of Madhya Bharat did not create any legal right amongst the Civil Servants of merged States to claim to be in service in the new State — The order stood as a whole and it could not be dissected so as to enable the petitioner to claim benefit under one part and be relieved from the obligation under the other part. If the order that enabled him to be absorbed in service was subject to certain terms the right claimed could not be claimed independent of those terms. A 1957 Madh B 100 (103) (DB).

(14) A, Assistant Master in High School, appointed to post of Special Officer for Hindi by process of selection — Review of promotions made irregularly on basis of provisional Inter-State Seniority List as superseded by final Inter-State Seniority List — Reversion of A from Class II to Class III post — Reversion is illegal and must be quashed as the new appointment was made on the basis of eligibility and qualifications prescribed by State Government when it created that special post and not upon the rank which A held in antecedent post. (1969) 1 Mys LJ 169 (172) (DB).

(15) Government servant in M. P., on Reorganization of States, allotted to Bombay and then to Maharashtra — Applicability of rules. **A 1977 SC 505 : 1977 Lab IC 230.** (S. C. A. No. 1251 of 1970, D/- 19-6-1974 (Bom), **Reversed.**)

(16) Administrative order under Sec. 83 Punjab Reorganisation Act (1966) — Reversion of Government servants concerned — — They became effective as soon as they were sent out, no matter when the Government servants actually received them. **A 1977 SC 629 (635, 636) : 1977 Lab IC 281.**

117-A. Promotion.— (1) No incumbent has a right to promotion, and promotion, as such, is not justiciable being a matter entirely within the discretion of the prescribed administrative superior. The combined effect of the provisions of Articles 14 and 16 of the Constitution is that employees under Government are entitled to equality of treatment both at the time of recruitment and at all material stages during the continuance of their service. Non-consideration of the claim of an employee, otherwise qualified for consideration, vitiates the exercise of jurisdiction in the matter, and subjects the action of the appropriate authority in the matter of grant of promotion to the scrutiny of the Court. A 1970 Orissa 19 (20, 21).

(2) Government servant has right not of promotion but to be considered for promotion — Principle governing promotion is seniority cum merit. 1970 Lab IC 160 (163) (Orissa) ** 1971 Lab IC 937 (938) (Mys).

(3) Right of promotion in a cadre — Express creation of separate cadre is essential. A 1970 Pat 25.

(4) Promotion by authority not competent — Ratification subsequently by competent authority — Held that there could be no valid ratification — Even if an order purporting to ratify such order is passed it will take effect as an independent order only from the date it is passed and not from the date of earlier order. 1978 Lab IC 920 (922) (DB) (Ker).

(5) Promotion — Determination of eligible candidates — Qualifications of a candidate on the date when vacancy is filled by promotion and not when it occurred is to be considered. A 1971 Mys 26 : 1971 Lab IC 171.

(6) Promotion according to seniority is normal rule — Promotion as Grade One clerks — Reservation of some vacancies for graduate clerks — Availability of vacancies under both graduate and non-graduate quotas in that cadre — Promotion and confirmation of junior graduate clerk before senior non-graduate clerks is irregular. 1970 Lab IC 1467 (1469) (DB) (Mys).

(7) Whenever promotion is made on basis of seniority subject to rejection of unfit, the senior person has a right of promotion in a mechanical manner unless he is declared unfit for promotion. On the other hand, in the case of promotion on merit, efficiency and suitability plays the vital part. The adverse entries, if any would certainly affect chances of promotion if promotion is made on basis of merit, but the same do not affect the chances of promotion if promotion is made on basis of seniority subject to rejection of the unfit. 1976 Lab IC 1533 (1535) (All) ** ILR (1977) 1 Ker 650.

Articles 310 & 311 — Note 117-A (contd.)

(8) When promotion is to be made on the basis of Positive Merit, it would be extremely untenable to say that merely because an officer has been allowed to cross the efficiency bar, all adverse entries up to that stage are wholly washed out and cannot be taken into consideration for the purposes of promotion. Clearance of the efficiency bar in a certain Pay-scale is not necessarily a qualification for promotion as the criterion for promotion is entirely different. 1978 Lab IC 1703 (1707) : 1978 Mah LJ 631 ** 1978 Lab IC 658 : A 1980 NOC 116 (FB) (Orissa) ** 1978 Lab IC 764 (767, 768) (DB) (Punj).

(9) Adverse remarks in confidential rolls — Employee subsequently promoted — Remarks are deemed condoned and not to be considered during further promotion. (1977) 4 Cal HC (N) 878: 1978 Lab IC (NOC) 6 (Cal).

(10) Promotion — Confidential reports of officers — Taking note of adverse remarks not communicated to incumbent cannot be taken note of. 1978 Lab IC (NOC) 169 (Ker). (1974 Lab IC 1192 (Orissa) (FB), **Dissented from.**)

(11) Opportunity of hearing — Employee not communicated about adverse remarks within period prescribed by Rules — Remarks not to be considered during further promotion. (1977) 4 Cal HC (N) 878: 1978 Lab IC (NOC) 6 (Cal).

(12) Adverse remarks — Promotions — Adverse report in confidential roll cannot be acted upon to deny promotional opportunities unless it is communicated — Non-consideration of explanation offered by servant — Non-issuance of integrity certificate, held, could not be upheld. **A 1979 SC 1622 (1626) : 1979 Lab IC 1186.**

(13) Promotion to selection post on basis of merit and ability — Previous punishment of withholding increment is a relevant factor to be taken into account in assessing the merit and ability of the person concerned. 1978 Lab IC 81 (83) (DB) (Ker).

(14) Suitability for promotion — Entirely for the Government to decide on the basis of record — Where this is done the selection is not illegal. 1973 All Serv LJ 619 (Delhi). ** 1980 Lab IC 556 (557) (Goa).

(15) Confidential report — **Held** on interpretation of relevant rule, that Promotion Committee could consider confidential reports of more than previous three years. 1978 Lab IC (NOC) 126: (1978) 1 Serv LR 593 (Kant).

(16) Promotion of Additional Commissioners of Income-tax as Commissioner of Income-tax — Departmental Promotion Committee's assessment regarding merit of each eligible officer by considering service record — Court cannot sit in judgment over the assessment. (1975) 1 Lab LJ 376: 1974 Lab IC 1059 (1066) (Delhi).

(17) C. C. R. of concerned Government servant in Orissa Industries Service, incomplete — Absence of rule — Main criteria for judging suitability for promotion are merit, seniority, competence, qualifications and experience of eligible candidates at relevant time — Public Service Commission considering suitability on basis of incomplete C. C. R. — State Government directed to reconsider case of promotion of aforesaid Government servant. (1975) 41 Cut LT 1373: 1976 All Ser R 132 (DB).

(18) Where the views of the Public Service Commission were affected by the existence of the adverse remarks in the C. C. R. and the concerned Government servant had been prejudiced because of the non-communication of the adverse entries against him, there being contraventions of administrative instructions in the relevant Book Circulars, such adverse entries ought not to be used or relied upon and should be ignored while considering his case for promotion. ILR 1975 Cut 1589: (1975) 41 Cut LT 1348 (DB).

(19) Employee under suspension — Right to be considered for promotion revives when proceedings against him are dropped. 1977 Lab IC 1337 (1338) (Mad).

(20) Once an enquiry was conducted and it was found that the claim of the candidate (claim of belonging to a particular Caste in this case) was genuine it cannot be reopened again at the time of promotion to the next higher grade. (1979) 2 Serv LR 370 (375) (AP).

(21) Promotion of police inspectors as Deputy Superintendents of Police — Punjab Police Service Rules (1959) Rr. 6 (1) (i) proviso (a) and 14 — In the years 1963 and 65 the government relaxed R. 6 and thereby reduced the requirement to four years of continuous service, in view of this relaxation police inspectors appointed in year 1963 were promoted to the post of Deputy Superintendent of Police, an executive order to this effect was made under Rule 14 in the year 1965. In the year 1969 the Government substituted a new Rule 14 which provided for relaxation of Rule 6, **Held,** that the promotion of the police inspectors was illegal because of the fact that the provisions of Rule 6 as they stood at the time of promotion did not provide for relaxation. It was further held that Rule 14 which authorised relaxation will be of no avail as it was substituted for the first time in the year 1969. **A 1979 SC 1034 (1037).**

(22) Orissa Subordinate Education Service — Promotions of members on ad hoc basis in defiance of Recruitment Rules of 1972 — Promotions are illegal — Appointments cannot be regularised by Regularisation Rules of 1978. 1980 Lab IC 534 (537, 538) (DB) (Orissa).

(23) Punjab Food Supplies Department (State Service Class III) Rules (1968), R. 11 — An employee promoted as Assistant subject to his passing Assistant Grade Examination — Subsequently 1968 rules coming into force — Condition as to passing examination does not become infructuous — His promotion as Deputy Superintendent and further as Superintendent without passing the examination in preference to one who has already passed, is invalid. 1980 Lab IC 674 (676) (Punj).

(24) Promotion of employee on basis of merit — Service Rules providing for promotion on seniority-cum-merit basis — Promotion is illegal — Subsequent reversion, to original post held, justified. 1978 Lab IC 1529 (1530) (Raj).

Articles 310 & 311 — Note 117-A (contd.)

(25) Promotion to Selection Post — Selection should be on merit and not by seniority alone. 1977 Lab IC 1151 (1154) (DB) (Orissa) ** 1974 Lab IC 1059 (1067, 1068) (Delhi).

(26) Reporter Inspectors held, eligible for promotion as Deputy Superintendent of Police — In absence of any rule, prohibiting such promotion, government entitled to determine, out of which field promotions may be made. (1973) 2 Serv LR 547 (Orissa). ** 1978 Lab IC 753 (757) (DB) (Orissa).

(27) Promotion to posts of Regional Transport Officers — Asst. R. T. O's to be promoted under Government Orders — Rules absent — Members of U. P. Civil Service (Executive) appointed as R. T. O's pending Cabinet decision to that effect — Appointment held illegal and also violative of Article 16. 1979 Lab IC 603 (606, 607) (DB) (All).

(28) Panel for promotion prepared by Departmental Promotion Committee — Appointing authority has a right to scrap the panel. **1975 Lab IC 1624 (FB) (Delhi).**

(29) Proceedings of Departmental Promotion Committee cannot be considered to have been vitiated because of something that may or may not be done by the committee in future. (1975) 1 Lab LJ 376 : 1974 Lab IC 1059 (1068) (Delhi).

(30) Recruitment to posts of Superintendent of Excise — Erroneous gradation list resulting in loss of seniority affecting petitioner's chances of promotion to next higher rank — Amounts to denial of equality of opportunity under Art. 16 (1). ILR (1972) 51 Pat 781 (804) (DB).

(31) For preparation of select list of suitable officers under Regulation 5 of the Indian Administrative Service (Appointment by Promotion) Regulations, it is only the record of the State service and not an adverse entry against the officer, has to be taken into consideration. 1977 SLWR 57 (Punj).

(32) Government of Orissa Home Department resolution No. 11589-A dated 8th December, 1957 R. A. B. C. D. appointment of 'T' as lower division assistant — Promotion of 'P' to higher post earlier than 'T' though appointed subsequently on that post — Preparation of gradation list — 'P' shown as senior to 'T' on basis of his earlier promotion — Gradation list, held, was prepared contrary to rule — Subsequent promotion of P on basis of gradation list held invalid. 35 Cut LT 1223 : 1970 Lab IC 160.

(33) Preparation of list of suitable officers for promotion — Select list prepared in 1973 challenged in 1977 on ground that juniors were included over-looking claim of petitioner — Petition liable to be dismissed because of inordinate delay. 1978 Lab IC 1212 (1218) (Andh Pra).

(34) Orissa Ministerial Service Method of Recruitment and Conditions of Service of Clerks and Assistants in the District Office and Offices of the Head of the Departments Rules (1963) Rule 21 (i) (d) — Promotion — Requirement — Two years Continuous service — Not necessary that one should have worked as junior Head Assistant. A 1970 Orissa 19 (20, 21).

(35) G. O. dated 8-3-66 of Kerala Government — Promotion to post of Professor in Engineering College — Teaching experience — Time spent for acquiring doctorate degree before passing of G. O. — **Held** cannot be included in computing teaching experience. 1980 Lab IC 443 (445, 446) (DB) (Ker).

(36) Private College taken over by Government — Service in the college before takeover cannot be obliterated — Promotion as readers — Requirement that the candidate must be drawing certain amount of salary on specified date, held discriminatory. **A 1977 SC 1237 (1241): 1977 Lab IC 558.**

(37) Supersession in the matter of promotion — Appeal Court holding it to be unjust — Government servant entitled to all ancillary benefits flowing from such redressal — Government Notification cannot deprive him of the right. (1969) 17 Law Rep 650 (651): (1969) 1 Mys LJ 197 (DB).

(38) Where the petitioner claiming promotion on the basis of seniority retired during pendency of the petition it was held that in spite of his retirement the petitioner would be entitled to his emoluments including the higher salary and consequential benefits and advantages in relation to his pension etc. following from that, as if he had been promoted to the post when his junior, superseding him was promoted. 1976 BBCJ 639 (640) (Pat).

(39) Promotion depends not merely on seniority but on the merit and the performance of each one of the Government servant. When a Govt. servant was under suspension, or removed or dismissed from service he cannot on his reinstatement claim salary of the promotional post merely because his junior was promoted during the intervening period. 1978 Mah LJ 339 (344) (DB).

(40) Appointment of teacher as in-charge Principal of the educational institution does not amount to promotion much less an officiating promotion and does not prejudicially affect others. 1978 Lab IC 1034 (1038) (Kant).

(41) Order appointing probationer to service after successful compeletion of period of probation — Order cannot be termed as one of promotion. 1970 Lab IC 893 (J & K).

(42) No right could be based or founded upon this officiation which was clearly understood by all concerned to be subject to equities being set right in final analysis 1979 Lab IC (NOC) 4 (Guj).

(42A) Where Departmental Promotion Committee (DPC) procedure is followed the appointments and promotions cannot said to be ad hoc appointments and promotions Even if both the expressions "ad hoc" and "temporary" were used in an order the nature of promotion is not changed. In the circumstances the promotions of the petitioner were not ad hoc and they could not be reverted to the substantive posts. 1978 Lab IC (NOC) 176: (1978) 2 Andh WR 175.

(43) Promotion on ad hoc basis — Government ordering demotion of officer promoted on ad hoc basis — Government not performing quasi judicial function — Speaking order not necessary. 1974 Serv LWR 825 (Punj).

Articles 310 & 311 — Note 117-A (contd.)

(44) Transfer of Government servant to the University — Principle of last come first go is a principle of prudence and equity but not a principle having any statutory force. Therefore, if this principle is not rigidly followed on account of some special circumstances it would not result in any illegality. 1978 Lab IC 1294 (1311) (DB) (Him Pra)

(45) Indian Railways Establishment Code Vol. I. R. 1707 — Ministry of Home Affairs Circular dated 31-8-60 — Railway Boards Circulars dt. 26-6-1970 and 3-11-1977 — Cumulative effect of these circulars — Postponement of promotion under circulars is not contravention of Rule 1707 — Postponement of promotion of empanelled employee pending criminal proceedings against him — Employer not having complete control over delayed criminal proceedings — No infringement of employee's legal rights. 1980 Lab IC 456 (463, 465) (Bom).

(46) Promotion of substantive U. D. C. as temporary Head Clerk on probation — Suspension of promotion or reversion — Opportunity of being heard — Not necessary. **1975 Lab IC 1624 (1630 to 1632) (Delhi) (FB).**

(47) Promotion from Junior Branch to Senior Branch of Bihar Finance Service — Hardship rule — Relaxation made in favour of Scheduled Castes and Tribes allowing them to pass requisite departmental examination within two years of promotion — No illegality — Government is competent to relax rules in favour of Schedule Castes and Tribes — Relaxation did not amount to modification of Statutory Rules by Executive Instructions. 1979 Lab IC (NOC) 128 : 1979 (3) Serv LR 389 (DB) (Pat).

(48) No obligation on Government that vacancy must be filled immediately as soon as it occurs — Government relaxing certain rule in favour of Scheduled Tribes and Castes — Relaxation can be made applicable while filling vacancies which occurred prior to issue of relaxation — No question of relaxation operating retrospectively. 1979 Lab IC (NOC) 128 : 1979 (3) Serv LR 389 (DB) (Pat).

(49) Reservation for Backward classes for promotion — Punjab Government Circular D/- 20-4-1963 — Conditions laid down in Circular would not apply to those classes which had already been declared as Backward and by laying down the condition an additional guideline has been provided entitling those persons who satisfy the conditions to take the benefit of the privileges which have already been declared as Backward. 1975 Cur LJ 399 : 77 Pun LR 553 (DB).

(50) Promotion to junior post — Junior persons holding requisite qualifications preferred to senior one — No illegality — Cannot be said that senior one is superseded. 1979 Lab IC (NOC) 141 (Cal) : (1980) 1 Serv LR 81.

(51) Supersession of petitioner not supported by reasons — **Held,** though reasons should be given, absence of reasons by itself not sufficient to strike down promotion. 1979 Lab IC (NOC) 131 : (1979) 48 Cut LT 232 (DB) (Orissa).

(52) Transfer of Government servant — Circular directing that servants who refuse to proceed on transfer out of their station should be debarred for promotion for at least three years — Promotion refused by servant to avoid transfer outside — Refusal does not act as bar against fresh order of transfer — Refusing transfer on promotion does not give Government servant indefeasible right of not being transferred. (1975) 2 Serv LR 4 (Delhi).

(53) Indian Police Service (Appointment by Promotion) Regulations (1955), Regulation 5 (3) — Promotion to Indian Police Service — Selection of State Police Officers — Eligible Deputy Superintendents of Police — Age above 52 years — Not entitled as of right to be considered for selection. 1979 Lab IC 894 (898, 899) (DB) (Ker).

(54) Government Servant in U. P. sent on deputation to Andaman Nicobor Administration — Steps taken for absorption there — Absorption not approved by Union Government — Reversion to parent department in U. P. — Legality — Representation by Administration conveying impression of absorption — No estoppel against the administration — Union Government's non-approval based on no reasons — Illegal. ILR (1974) 2 Cal 84.

(55) Promotion of employee with instruction that his work be observed for six months — His reversion before expiry of that period is illegal. 1969 Cur LJ 146 (Punj).

(56) Order of Punjab Government making reservation for Scheduled Castes and Backward Classes and reserving first vacancy for them — Promotion of official of Scheduled Caste in pursuance thereto — Provision in order making reservation as to first vacancy struck down by High Court — Reversion of that official — **Held** on facts that reversion was valid as decision of High Court was binding on State Government — Such official was not entitled to claim hearing in that respect and could not challenge invalidity of order of reversion for want of hearing. A 1971 Punj 284 (287).

(57) Transfer on deputation to higher post to another department within the administration — Not promotion — Transferee, in terms of order, can subsequently be repatriated to parent department. 1977 Lab IC 1988 (1991) (Delhi).

(56) Seniority and promotion — Seniority amongst persons determined according to date of joining service — Promotion of junior on ground that he was science graduate in science faculty must not be contended but also established — Else promotion of junior cannot be justified. ILR (1975) Cut 651 (656, 657) (DB).

(57) Promotion of Government servant through mistake in interpreting Service Rules — Rectification of, by reviewing earlier decision — Consequent reversion involving neither punishment nor stigma — Rectification order is executive — Cannot be challenged in Court. ILR (1970) 2 Punj 673 (DB).

(58) Employee reverted after due enquiry — On appeal department gave him chance and he was repromoted — Department

Articles 310 & 311 — Note 117-A (contd.) later confirmed him from date earlier to his repromotion — As confirmation could only be from date of repromotion, his reconfirmation from earlier date, held was correct. 1977 Serv LJ 396 (Raj) : 1977 WLN (UC) 87 (DB).

(59) Where orders for promotion and for giving selection grade to the employee were passed by the appointing authority by mistake without noticing his whole service record, it is always open to the Appointing Authority to rectify the orders after giving the employee an opportunity of hearing. (1979) 2 Serv LR 405 (407, 408) (Punj).

118. Cancellation of promotion.— (1) Where a Government servant holding a lower post is promoted to a higher post but thereafter, such promotion is cancelled for some reason by order of the higher authorities whereupon the Government servant is reverted to his original post, there is no question of reduction in rank. A 1957 All 152 (153) (DB) ** A 1955 All 528 (530, 531) ** A 1955 Cal 385 (391) (DB) ** 1979 Lab IC 420 (Ker).

(2) Reduction in rank — Government has power to reduce a civil servant who was previously promoted to higher rank. A 1960 Him Pra 24 (27) ** A 1963 Mys 109 (110, 111) (DB). (Revocation of the order of promotion on the ground that it was passed through mistake does not amount to reduction in rank so as to attract the provisions of Art. 311.)

(3) Natural justice — Violation of — Member of Police Service — Inclusion of name in list F which is a prelude to promotion — Delisting the name or cancellation of promotion — Petitioner must be heard. 1977 Lab IC (NOC) 27 (Delhi).

(4) Order of promotion issued through mistake — Promotion not permitted under rules — Correction of mistake by issuing cancellation of promotion order — No opportunity of being heard given to the Promotee — No violation of Article 311 (2) of the Constitution. 1973 Serv LJ 791 (Delhi).

(5) It is no point of law that because the Railway Administration made an error in promoting the petitioner, the Administrator must always be anchored to their error and must not be permitted to correct the same. The erroneous promotion does not invest the petitioner with a right to continue in the promoted post. His reversion, therefore, to his substantive rank does not amount to a reduction in rank as contemplated in Article 311 (2) of the Constitution. (1966) 12 Fac LR 53 (54) (Cal).

(6) Where another person's promotion need be set aside before making an order for promotion, rules of natural justice require that the authority must hear the person before making on order adverse to him, particularly when done on the theory that he was unworthily promoted. (1966) 12 Fac LR 264 (271) (Cal).

(7) Government servant promoted to permanent post on substantive basis — Reversion without following procedure in Section 126 of J. and K Constitution, illegal. A 1966 J and K 24 (26) (DB).

(8) Constitution of India (1950) Art. 311 (2) — Where a Government servant is given a chance to officiate on a post on a trial basis it is implicit in the promotion awarded to him that he would be reverted on account of unsatisfactory performance Since he has no right to the post, he cannot complain on reversion to substantive post that he has been deprived of a position to which he was legally entitled — The order of reversion was not by way of punishment and it did not amount to reduction in rank. ILR (1967) 2 All 240 (242, 245) (DB).

(9) Promoted officer cannot be reverted on the ground that he did not pass the departmental examination, when no departmental examination was specifically prescribed under Service Rules. (1966) 2 Mys LJ 129 (130, 131) (DB).

(10) Reduction in rank — A, Assistant Master in High School appointed to post of Special Officer for Hindi by process of selection — Review of promotions made irregularly on basis of provisional Inter-State Seniority List as superseded by final Inter-State Seniority List — Reversion of A from Class II to Class III post — Reversion is illegal and must be quashed. A 1969 Mys 306 (308) : 1969 Lab IC 1219 (DB).

(11) Departmental promotion — Revision of original select list by dropping petitioner's name — Applicability of principles of natural justice attracted since as a result of the proposed action the person, whose name is sought to be deleted from the list wherein it was originally included, will undoubtedly be visited with serious adverse civil consequences. Further, when any adjudication regarding the inter se seniority as between two Government servants is conducted pursuant to the representation made by one of them, a final decision should be taken in the matter only after affording a hearing to the party whose seniority is being challenged. 1975 Ker LT 682.

(12) Cadre officer in junior scale of pay promoted to officiate in senior scale — Subsequent reversion to substantive post — Juniors allowed to continue to officiate in senior scale — Action taken is by way of penalty because it not only amounts to reduction in rank but also to a withholding of promotion to which he is entitled under the Rules depending on availability of posts and seniority. **A 1968 SC 754 (759).**

[**But see** (1972) 1 Andh WR 370. (Persons junior in service but promoted earlier in view of their acquiring requisite qualifications at the time of promotion cannot be reverted to make room for seniors who had subsequently acquired the necessary qualifications but who were quite properly passed over at the earlier stage.)]

(13) Promotion of appellant to Class I post on ad hoc basis — Reversion to Class II as his service record in Class II post did not justify promotion — His service record in Class I post must be considered when his juniors are promoted to Class I post on ad hoc basis.

Articles 310 & 311 — Note 118 (contd.)

If, on the basis of the subsequent record of his service, the appellant was entitled to be promoted to Class I post in preference to any one of his juniors, there was no justification for the order reverting him to Class II service. **A 1975 SC 1915 (1916).**

(14) Petitioner Police Inspector of former Coorg State and promoted as Deputy Superintendent of Police by new Mysore State Government subsequently reverted as Police Inspector — Petitioner being over 52 years of age stated as ground for reversion — Police Service Rule imposing age restriction of 52 years for promotion as Deputy Superintendent of Police relied upon — Prior approval of Central Government before promulgation of Rule, not obtained — Proviso to sub-section (7) of Section 115, States Reorganisation Act (1956) held attracted — Rule held invalid for want of prior approval of Central Government — Order reverting petitioner as Police Inspector set aside. A 1965 Mys 19 (25).

(15) Temporary promotion — Order reciting reversion of petitioner at any time without notice — Refixation of provisional seniority resulting in cancellation of promotion order, before the petitioner joined the post — Petitioner cannot complain cancellation of his promotion. (1973) 2 Serv LR 706 (Andh Pra).

(16) Fixation of seniority and pay — Authorities realising that fixation of seniority and pay of petitioner was made on patently wrong interpretation of Rules — Authorities cancelling fixation of pay and seniority after fifteen years without giving opportunity to petitioner of being heard — Cancellation order being against principles of natural justice was quashed. 1974 All Serv LJ 610 (Delhi).

119. Refusal to promote.— (1) Promotion — Cannot be claimed as of right — Decision not to promote does not amount to imposing penalty. A 1969 All 213 (214): 1969 Lab IC 518 ** 1970 Lab IC 160 (163) (DB) (Orissa).

(1-A) Question of demotion can arise only in case of promotion to a permanent post without any time limit. Hence when promotion had been only to officiate in short term vacancies followed by reversion refusal to promote is no demotion and therefore Art. 311 or Rule 14, Central Civil Services (Classification, Control and Appeal) Rules, will not be attracted. A 1971 Pat 221 (222).

(2) Reversion from officiating post — Juniors allowed to continue on promotional posts — Reversion not in ordinary course of administrative convenience, amounts to infliction of punishment — Petitioner entitled to protection. (1973) 2 Serv LR 160 (J and K).

(3) Among the well-known attributes of public service, one that is least subject to exception is that no employee can claim as of right a promotion from one position to another unless he could do so under a statutory provision or an enforceable condition of service; a variety of considerations govern the promotion of an employee, none of which alone can render an employee suitable for promotion; ordinarily, it is for the State or the promoting authority to determine such suitability after an assessment of all relevant considerations, such as seniority, competence, rectitude, and antecedent official records, none of which is less important than the other, for the preservation of purity and efficiency in public service; the basic or governing consideration in all promotions is what may be shortly described as merit or suitability; seniority is in substance one of the elements in the assessment of merit. (1963) 2 Mys LJ 248 (249) (DB) ** (1964) 1 Mys LJ 226 (228, 229).

(4) Refusal to select a person for a particular post though resulting in loss of some place in seniority is not reduction in rank. A 1964 All 356 (358).

(5) Promotion is in the discretion of the competent authority, and no Government servant can say that he has a legal right to be promoted. Hence no legal action would lie to enforce an alleged right that he is entitled to be promoted. The remedy of the Government servant aggrieved in such a case lies only by way of appeal to the superior authorities. A 1958 Manipur 35 (37). (Promotion from one grade to a higher grade is not to be made only on the basis of seniority but is to be made primarily on the basis of merit and efficiency, although seniority is also a factor to be taken into consideration.) ** A 1961 All 315 (316) (DB).

(6) Keeping in abeyance promotion due — It is an exercise of executive power — It must be exercised fairly, reasonably and in public interest. 1970 Lab IC 945 (Mys). ** (1972) 2 SCJ 62: 1971 Lab IC (N) 2 (SC). (A 1969 Delhi 15, Affirmed.)

(7) In a selection post a person cannot claim to be promoted merely on the ground of seniority. It is only when definitely a finding is arrived at by the authority that the work of the senior is not efficient and another person is found more suitable, that a junior would be entitled to be appointed in preference to the senior. That is a matter which would not be justiciable in a writ petition. A 1961 All 316 (319, 320).

(8) Right of promotion in a cadre — Creation of separate cadre is essential. A 1970 Pat 25 (Pr. 32): 1970 Lab IC 53 (DB).

(9) Refusal to promote on ground of inefficiency — Does not amount to discrimination. A 1958 J and K 43 (45).

(10) Refusal to give promotion — Not tantamount to reduction in rank. (1972) 76 Cal WN 581.

(11) Promotion — Petitioner considered for promotion and found unfit — Held not entitled to any remedy. 1978 Lab IC (NOC) 171 (DB) (Madh-Pra).

(12) A mere non-promotion of a Government servant after consideration of his case for promotion does not amount to punishment. (1964) 1 Mys LJ 226 (230) (DB).

(13) Non-selection to post in selection grade is not removal or reduction in rank. A 1970 Delhi 1 (5): 1970 Lab IC 31.

(14) It is the fundamental right of every public servant to seek higher promotion if he is eligible therefor and to obstruct his path of promotion amounts to infringement of his fundamental right under Article 16. Promotion of employee by order of Chief Minister with instructions that his work be observed for six months — His reversion

Articles 310 & 311 — Note 119 (contd.)
before expiry of that period is illegal — Amounts to deprival of his right to promotion. (1969) 71 Pun LR 439 (446).

(15) Civil Servant — Promotion — Overlooking of claim — Mala fides — Employees junior to petitioner promoted overlooking petitioner's claim — Direction of Chief Minister to promote him retrospectively not followed — No adverse remarks passed against petitioner as spelled out in impugned order — Petitioner getting annual increments regularly — Commendation certificates (about 60) and cash rewards received — **Held**, impugned order declaring petitioner as unfit for promotion was mala fide. 1977 Lab IC (NOC) 117 (J and K).

(16) Promotions in Government service — Seniority by itself does not confer an absolute right to promotion — Decision of the Government as to suitability for promotion is final — Superseding senior member without more does not amount to 'reduction in rank' — No discrimination is practised by promoting a member lower in seniority order over his superior — Idea of selection not ruled out in considering equality of opportunity — Superseding a senior member of the services is not 'reduction in rank' of the senior member. (1963) 2 Mys LJ 248 (250) (DB).

(17) Promotion given by process of selection — Review of promotion made irregularly and promotee reverted — Reversion must be quashed. A 1969 Mys 306 (308) (DB).

(18) Promotion — Two cadres of Railway Ticket Collectors with different grades — Revision of pay scales equalising pay of certain posts — Does not amount to promotion. 1977 SLJ 245 (250) (Raj).

(19) Non-promotion of petitioner on the ground of unsuitability and promoting another who is junior cannot be viewed as reduction in rank of the petitioner or as a punishment imposed on him. (1964) 1 Mys LJ 226 (229) (DB).

(20) Petitioner refused promotion on two occasions — Authorities passing an order that he should not be offered any promotion for two years — **Held** the refusal of promotion if he was allowed the option to refuse it could not justify proscription for future promotion. If by reason of seniority he became entitled to promotion he could not be set aside on the ground of earlier refusal. (1966) 2 Mys LJ 187 (188) (DB).

(21) The authorities while considering the question of suitability for promotion and taking a decision thereon were not acting judicially and an opportunity to put forward explanation by concerned employees need not be given. (1964) 1 Mys LJ 226 (229) (DB).

(23) When the withholding of the promotion was not by way of punishment Article 311 is not attracted. Even assuming that the doctrine of pleasure of the Governor reiterated in Art. 310 relates only to tenure of office and not to the other conditions of service and there may be a justiciable right independent of Article 311 where there is a contravention of a statutory rule dealing not with the tenure of office but with the other conditions of service, it cannot be held that there was any contravention of any rule relating to conditions of service, in not promoting a government servant, where the very conditons of service under which he was holding his post clearly laid down that promotion can be made only on the basis of merit and not on the ground of seniority alone and he was fully aware of it. ILR (1962) Cut 243 (245, 246) (DB).

(23) Promotion of teacher of private school receiving grant-in-aid from Government is within power and discretion of superior authority and is not justiciable unless it is decided in contravention of provisions of some specific rules — Where there are no rules, promotion cannot automatically go by seniority — Merit, general suitability etc. are some of the matters which have to be taken into account — Promoting authority only is the judge of it. A 1959 Manipur 1 (7).

(24) Person serving as Teacher in Government High School qualified and eligible for award of Selection Grade — Govt. cannot refuse to consider his case for grant of selection grade. (1971) 2 Serv LR 2 (Delhi).

(25) Reduction means demotion, that is, putting an employee in a Lower Grade or post or on a lower scale of pay. It may even include a case where an employee is reduced to a lower stage of pay in the same scale, but by no stretch of imagination it is possible to conceive that when a man has not been allowed to go up by way of promotion as he was not found fit for the higher post there was a reduction in his rank. A 1958 Manipur 35 (37).

(26) Employee allowed to cross efficiency bar — Adverse character roll can be taken into consideration for negativing claim of promotion. **1974 Lab IC 1192 (1207) (FB) (Orissa).**

(27) Order withholding promotion indefinitely passed and served on the Civil Servant after he was actually promoted but before he could join his new post — There being no adverse circumstances against the Civil Servant between the date of promotion and the passing of impugned order, the impugned order, held, amounted to a penalty, cast a stigma and was liable to be quashed. 1973 Serv LC 50 (Delhi).

(28) Petitioner working as Inspector (Selection Grade) in the Central Excise Department — Claim for promotion as Superintendent of Central Excise Class II — Confidential reports from Appellate Collector under whom the petitioner worked for six months not made available to the Screening Committee — Non-selection for the promotion under the circumstances not justified as the petitioner was prejudiced by the omission to consider the reports. 1973 Serv LJ 789 (Delhi).

(29) Juniors promoted as petitioner stopped at efficiency bar — Stoppage at efficiency bar set aside with retrospective effect — Petitioner confirmed on post held with retrospective effect — Placed senior to Juniors superseding him — Consideration for future promotion — Court can compel Government to consider case under its special circumstances — Party can succeed in getting limited relief only. 1973 Cur LJ 159 (Punj).

Articles 310 & 311 — Note 119 (contd.)

(30) Deputy Magistrate working as S. D. O. — Punishment by stoppage of promotions and censure in character roll — Period of suspension directed not to be treated as on duty — There is no reduction in rank — No further opportunity to show cause against punishment necessary. A 1966 Pat 97 (101) (DB).

(31) Promotion — Adverse remarks not communicated to Civil Servant should be ignored. 1976 Lab IC 1760 (1761) (DB) (Orissa).

(32) Supersession in the matter of promotion — Appeal Court holding it to be unjust — Government servant entitled to all ancillary benefits flowing from such redressal — Government Notification cannot deprive him of the right. (1969) 1 Mys LJ 197 (198) (DB).

(33) Integration lists of Officers — List though quashed by High Court yet upheld by Supreme Court — High Court while quashing integration lists had failed to consider individual grievances — Supreme Court approached with request to direct High Court to hear individual grievance — **Held** no directions were necessary as the integration lists had become final. **1972 Lab IC 1570 (1571) (SC).**

(34) Pendency of the disciplinary proceedings cannot be a ground for withholding promotion, if a Government employee is otherwise eligible to be promoted. Withholding of promotion being a penalty, it cannot be imposed except by following the procedure prescribed by statutory rules. If such penalty were to be imposed without following the procedure prescribed it would amount to contravening Art. 311 and such action would be unsustainable. 1978 Serv LJ 201 (203) (Andh Pra) ** 1977 S LJ 410 (Andh Pra) ** 1974 Serv LWR 727 (Andh Pra) ** (1973) 2 Serv LR 131 (Andh Pra).

[**But see** 1978 Lab IC 904 (908) (Guj). (Government servant — Departmental enquiry pending — Withholding promotion during enquiry — Not punishment.)]

(35) "Promotion by selection irrespective of seniority" under Allahabad High Court (Conditions of Service of Staff) Rules, R. 9 — Interpretation of — Emphasis is on merits rather than on seniority. 1971 Lab IC 426: A 1971 All 205.

(36) Placing of person in independent charge of a higher post does not amount to promotion to that post. (1974) 1 Kant LJ 408.

(37) Right of eligible persons cannot be ignored in the garb of temporary orders — Appointing authority must give reasons for making promotions when a senior employee is superseded. (1973) 2 Serv LR 339 (J and K).

(38) Writ petition by lower division clerks promoted on ratio basis provisionally from those belonging to Andhra and Telangana regions without sanction under Sec. 115 (7), Proviso, States Reorganisation Act cannot lie against alteration of their promotion dates following final seniority list. ILR (1972) Andh Pra 240 (DB).

(39) Seniority and promotion — Misrepresentation by Government — It has power to review and rectify earlier administrative decision based on the misrepresentation. **1979 Lab IC 1294 (1302): 1979 (2) Serv LR 478 (FB) (Delhi).**

(40) Where on upgradation of posts of B-Grade nurses as A-Grade, a male nurse of B-Grade was promoted as A-Grade but was not allowed to draw the emoluments of A-grade, it was held that on up-gradation of the post the incumbent petitioner automatically got promoted to A-grade and as the promotion was not made dependent on consideration of his character roll or other material or screening of his case, the petitioner was entitled to draw the emoluments of A-grade nurse. A 1972 Pat 247 (248): 1972 Lab IC 918.

(41) Railway servant — Promotion — Seniority — Promotion denied owing to administrative error — Denial challenged by writ petition — To set right injustice, promotion directed by Supreme Court from date of writ petition, with suitable orders regarding salary and seniority. **A 1977 SC 1868: 1977 Lab IC 1191.**

(42) Promotion of petitioner to a post purely on temporary basis — Reversion on ground of unsatisfactory work — Juniors allowed to continue on posts to which they were promoted — Order of reversion casting no stigma — Court competent to probe, to find out whether impugned order is passed by way of punishment. (1974) 1 Serv LR 195 (J and K).

(43) Section 3 of the Karnataka Service Examinations Act 1976 is made to give benefit to Government Servants who were denied in the new State promotions to higher cadres to which they were entitled but were not given promotions, on account of their not passing the prescribed departmental tests or examinations. The section created a fiction that for the relevant period prescribed examinations or tests were to be treated as dispensed with for becoming eligible for promotion. Where a person was promoted without having passed any examination whatsoever and if his seniors, at the relevant times in the relevant cadres were overlooked for promotions to the higher cadre on the ground that they had not passed the prescribed tests and examinations then such seniors would be entitled to get their rightful position by promotions in respective cadres by virtue of the provisions of the Act. The person who was promoted earlier though junior to others could have no grievance in such circumstances. (1979) 2 Kant LJ 398: 1980 Lab IC (NOC) 31.

120. Reversion and departmental enquiry for same cause.— (1) Where the petitioner, who was a permanent Government servant, and who was promoted to a higher post purely on a temporary basis and until further orders, is found unsuitable for the post on account of misconduct, two courses are open to the Government. The first was to revert him to his former post without any notice and without assigning any cause, and the second, by taking disciplinary action. But both the courses are not open to the Government simultaneously, and the methods are only alternative. Where therefore it is found that the authorities have reverted the petitioner to his former post, it is not open to the authorities to start proceedings for disciplinary action

Articles 310 & 311 — Note 120 (contd.)
either themselves or through another authority. A 1958 Tripura 45 (47).

121. Retrospective orders under the Articles.— (1) The notice of termination of services which adversely affects the employee will take effect from the date on which it is actually or constructively communicated to him. The words, 'commencing with immediate effect' in the notice would only mean commencing from the date on which the notice was served and not from the date of issue. A 1965 Him Pra 55 (57, 58).

(2) Order of dismissal cannot have effect from any date prior to that on which it is communicated to delinquent Government servant. A 1969 Cal 397 (399) : 1969 Lab IC 1094 •• A 1963 Manipur 28 (35) •• A 1958 Cal 470 (471) •• (1956) 60 Cal WN 1023 (1026) •• (1973) 2 Serv LR 561 (Orissa). (Verbal intimation of termination of services cannot be accepted in absence of any proof.)

(3) Order of dismissal with retrospective effect is in substance an order of dismissal as from date of order with superadded direction that it should operate retrospectively as from an anterior date. The two parts are clearly severable — Court has power to give effect to valid and severable part of order but it cannot pass new order of dismissal. A 1966 SC 951 (953). ((1957) 61 Cal WN 880 and A 1961 Cal 626, Overruled.) •• A 1970 Orissa 49 (49).

(4) There can be no suspension of a person with retrospective effect. (1963) 6 Fac LR 225 (227) (Cal).

(5) Dismissal with effect from the anterior date on which the suspension was ordered — Valid in law. 1980 Lab IC 442 (443) : (1980) 1 Serv LR 302 (DB) (Ker). (1979 Ker LT 99 : 1979 Lab IC (NOC) 52 (Ker), Reversed.)

(6) The State Government have the power to make retrospective appointment provided it does not affect adversely the right of anybody else. In this case the petitioner was merely officiating as Assistant Engineer temporarily, therefore, by appointing 'X' in his place on the basis of his retrospective appointment as overseer no legal right of the petitioner was infringed. ILR (1977) 56 Pat 555 (564).

(7) Civil Service — Confirmation — Orders for confirmation can be passed with retrospective effect — Even though on date of issuing of confirmation orders, the incumbents are not working under the jurisdiction of authority issuing confirmation orders, such orders can be passed by such authority relating to period during which such persons were working under it. A 1976 Bom 42 (49) (DB).

(8) Where the order of termination of service was made long after the disciplinary proceedings ended, it will take effect only from the date of the orders and not retrospectively from the date when the disciplinary proceedings ended. The petitioner in respect of period prior to date of actual order should be treated as being in service and is entitled to get his pay for it. (1970) 74 Cal WN 966.

(9) Enquiry against retired employee — Enquiry invalid — Order of dismissal after holding enquiry after retirement was illegal — Dismissal cannot be with retrospective effect under Article 311 of Constitution. 1977 Serv LWR 313 (Punj).

122. Censure.— (1) Government servant cannot legitimately complain that the penalties of censure and suspension were imposed upon him without affording him an opportunity to show cause against the imposition of such penalty. A 1969 Orissa 224 (226) : 1969 Lab IC 1221 (DB).

(2) An enquiry as contemplated in cases falling under Article 311 (2) would not be necessary for punishments other than dismissal, removal or reduction in rank, that is, in cases of lesser punishments including censure. A 1958 Manipur 35 (37).

(3) The constitutional protection afforded by Article 311 does not extend to a Government servant with regard to whom a censure entry in his character roll is ordered to be made. A 1957 Raj 230 (231) •• A 1954 Ajmer 22 (25).

(4) Petitioner having joined educational services, applied for leave and remained absent without sanction and continued this behaviour for over five years. This conduct constituted cesser of service under R. 76 of Service Code and without giving any hearing petitioner was informed that her services were deemed to have ended.

Held that the impugned order amounted to removal of petitioner attracting protection under Art. 311. A 1973 Pat 431 (433) : 1973 Lab IC 1530.

(5) Second opportunity after completion of enquiry — No such opportunity need be given unless Art. 311 (2) is attracted — Case of censure or stoppage of increment of servant does not come within Article 311 (2) — No second notice is essential. ILR (1969) 1 Cal 272.

(6) Rules operate in different fields and do not overlap — Even after initiating enquiry under Rule 7 with the object of imposing major punishment, Government can withdraw the enquiry and decide to impose minor punishment like censure. 1970 Lab IC 170 (Punj).

(7) Displeasure of the Government is an expression of disapproval or reprimand, which are synonym to word 'censure'. Where displeasure of the Government was communicated to the Government servant after his retirement when the relationship of employer and employee had ceased, the order was held not sustainable vis-a-vis such communication. (1979) 3 Serv LR 443 (452) (DB) (Pat).

123. Determining order of seniority.— (1) Rules of natural justice — Application of, while determining seniority — Exclusion of name of certain employee from final seniority list though included in provisional seniority list — Opportunity of making representation must be afforded before such exclusion. 1969 Lab IC 893 (895) : (1969) 1 Mys LJ 325 •• 1978 Lab IC 764 (770) (Punj). (Fixation of seniority — Representation against — Rejection of on merits — Speaking order not necessary. (1971) 1 Serv LR 119 (Punj) and observation in (1974) 1 SLWR 539 (Delhi), Overruled.) •• A 1970 Madh Pra 132.

(1-A) Confirmation — Petitioner confirmed by Government exercising powers of relaxation given under Service Rules — Order causing hardship to other members of service — Government has right to withdraw the concessional order. (1979) 3 Serv LR 630 (633) (Punj).

(2) Executive orders settling the principles for determining seniority, or for that matter, determining other service conditions, cannot be changed with retrospective effect by similar executive orders passed later. Matters settled should not be reopened after the lapse of a

Articles 310 & 311 — Note 123 (contd.)
considerable length of time. (1973) 2 Lab LJ 363 (Ker).

(3) Seniority — Fixation of employees liable to be retrenched absorbed in another department on compassionate grounds — Their seniority to be fixed below existing employees in that department. 1980 Lab IC 316 (319) (Guj).

(4) The right of the Government to regulate or determine inter se seniority of its employees is implicit in the theory that the civil servants of a State hold office at the pleasure of the President or Governor and that so long as any statutory inhibition is not shown to be contravened, the employee cannot complain before a Court or claim any relief on the basis of the failure or refusal of the Government to assign to him his proper position in the seniority list. A 1958 Mad 243 (247) °° A 1958 Mad 53 (64, 65) °° A 1956 Pepsu 26 (29).

(5) Persons already declared to have completed their probation — Subsequent Order of Government to prepare integrated seniority list to receive their promotions with retrospective effect — Illegal. A 1969 Andh Pra 118 (123).

(6)Article is attracted when reduction is as a punishment; it does not apply to the case of a public servant whose rank is reduced in the fixation of seniority list. A 1961 Ker 203 (207) °° A 1962 SC 1704 (1710).

(7) Whenever the Government wanted to change the rules as to seniority or to refix the seniority with reference to a particular service the persons in service likely to be affected need not be given an opportunity of being heard and no principle of natural justice can be said to have been violated if such opportunity was not given.

A person who had obtained a benefit in the way of seniority by relaxation of rules and who has been deprived of that benefit by a subsequent cancellation of such relaxation cannot claim as of right any particular rank in his substantive cadre and least of all can he seek to enforce such a right. A 1959 Mad 1 (4, 5, 6, 7) (DB).

(8) Seniority — Appointment of Government servant by promotion — Approval of public service commission — Delay in conveying — It will date back to original date of appointment by promotion. 1970 Cur LJ 379 (Punj).

(9) Fixation of seniority — Service Rules vesting discretion in authorities — No arbitrary exercise of discretion — Courts will not interfere with the order — Posts and Telegraphs Manual, Vol. IV, Chapter II, Rule 38. A 1962 Orissa 20 (21) (DB).

(10) Seniority — Clerical staff — Memorandum of Ministry of Home Affairs, D/- 22-6-1949 — Length of service alone is not decisive for determining seniority. A 1977 SC 1673 : 1977 Lab IC 904.

(10-A) Seniority — Inter se change in — Order without giving an opportunity to the affected party to be heard is liable to be quashed as it is against the principles of natural justice. 1975 Cur LJ 41 : 1975 Serv LJ 27 (Punj).

(11) Seniority — Gradation list prepared in the absence of Rules under Art. 309 — Retrospective effect given — Gradation not valid. 1972 Lab IC 469 (471) : ILR (1971) Cut 857.

(12) In absence of any specific rule that a trained appointee would become senior to an earlier untrained appointee, the trained appointee cannot become senior to the earlier untrained appointee even though the untrained appointee is required to be sent for training subsequent to the appointment. This is particularly so when the training is not a condition precedent to the appointment of the untrained appointee. ILR (1973) 52 Pat 272.

(13) The expression 'rank' in Article 311 (2) has reference to a person's classification and not his particular place in the same cadre in the hierarchy of service to which he belongs. A 1966 SC 1197 (1200) °° A 1962 SC 1704 (1710).

(14) Losing some places in seniority list is not tantamount to reduction in rank within Art. 311 (2). A 1966 SC 1197 (1199, 1200). (A 1960 Cal 209, held overruled in A 1962 SC 1704.) °° A 1966 SC 1529 (1533, 1534). (W. P. No. 531 of 1961, dated 12-12-1962 (Mys), Reversed.) °° A 1962 SC 1704 (1710) °° A 1968 All 276 (278, 279) : 1968 Lab IC 1027. (Petition challenging an order which has resulted only in the loss of seniority is not maintainable under Article 311.) °° (1966) 2 Lab LJ 374 (389) : (1964) 8 Fac LR 375 (All). Seniority of Munsif reduced in same cadre — Article 311 (2) held not applicable since order did not amount to reduction in rank.)

(15) Government servant — Fixation of his seniority in cadre — No law as to — It depends upon discretion of Government — No writ of mandamus can be issued. A 1963 All 358 (360) °° 1978 Lab IC (NOC) 176 (Andh Pra). (Seniority list — Petitioner not objecting to draft seniority list — He cannot be allowed to question the final list.) °° 1978 Lab IC 1177 (1178) (DB) (Ker). (Employees of Kerala University transferred to Government service — Employees appointed on same date — Absence of any rules or regulations governing question of seniority — Government fixing seniority on the basis of seniority in age as per communication of Registrar of University — Fixation valid. O. P. No. 125 of 1971 (Ker), Reversed.)

(16) Refusal to select person for particular post — Losing place in seniority list in same cadre — Not reduction in rank. A 1964 All 356 (358).

(17) Reduction in rank — What constitutes — Reversion of Government servant from officiating post to his substantive post resulting in loss of seniority in that post — Reversion must be held to be by way of punishment — Government of India Act (1935), S. 240 (3). A 1962 SC 8 (10, 11). (Appeal No. 138 of 1956, dated 26-7-1956 (Bom), Reversed.)

(18) Railway servant — Reduction in rank by way of seniority — Order held not justiciable. A 1959 Mad 68 (71) (DB).

(19) Fixation of seniority on transfer — Transfer of employees in the interest of administration — Transfer held not discriminatory — Fixation of seniority after transfer, held valid. 1978 Lab IC 1013 (1081) (DB) (Cal). ((1974) 1 Cal HC (N) 166, Reversed.)

(20) Orissa Administrative, Finance and Police Service (Direct Recruitment) Rules (1950), Rules 2, 7 (2) (b), 7 (2) (a) (i) and Appendix I — Combined competitive examination in accordance with Rule 2 — While drawing up the results, separate ranking of candidates only for police service in separate column is invalid — Unilateral decision of State Government to demote a police officer to lower place in list of seniority affects his future chance of promotion to higher rank — Non-compliance with provi-

Articles 310 & 311 — Note 123 (contd.)
sions of Art. 311 and principles of natural justice — Decision is invalid. 1969 Lab IC 738 (741, 742) (DB) (Orissa).

(21) Unaccepted officiating Patwaris — Such Patwaris are not included in R. 16 Punjab Revenue Patwaris Class III Service Rules — Names of such persons are not maintained in the register kept in specified form for other Patwaris — Unaccepted Patwaris terminated as a result of their participating in strike — Subsequent re-instatement — Past service ordered to be counted only for the purpose of pension under Rule 4.20 (a) of Punjab Civil Service Rules — Government order fixing seniority — Candidates continuing to work during strike given seniority over candidates participating in strike — Order is only administrative — No discrimination violating Arts. 14 and 16 of the Constitution — Order fixing seniority does not amount to dismissal, removal or reduction in rank within the meaning of Article 311 — Article 311 not attracted. (1967) 69 Punj LR 1036 (1041).

(22) An alleged breach of service rules does not give to an employee of the Government any cause of action. Hence, to a suit to get an order fixing the seniority of the plaintiff, an Assistant Surgeon in the Punjab Civil Medical Service, in contravention of Government Service Rules declared illegal and ultra vires, the provision of Article 310 of the Constitution is attracted and the matter is not justiciable. 64 Punj LR 774 (780) : (1962) 2 Lab LJ 725.

(23) Seniority — Punjab Medical Department Subordinate Posts (Recruitment and Conditions of Service) Rules (1945), R. 5 (3) — Employees already in service, appointed to posts of Assistants — Such employees fall in the category of promotees and are not direct appointees — Joint seniority list of integrated cadres — Opportunity to affected persons to file the objection, not given — List quashed. 1978 Lab IC 1519 (Punj).

(24) Integration of services on reorganization of State — List prepared by considering all relevant factors — Revised list and refixing particular servant's seniority — Representation of all affected servants not considered — Revision is whimsical and arbitrary and violative of Article 14 — Mysore Government Order No. G. A. D. 20 I. G. S. 62 dated 20-7-63 held ultra vires and illegal. A 1966 Mys 31 (35) (DB).

(25) Integration of two services — Rules prescribing that seniority in integrated cadre shall be fixed in accordance with length of continuous service from date of appointment. Held, date of appointment means date of assuming duties of new post in integrated cadre and not date of appointment order, and length of service would start from date of so assuming duties. 1969 Cur LJ 918 (Punj).

(26) Fixation of seniority after absorption of staff from princely State in the service of Union Government on basis of length of service after confirmation — No interference on ground of violation of Art. 16. A 1980 SC 444.

(27) Seniority — Government servant in M. P., on Reorganization of States, allotted to Bombay and then to Maharashtra — Grievance about placement in seniority list — Not Maharashtra Government Circular, D/- 25-2-1965 but Bombay Government Circular D/-10-3-1960 applies to respondent's case — Circular of 1965 does not govern questions of seniority and supersession arising from Reorganization of States. A 1977 SC 505 : 1977 Lab IC 230. (S. C. A. No. 1251 of 1970, D/- 19-6-1974 (Bom), Reversed.)

(28) Constitution of India, Article 311 — Reversion — 'A' working as temporary clerk opting for war service — On return from war service 'A' appointed as clerk in similar job but in new State as old State had merged due to reorganization of States — 'A' given benefit of war service vide instructions issued by Punjab Government on 11-12-1946 and 13-10-48 and was placed higher up in seniority list — New Government cannot cancel the seniority as Government instructions are to be liberally interpreted — 'A' having rejoined as clerk cannot be termed as new entrant. 1977 Serv LJ 541 (Punj & Har).

(29) Whenever the Government proceed to modify or amend the rules relating to seniority and refix the seniority of the Government servants with reference to such rules, the affected servant cannot contend that his reduction in rank is by way of punishment. The loss of seniority of the petitioner which resulted from the refixing of the seniority inter se between the petitioner and another would not amount to a reduction in rank of a penal nature so as to attract the application of Art. 311 (2). A 1960 Mys 255 (257, 258) (DB) ** A 1958 Mad 53 (68). (Re-adjustment of the order of seniority will not amount to a reduction in rank.) ** 1977 Lab IC (NOC) 29 (J & K). (In matters relating to fixation or refixation of seniority, the rules of natural justice have no application.) ** 1972 Lab IC 1523 (Cal).

(30) Determination of order of seniority — Merger of departments, inter se seniority of officers belonging to one and the same grade is to be determined with reference to continuous officiation. 1978 Lab IC (NOC) 76 (Pat) ** 1977 Lab IC (NOC) 65 (DB) (Pat). (Date of confirmation in permanent post is material and not length of previous temporary service — Further, period in different service cannot be tagged.) ** 1972 Pat LJR 287 : 1972 BLJR 420. (Determination of inter se seniority — Date of confirmation is an important criterion but not the sole criterion.)

(31) Where the petitioner though had joined duty earliest has been placed in the seniority list (fixed on length of service) juniormost just because the actually juniormost employee had to be made senior to the petitioner in terms of R. 5 (1) Delhi State Services (Seniority) Rules, 1954 proviso (permitting fixation of inter se seniority on the basis of merit accorded in selection) no interference under Article 226 Constitution is permissible. By such a step the Administration has only avoided the inequity to the other candidates in the list of having to become junior to the actual juniormost. This is within the power of the Administration under R. 8, of the rules. A right to seniority independent of Article 311 when interfered with in a manner opposed to law can be challenged. But since the step adopted by the Administration is within R. 8 and with no allegation of mala fides or unfairness or attack against validity of R. 8, it is clear such step cannot be interfered with by a writ. 1973 Serv LC 583 (Delhi).

Articles 310 & 311 — Note 123 (contd.)

(32) Relative seniority inter se — Central Secretariat Stenographer Service — Qualifying tests — Fixation of seniority — Four chances in quilifying test — Two chances could not be availed of due to fault of department — Qualifying after chances given — Seniority to be fixed as if they were deemed to have passed in four chances. (1974) 2 Serv LR 22 (Delhi).

(33) Promotion of assistant teacher as headmaster in Railway High School — Provisional panel made by General Manager in accordance with Railway Board's Letter No. E. (N. G.) 57 P. M. 1-24, dated 8th October, 1958 according to which fresh panel to be made after existing one is exhausted — Final panel rearranging seniority affecting the petitioner — **Held**, this was not a rectification of clerical mistake and General Manager could not invoke even his inherent power. 1969 Lab IC 483 (484) : 16 Fac LR 440 (Cal).

(34) In respect of selection grade posts a selection has to be made from amongst the officers in that cadre, and only that officer who in the opinion of the authority making the selection is considered fit is selected for the post. Hence no Government servant in a particular cadre can claim a post in the selection grade in that cadre as of right on the ground of his seniority. His suitability for that post must obviously depend on the subjective satisfaction of his superior officers. ILR (1962) Cut 243 (245) (DB).

(35) I. P. S. (Regulation of Seniority) Rules (1954), Rr. 2 (g) and 3 (3) (b) — 'Senior Post' — State Government has been given power to declare any post as 'Senior I. P. S. Post' and no form has been prescribed for such declaration — For purpose of applying R. 3 (3) (b), definition in R. 2 (g) is sole guide and whether person acting in an equivalent post was on deputation from Army or was promoted to State Police ranks is immaterial — If definition in R. 2 (g) included only officiation subsequent to appointment to I. P. S. cadre after termination of deputation from parent Department, second part of definition would become unnecessary and meaningless and it would involve an interregnum which cannot be reasonably imputed to Service Rules. (1967) 2 Lab LJ 289 (Cal).

(36) Government taking over management of private trust fund and treating its employees as Government servants from 20-11-55 — **Held** on facts that B who became a second grade clerk in 1951 was clearly entitled to a higher rank than A, a Government servant, who became a second grade clerk only on 4-12-1953 — Services rendered by B in private trust fund are to be treated as part of services rendered under Government. A 1969 Mys 346 (347, 348) (DB).

(37) Kashmir Administrative Service Rules, R. 4 — Mala fides cannot be imputed when under R. 4 the Government revised the cadre strength partly by converting some temporary posts included in the temporary cadre strength to the permanent cadre strength and partly by adding some ex-cadre posts to the permanent strength of Kashmir Administrative Service. It is done in the exigencies of service. **A 1973 SC 1138 (1142).**

(38) If owing to bona fide mistake or otherwise the Government has taken an erroneous decision regarding fixation of seniority of an officer, it does have power to revise the same when mistake comes to its notice. Its decision regarding correction of such an error does not come within the ambit of Art. 311. 1973 All Serv Rep 320 : 1973 Serv LC 376.

(39) Fixation of seniority — General principles enunciated by Central Government in its Notifications dated 22-6-1949 and 22-12-1959 — Petitioner, employee of Food Dept. — Food Dept. Notification dated 24-6-1959 directing fixation of seniority of its employees according to date of initial appointment — Petitioner, held would be governed by special notification of Food Dept. and not by general notification. 1974 All Serv LJ 631 (Andh Pra).

(40) Writ petition — Seniority list challenged on ground that no notice was given — Petitioner and all others having knowledge about change in Seniority List — He making representation about his affected seniority — **Held**, petitioner could not complain of absence of notice. 1977 Lab IC (NOC) 78 (Andh Pra).

(41) Determination of seniority of temporarily promoted employee — Petitioner, a Trains Examiner in Delhi Division, promoted and posted as Head Trains Examiner in Headquarters Division temporarily — He could have seniority and promotion only in parent division on basis of seniority list of that division. (1971) 1 Serv LR 421 (Delhi).

(42) Seniority — Promotion on ad hoc basis — Service regularised subsequently — Service put in on ad hoc basis cannot be considered for purposes of fixing seniority. 1976 Lab IC 346 (Punj).

(43) Punjab Ayurvedic Department (Class III Ministerial Service) Rules (1963) — Seniority — Fixation on basis of executive instructions — No Rules in existence holding the field — Rules framed subsequently — Seniority cannot be altered on that basis. (1980) 82 Pun LR 32 : 1980 Lab IC (NOC) 23.

(44) Where war service benefits were conferred on certain employees, who returned to the posts from which they proceeded to military service under executive instructions and the Department treated the official as ex-serviceman it cannot turn round and unsettle the settled matters withdrawing seniority to his disadvantage after many years on his return. (1977) 1 Serv LR 49 (53) (Punj).

(45) Promotion to selection post — Confidentials sole criterion — Seniority secondary — Juniors preferred — Person superseded cannot claim post as of right merely on grounds of seniority. ILR (1974) Him Pra 25.

(46) Where an order redetermining seniority of a Government servant involves loss of seniority both in his substantive rank and in the higher rank that he is holding, compliance with provisions of Sec. 126 is necessary before passing the order. 1973 J & K LR 237 : 1973 Serv LC 388 (J & K).

(47) Determination of seniority — Employees in grainshop establishment of Railways absorbed in clerical and other cadres on closure of the establishment — Decision that absorption should not be only to clerical cadre but must be in such posts where absorbed persons can be more conveniently and, particularly more usefully employed — Clearly discriminatory — Such procedure denies to some what has been given to others. 1978 Lab IC 407 (410) (DB) (Mad).

Articles 310 & 311 — Note 123 (contd.)

(48) Order changing seniority of employees to their prejudice and detriment — It was incumbent on Government to have allowed them opportunity of being heard. 1974 Lab IC 1153 (DB) (J & K).

124. Grounds of dismissal or removal.— (1) A Government servant may be dismissed or removed for any good and sufficient reason. Where the Government Servants' Conduct Rules prohibit the doing of certain thing, a breach of the rule will be a good and sufficient reason for dismissal. A 1956 Raj 28 (29) (DB).

(2) Dismissal — Absence without obtaining leave — Removal order and order granting leave passed on same day — Removal whether valid — Absence of specific Rule — Held, it cannot be said that State Government intended to invalidate its order of removal by sanctioning leave. (1935-73) 2 SC Serv LJ 370 : A 1969 NSC 36.

(3) So long as it is not complained that there has been an infringement of Arts. 310 and 311, High Court would not be justified in setting aside an order of removal (for disobedience of transfer order) of Governor whose pleasure with regard to termination of services of Government servants serving in a State is final. 1958 All LJ 218 (221).

(4) Where a Government servant is dismissed or removed from service on certain charges, it is open to the Court to go into the question of the sufficiency of the reasons on which the order of dismissal or removal is based in order to satisfy itself whether the reason given can at all be a "good and sufficient reason" for the dismissal or removal. ILR (1958) 8 Raj 432 (434) (DB).

(5) The Court can consider not only whether the reason given for dismissal or removal can at all be a reason for such action but also whether the finding of the dismissing authority that a certain ground has been made out is a bona fide one. A 1956 Mad 220 (225) •• A 1956 Pepsu 19 (26).

(6) Dismissal of public servant based on two charges — Subsequent finding of guilt on one charge only — Order of dismissal cannot be maintained. A 1963 Punj 336 (338) (DB).

(7) Order of dismissal based on charges, findings on some of which are vitiated — Order of dismissal is to be set aside and cannot be justified on the basis of remaining charges. A 1962 Orissa 78 (81, 82) (DB). (Findings on charges vitiated.)

(8) If a person has been guilty of indiscipline and has been punished on previous occasions those factors are usually taken into consideration in awarding punishment though they should not be taken into consideration in finding the applicant guilty of that particular charge. A 1959 All 624 (625).

(9) Where the guilt of taking bribe is proved against the public servant, it is sufficient to entail dismissal from service and the fact that the enquiry officer exceeded the scope of enquiry on other counts is immaterial and the dismissal cannot be challenged on this ground. A 1960 All 618 (619) : 1960 Cri LJ 1290 (DB).

(10) Where a Government servant was dismissed merely on the ground that he had received some money from one person for being paid over to another which he accordingly did, it was held that this was no reason at all for punishing him. ILR (1958) 8 Raj 432 (435) (DB).

(11) A civil servant cannot be dismissed or removed from service merely for giving in court evidence prejudicial to the interest of the Government. ILR (1975) Andh Pra 168.

(12) It is not necessary that the ground on which a public servant is dismissed must amount to or be akin to a criminal charge. A 1951 Mad 882 (882) (DB).

(13) Dismissal or removal of a Government servant may be justified on grounds of inefficiency, insubordination and general reputation of corrupt conduct. A 1951 Mad 882 (882, 883) (DB).

(14) The guarantee provided in Article 311 did not refer only to the procedural aspect — Matters wholly unconnected with conditions of employment could not be taken into consideration in imposing punishment. (1963) 1 Lab LJ 512 (516, 517) (Mad).

(15) In order to enable a master to take disciplinary action against his servant it is not a condition precedent that misconduct on the part of the servant must arise within his employment and not outside his employment. There is no reason why this principle should not apply to public servants. A 1960 Bom 285 (286, 287) (DB).

(16) Disrespectful statements made against a superior in an appeal to the higher authorities will amount to indiscipline and misconduct for which Government servant may be dismissed. A 1956 Orissa 99 (101) (DB) •• A 1954 Him Pra 1 (4).

(17) The High Court will not normally question the correctness of the decision of punishing authority where the Government servant has been given a reasonable opportunity as contemplated by Article 311, Cl. (2). A 1956 Bom 483 (487) •• A 1956 Bom 455 (458) (DB) •• A 1956 Raj 28 (29) (DB).

(18) Enquiry into integrity of public servant — Defence that assets were increased on account of gifts from father or mother — Onus to prove on delinquent. A 1964 Cal 415 (417).

(19) Order of removal on ground of acceptance of private service by Government servant — Inaccurate references in order to Rule 13, Government Servants' Conduct Rules instead of Rule 15 and also to a particular Government Order which was not applicable — Held did not affect validity of the order. A 1959 SC 536 (542).

Articles 310 & 311 — Note 124 (contd.)

(20) Mere passing of resolution of strike — No breach of Disciplinary Rules. A 1959 All 614 (616).

(21) "Misconduct" — Employee overstaying leave — Amounts to misconduct — Removal from service — Compliance with Article necessary. A 1970 Tripura 19.

(22) Suit by dismissed Government servant for salary after his reinstatement — Dismissal in violation of Art. 311 (2) of Constitution — Cause of action for suit — Determination — Fundamental Rule 52, if applies. ILR (1973) Him Pra 376.

(23) If the procedural requirements of Article 311 are complied with, a civil servant can be dismissed on grounds relevant to the interests of the public service. It is not necessary to lay down specific penal provisions in order to institute disciplinary proceedings against civil servant even to punish them by the extreme penalty of dismissal. ILR (1969) 1 Cal 272.

125. Grounds of dismissal — Subversive activities — See also Note 41.— (1) Reference in charge-sheet only to political leaning but not to any objectionable activity having relation to politics amounting to misconduct — Dismissal on basis of charge-sheet — Dismissal amounts to fundamental error on basis of record. A 1967 Mad 392 (394, 395) (DB). (W. P. No. 113 of 1960 (Mad), Reversed.)

(2) A rule providing for the discharge or compulsory retirement of a Government servant for being involved in subversive activities prejudicial to national security is not open to impeachment on the ground of its being too vague and indefinite and as such as being violative of Article 14. A 1958 SC 232 (237) •• A 1958 Andh Pra 288 (292, 293) (DB).

(3) The rules governing the conduct and discipline of Government servants may provide for the dismissal or compulsory retirement of persons involved in such subversive activities and in such cases a special short procedure may be provided and the provisions of such special procedure would not be an infringement of Article 14 of the Constitution. A 1958 SC 232 (237, 238) •• A 1956 Mad 220 (223) •• A 1956 Pepsu 19 (23, 24).

(4) The subversive activity for which a Government servant can be dismissed or compulsorily retired must be an unlawful activity. Being a member of the Communist Party or of a Labour Union, which is not declared to be unlawful, will not amount to "subversive activity". A 1956 Mad 220 (224).

(5) Government servant cannot be held to be guilty of misconduct by being member of an association formed by Government servants, which has not been recognised by Government. A 1960 All 353 (356, 357, 358) (DB).

(6) Public servant's freedom to vote for any political party does not mean 'active membership' and open participation in subversive organisation. Concealment of the fact of 'active membership of a subversive organisation' would certainly be a concealment within the meaning of R. 1706 of Railway Est. Code relating to dismissal. A 1958 Cal 654 (656).

(7) Mere association with persons who are engaged in subversive activities is not enough to justify dismissal or compulsory retirement of Government servant unless he is associated with the others in the subversive activities in which they are engaged. A 1956 Mad 220 (224) •• A 1956 Pepsu 19 (25).

(8) Where the authorities have the power under the relevant Service Rules to terminate the services of an employee simply by giving notice and also have power under a different rule to terminate his services on the ground of his engaging in subversive activities prejudicial to national security, and the authorities profess to follow the latter course, the procedure prescribed by the Rules in this connection must be followed. A 1958 SC 232 (236).

(9) The termination of service of a Government servant on the ground of his being a Communist or Trade Unionist does not infringe his Fundamental Right under Art. 19 (1) (c). A 1958 SC 232 (238).

(10) The termination of the services of a railway servant by notice under R. 3 of the Railway Services (Safeguarding of National Security) Rules, 1949, does not constitute a punishment so as to amount to dismissal or removal within the meaning of Art. 311. A 1958 SC 232 (238).

(11) The Railway Services (Safeguarding of National Security) Rules, 1949, are prospective in their operation and action can only be taken under them in regard to subversive activities being presently indulged in or likely to be indulged in. A 1958 SC 232 (239).

(12) West Bengal Government Servants' Conduct Rules (1959), Rule 4 — Association of public servant with girls taking intoxicating drinks alleged to be unbecoming conduct — Held case not covered by R. 4 — Rule 4 not retrospective. A 1964 Cal 503 (514, 515).

(13) Even in the absence of a specific rule in the Government Servants' Conduct Rules prohibiting strikes a Government servant in an administrative department going on strike will be guilty of serious indiscipline. A 1956 Raj 28 (29) (DB).

126. Criminal proceedings against officer.— (1) The fact that the officer has committed an act for which he may be criminally prosecuted is no bar to his being departmentally proceeded against and dismissed if he is found guilty in such departmental enquiry. A 1956 Mad 460 (461) : 1956 Cri LJ 1081 •• 1979 Lab IC 972 (974) (Kant) •• A 1955 Pepsu 97 (98) •• A 1951 Cal 179 (181).

[But see A 1954 Assam 18 (21) : 1954 Cri LJ 31 (DB).]

(2) A civil servant dismissed on ground of his conviction on a criminal charge is not entitled to the protection of Art. 311. 1971 Lab IC 823 (825) : 1971 MPLJ 483 (DB).

Articles 310 & 311 — Note 126 (contd.)

(2A) Disciplinary proceedings against a Government servant need not always be stayed in respect of a charge, pending the trial of a criminal case regarding the same charge. In case of grave nature or involving complicated questions of fact or law, it may be advisable to wait for the verdict of a criminal Court but when it is not so, pendency of the criminal case against the Government servant does not bar the taking of disciplinary action against him. (1980) 1 Serv LR 225 (229) (Raj) •• 1969 Serv LR 827 (DB) (Delhi).

(3) Even where a civil servant has been acquitted of charges in the criminal proceedings in a Court departmental proceedings under Article 311, Cl. (2) in respect of identical charges would not be without jurisdiction. A 1955 Pepsu 97 (98) •• A 1953 Cal 316 (319) •• A 1967 Mad 315 (316, 317) (DB).

[See A 1957 Orissa 51 (54) (DB).]

[See however A 1965 Mad 502 (505).]

[But see A 1959 Madh Pra 46 (48) •• A 1956 Punj 106 (108) (DB) •• 1951 Nag LJ 593 (595) (DB) •• 1970 Ker LT 1047.]

(4) Criminal Court proceedings pending simultaneously with departmental proceedings on same charge — Conviction in trial Court resulting in dismissal of delinquent-accused under proviso to Article 311 — Conviction set aside on appeal resulting in reinstatement of accused — Completion of pending departmental proceedings and dismissal thereon quite valid. 1977 Serv LJ 488 (All).

(5) Suspension from service during prosecution of civil servant on criminal charge — Conviction but benefit of Section 4, Probation of Offenders Act, 1958, given — Reinstatement with effect from date of conviction — Reinstatement would result in restoration of status quo ante suspension — It would render conviction unactionable — No order of dismissal could be based on conviction. A 1970 Delhi 240 (244).

(6) It cannot be said that in the case of an acquittal by a criminal Court the departmental proceedings cannot be initiated on the same facts. Even in the case of acquittal the departmental proceedings may follow when the acquittal is 'other than colourable'. 1968 Lab IC 63 (65) : 79 Mad LW 635 •• (1967) 1 Mad LJ 146 (147).

(7) Government servant prosecuted on criminal charge and honourably acquitted — Departmental proceedings in respect of same matter — Not open to authorities. A 1959 Madh Pra 46 (48, 49).

(8) Where a criminal case on same allegations was pending the enquiring officer ought to have stayed the departmental enquiry pending conclusion of criminal case. A 1966 J & K 73 (75).

(9) As mere prosecution is not conviction and the pendency of a criminal prosecution is no proof of the guilt of an accused, to call upon a man to show cause why he should not be dismissed from Government service because of the pendency of a criminal prosecution against him is only to make a nonsense of a charge of misconduct. A 1961 Cal 626 (629) (DB). (Overruled on another point in A 1966 SC 951.)

(10) Domestic enquiry need not be stayed until disposal of criminal trial where facts are not shown to be complex. 1973 Lab IC 1564 (1565) (DB) (Gauhati).

(11) It is not the true position of law to state that wherever it is possible to prosecute a Government servant in a Court of law the authorities would be precluded from proceeding against him departmentally under any conceivable circumstances. Whether the concerned Railway Code provides for disciplinary proceedings after acquittal by a criminal Court or not, the right to exercise the disciplinary jurisdiction is always, there when a charge of sufficient gravity is alleged against an employee. (1966) 1 Mad LJ 306 (307) •• A 1967 Mad 315 (316, 317).

(12) In an enquiry against a Government servant once a properly constituted authority has arrived at a decision, then its successor in office cannot enter upon a reconsideration of the matter so as to arrive at another and totally different decision. A 1958 Madh Pra 413 (414, 415) : 1958 Cri LJ 1485.

(13) The Government servant, who has been dismissed from service by way of departmental action for corruption, can be later on prosecuted and punished in a Court of law. A 1954 SC 375 (378) : 1954 Cri LJ 993.

(14) Although Government employee may have been acquitted by a criminal Court on a charge of criminal misappropriation, he may still be held responsible for the loss and may be removed from service. A 1956 All 43 (45).

(15) Criminal charge against public servant — Acquittal on basis of benefit of doubt — Departmental inquiry in respect of same charge is not against natural justice — Standard of proof in criminal case and departmental inquiry not same — Orissa Service Code, Vol. II, Rule 5 (c). A 1963 Orissa 73 (78, 79) •• A 1956 Pat 228 (230) (DB).

(16) Suspicion of theft without actual proof of theft at a departmental inquiry is a sufficient reason for the removal of a turner in a railway machine shop. A 1957 Hyd 13 (13) (DB).

(17) Patwari removed from services as a result of enquiry — Acquittal by criminal Court of same charges — Accused held not entitled to reinstatement on basis of his acquittal. 1974 Lab IC 553 (554) (Him Pra).

(18) Discharge under S. 207-A (6), Criminal Procedure Code does not affect departmental enquiry pending against accused on same facts. (1970) 2 Mys LJ 199 : (1970) 2 Lab LJ 460 (DB).

127. Suit for declaration.— (1) In a suit for declaration that the plaintiff's dismissal from service was wrongful and for arrears of pay it is not necessary for the plaintiff to refer to

Articles 310 & 311 — Note 127 (contd.)
Art. 311 (2). 1963 MPLJ 28 (DB) •• 1971 MPLJ 837.

(2) The plaintiff is not under any obligation to give further particulars as to who was the authority which had appointed him and as to how such an authority was superior to the authority which had made the termination order. The plea under Art. 311 (1) is not barred for lack of particulars. (1974) 2 Serv LR 602 (Delhi).

(3) Suit for declaration by civil servants that dismissal from service was illegal and they continued in service and were entitled to full pay — Relief of declaration is discretionary — Discretion exercised by Court in the spirit of the statute — Cannot be interfered with. A 1977 SC 747 (755, 756).

(4) No declaration to enforce a contract of personal service will be normally granted. There are certain exceptions to this rule and they are: To grant such a declaration in appropriate cases regarding (1) a public servant who has been dismissed from service in contravention of Art. 311 (2) Reinstatement of a dismissed worker under Industrial Law by Labour or Industrial Tribunals (3) A statutory body when it has acted in breach of a mandatory obligation, imposed by statute. A 1970 SC 1244 (1251, 1253) : 1970 Lab SC 1044.

(5) Government officer — Dismissal of — Suit filed by officer to challenge validity of order of dismissal is maintainable. A 1966 SC 1313 •• 1978 Serv LWR 270 (274) (Punj). (If an employee is dismissed without there being any evidence whatsoever, the Civil Court has the jurisdiction to quash such order of dismissal.)

(6) A plaintiff, who is compulsorily retirable but is discharged from service, is not entitled to a declaratory decree that the discharge is not valid and that he must still be regarded as being in service. A 1956 Punj 42 (43).

(7) A declaration cannot be granted where at the time of the decree the circumstances have changed and on account of the highly advanced age of the plaintiff and other circumstances, he cannot be properly restored to his office. A 1953 Cal 188 (193) (DB).

(8) Compulsory retirement — Appeal against, seeking declaration that order of retirement is wrong — Death of appellant — Appeal abates, relief sought being personal one. 1980 Lab IC 343 (347) : 1979 Raj LW 509 (DB).

(9) Where a civil servant, whose dismissal from service was found ultra vires and illegal, had prayed for a declaration that the dismissal was ultra vires and illegal — Held that the plaintiff was entitled to a declaratory decree prayed for, taking into account the circumstances of the case. A 1960 Pat 366 (370, 371) (DB).

(10) Suit by Government servant for declaration that order of his dismissal was void and he still continued in service — Plaintiff reaching age of superannuation pending decision of appeal against the decision in suit — Held it would not be proper for the appellate Court to grant plaintiff-appellant declaration that he continued in service up to the date of decision of appeal. A 1963 Raj 57 (62).

(11) Person appointed as additional Government Advocate which at the time was tenure post — Subsequent alteration of Rules providing for superannuation at the age of sixty — Termination of services of appointee under new rules before the expiry of period of tenure for which he had been appointed — Proper remedy is civil suit. A 1959 All 169 (176, 178, 179) (DB).

(12) Suit for declaration that the charge-sheet issued to the plaintiff in a departmental enquiry is illegal on the ground that there is no evidence to support it, is in law maintainable. A 1964 Pat 168 (174).

(13) Where a suit was brought challenging an order of dismissal of a public servant, on the ground that the order was passed by an officer subordinate to the officer by whom the dismissed public servant had been appointed, and pending the suit an order of dismissal is passed by the proper authority, the Court will not pass a declaratory decree to the effect that the dismissal of the plaintiff is void and that he is still in service. A 1950 All 212 (223) (DB).

(14) Where in a suit for a declaration that the order dismissing the plaintiff from service was illegal, null and void and for consequential reliefs and to recover arrears of salary, etc., it is proved that the show cause notice against the proposed punishment was vitiated, the plaintiff would be entitled to the declaration that the plaintiff was in the service of the Government on the date of the suit and to arrears of salary only up to the date of the suit. A 1963 Guj 244 (250).

(15) Dismissal of clerk of Andhra University for alleged misconduct — Suit for declaration that dismissal was unjust and illegal — Onus is on the University to satisfy the Court about propriety of its dismissal — Suit for bare declaration without further claim for damages or restoration to office is maintainable. A 1951 Mad 870 (871, 872, 873).

(16) In a suit for declaration that the plaintiff's dismissal was wrongful on the ground that no opportunity was given to him as required by Art. 311 (2) the failure to give an opportunity is a part of cause of action and must be taken to have accrued at the place where the order of dismissal was passed so that the Court at that place has jurisdiction to entertain the suit. A 1956 Sau 75 (76).

(17) No suit to declare invalidity of the decision of a statutory tribunal is maintainable for a mere error of fact or of law. A 1966 Cal 42 (44) (DB).

(18) In a suit for declaration that a Government servant continued in service till filing of plaint, based on a finding that the order of dismissal was void and has to be regarded as non-existent or ineffective, Civil Court is not sitting in appeal over the decision of departmental authorities. (1957) 70 Mad LW 965 (969) •• 1979 Lab IC 1102 (1111) (All).

[But see 1979 Lab IC 1344 (1349) (All). (Order of dismissal against Railway servant —

Articles 310 & 311 — Note 127 (contd.)
Suit challenging validity — Court can question findings recorded by Enquiry Officer in departmental proceedings in case of violation of natural justice and declare the same to be null and void.)]

(19) Removal of Government servant — Suit for declaration that removal was unconstitutional and illegal — Questions that can be decided in such suit — Findings of Tribunal conducting departmental enquiry not to be considered. A 1963 Tripura 20 (25).

(20) Duty of Court — The Court is not to reconsider on facts the decision in the departmental enquiry — The Court is not entitled to go into the facts to find out as to whether the finding is correct or not. A 1960 Bom 225 (229).

(21) Dismissal of police constable after enquiry — Finding by Deputy Inspector-General of Police that constable was so hot-headed that he might prove source of danger to others at any provocation or no provocation — Held, Court would not lightly interfere with decision in absence of some jurisdiction or other similarly serious legal infirmity justifying judicial interference. (1966) 68 Pun LR 874 (878).

(22) Suit for declaration that order for removal from Government service was unconstitutional — Nature of decree that can be passed — Future salary until reinstatement cannot be awarded. A 1963 Tripura 20 (31).

(23) It is the choice of the Government servant who challenges the order of his dismissal from service as illegal, either to sue for a declaration or to claim the actual arrears of salary, that might be due up to the date of the suit. A 1959 Madh Pra 46 (49).

(24) Suit for declaration that termination was illegal and arrears of pay and other allowances — Where the appellant was admittedly working at Delhi during the material period, he would, therefore, unless there is any indication to the contrary either in the contract of service or in the rules relating to service, be entitled to house rent allowance which would be admissible to a Government servant working in Delhi. (1974) 2 Serv LR 602 (Delhi).

(25) Disciplinary action against railway servant — Order of suspension as punishment under R. 1702 of Railway Est. Code — Substantial non-compliance with procedure laid down in R. 1711 and Art. 311 — Civil Court has jurisdiction, even before second stage under Art. 311 has arrived, to declare suspension order void. A 1964 Pat 168 (171, 172).

(26) In case of wrongful dismissal, declaration entitling petitioner to recover salary for 12 years without discharging any duty and without proof of damages would not be proper. A 1962 Raj 244 (247).

(27) Suit filed in 1958 against State of Bombay — Suit pending in trial Court in 1960 — Liability of defendant in suit — Effect of Sections 60 and 61 of Bombay Reorganisation Act on suit — Liability held to be that of State of Maharashtra whether suit was on contract or on actionable wrong — Held, that State of Maharashtra was necessary party. A 1965 Guj 173 (179) (DB).

(28) Railway servant — Dismissal in contravention of Art. 311 (1) — Civil suit — Decree declaring dismissal as illegal — Reinstatement and second order of dismissal by same officer after fresh inquiry — Application under Article 226 — Principle of res judicata applies. A 1959 Punj 37 (38).

(29) Setting aside order of dismissal from service should be treated as passed on merits irrespective of grounds on which it is passed. 1960 Raj LW 385 (386, 387).

(30) Civil servant retired from service, filing suit for mere declaration as to his date of birth — Plea that he should sue for being reinstated — Suit for mere declaration of birth date is maintainable. 1967 Cur LJ 70 (72) (Punj).

(31) Removal from office — Suit for declaration filed after 8 years — Courts finding that order of removal was unconstitutional and void but dismissing suit as barred by limitation — Case not covered by Article 120, Limitation Act — No limitation for filing such suits — Suit filed after eight years not barred by limitation. 1977 SLWR 447 (448) (Punj).

(32) Dismissal of public officer — Disciplinary proceedings taken after conviction for criminal breach of trust — Application for declaration that dismissal null and void — Time barred — Whether right waived — No reasonable cause of action — Public Authorities Protection Ordinance 1948, S. 2 (a). (1976) 2 Malayan LJ 114.

(33) Where a Government servant has been honourably acquitted by a Criminal Court departmental proceedings on the basis of same charges are incompetent. 1973 Lab IC 1421 (1422) (All).

(34) Employee of statutory corporation — Termination of service in breach of standing orders — Remedy of employee lies in damages — Suit for declaration that termination was void, inoperative and not maintainable. 1975 Lab IC 740 (DB) (Cal).

(34) Government servant dismissed — Dismissal held violative of Article 311 of Constitution and void — Suit for declaration that dismissal is illegal, filed after nine years, while period of limitation is six years under Art. 120 of Limitation Act — Held, no bar of limitation for such suits — Article 120 of Limitation Act inapplicable. 1977 SLWR 447 (Punj).

128. Suit for salary.— (1) A civil servant is entitled to sue for arrears of his salary. A 1954 SC 245 (249) •• A 1955 Assam 17 (20) (DB) •• 1965 All LJ 292 (294) •• A 1961 Cal 626 (635) (DB). (Overruled on another point in A 1966 SC 951.)

(2) A civil servant, who has been dismissed or removed from service and whose dismissal or removal from service is illegal and ultra vires, can sue the Government for arrears of his salary. A 1958 SC 36 (41) •• A 1955 SC 600 (601). (A 1951 All 205, Reversed.) •• A 1954 SC 245 (249, 251) •• A 1947 FC 23 (26).

Articles 310 & 311 — Note 128 (contd.)

(3) Termination of service — Termination held by Court to be illegal — Right of employee to arrears of pay held, extended for period from the date he was relieved to the date of judgment. 1977 Lab IC 1675 (1676) (Ker).

(4) The principle that a civil servant holds office during the pleasure of the head of the State refers to the tenure of office of the civil servant and does not imply that his service is ex gratia or that his salary is in the nature of a bounty. A 1954 SC 245 (250).

(5) Claim for arrears of salary — Suspension on untenable allegation — Suspension set aside and employee reinstated — Claim is maintainable. A 1965 Cal 281 (282).

(6) Railway servant dismissed on basis of conviction for offence unconnected with his duty — Conviction set aside in appeal — Order of dismissal also set aside — Servant is entitled to his pay for period between dismissal and reinstatement. A 1965 Cal 75 (76, 77, 79) •• A 1961 Mad 486 (490 to 593) (DB).

(7) Dismissal of Railway servant — Dismissal declared void and reinstatement ordered — Claim to salary for a period prior to three years of institution of suit for recovery of arrears will be barred by Article 102, Limitation Act, 1908. A 1968 Madh Pra 204 (206, 207) (DB).

(8) Dismissal from service — Set aside by civil court — Payment of arrears of salary — Only three years salary as accrued due prior to the date of institution of suit could be awarded to employee. 1978 Lab IC 1289 (1290) (DB) (Guj). ((1970) 11 Guj LR 51, Not good law in view of (1969) 3 SCC 642 and 1974 Lab IC 580 (SC).)

(9) The prohibition or disability to claim arrears created by the Service Rules cease to operate with orders of dismissal etc. going out of the way and the right to claim arrears at once get revived. The starting point in a suit for arrears of salary therefore is the date on which dismissal order is set aside and not the date of reinstatement. 1978 Mah LJ 339 (344) (DB).

[But see 1977 Mah LJ 343. (Cause of action for claiming salary for the purpose of limitation arises from the date of salary accrued due from month to month and not from the date when dismissal was set aside.)]

(10) Article 14 does not apply to order void from its inception — Order prematurely retiring Government Servant in contravention of R. 294 (a), Note 4 of Mysore Service Regulation and Article 311 (2) of Constitution — Order is void — Suit for arrears of salary for period of illegal retirement — Limitation is governed by Art. 102 and not by Article 14. A 1971 Mys 117 (120, 122, 123, 124) : 1971 Lab IC 473.

(11) Though a Government servant is entitled to recover arrears of salary for period of service already rendered at his usual rate of pay, which existed during that period he has no legal right to have his pay fixed at a particular rate, unless he has statutory right to the same. A 1965 Cal 484 (488) : 1965 (2) Cri LJ 471.

(12) Government servant — Right to salary — M. B. Civil Service (Classification, Control and Appeal) Rules, 1956 — Withholding of pay by way of punishment is ultra vires the Rules of 1956 — Such punishment is against the spirit of Article 23 of the Constitution. A 1960 Madh Pra 303 (304) (DB).

(13) Dismissal of civil servant in contravention of Section 240 (2) of Government of India Act (1935) — Suit by servant for recovery of arrears of pay, is maintainable — Relief need not be limited to declaration only. A 1954 Mad 1155 (1158, 1159) (DB). (Reversed on another point in A 1955 SC 817.)

(14) Government servant — Servant discharged of offence — Suspension during trial — After discharge, servant claiming pay for suspension period — Servant is entitled to his pay. A 1966 J & K 27 (28, 29).

(15) Suit for arrears of salary by dismissed Government servant without seeking declaration for quashing order of dismissal — Decree for arrears of salary can be granted. A 1959 Madh Pra 46 (48).

(16) Suit for declaration that dismissal order was void or illegal relief founded on allegation of breach of provisions of Article — Plaintiff bound to ask for salary for period between dismissal and filing of the suit — If plaintiff omits to sue for arrears of salary to date of suit a second suit for arrears prior to that date would not be competent in view of Order 2, Rule 2, Civil P. C. A 1968 Bom 304 (307) (DB).

(17) Government servant — Supersession or Reduction in rank — Remedy — Question as to how much more amount Government servant was entitled to — Separate suit and not writ petition would be proper remedy. A 1961 All 316 (317, 318).

(18) Reversion of government servant — Servant challenging reversion as illegal and absenting from duty during pendency of suit — He is entitled to salary for period of absence on declaration of his reversion illegal — It is immaterial that he does not convey his protest to office. A 1971 Mad 202 (203) : 1971 Lab IC 493.

(19) Reversion of government servant — Servant applying for leave without pay — He is not entitled to claim salary for period of leave even if his reversion is subsequently declared to be illegal. A 1971 Mad 202 (203) : 1971 Lab IC 493.

(20) Suit for salary by Government servant — Fundamental Rules, Rule 67 — Leave cannot be claimed as a matter of right — Leave with or without pay — Discretion of appointing authority — No interference unless department shown to have acted mala fide — Leave enjoyed without sanction commuted to leave without pay — Claim for arrears of salary must be rejected. ILR (1969) 2 Cal 289.

(21) An order of reversion violative of Article 311 is void and no declaration is needed for purpose of enforcing a claim for arrears of salary which fell within three years of limitation. (1978) 80 Pun LR 49 (59).

(22) Civil P. C. (1908), Section 9 — Suit by government servant to recover money on the

Articles 310 & 311 — Note 128 (contd.)
ground that his promotion was withheld illegally does not lie. ILR (1962) Cut 243 (244, 246) (DB).

(23) Suit by railway servant against Union of India for arrears of salary — Plaintiff claiming that he was entitled to draw salary on basis of old scales — Amount claimed representing difference between old scale and new scale — Suit is maintainable. A 1961 Punj 329 (331).

(24) Temporary employee of corporation — Termination of service without one month's notice or one month's pay in lieu thereof — Temporary injunction restraining employer from dispensing with services — Interference in revision. (1975) 1 All LR 429.

(25) A Police Sub-Inspector, who was later confirmed, was when he was absorbed into the regular service admittedly treated as a temporary and officiating Sub-Inspector. While so functioning he was reverted to the post of Head Constable 1st Grade by the Inspector General of Police. In a suit filed after 18 years of reversion, a decree was granted declaring reversion as illegal and ordering difference of salary and allowances for 3 years and 2 months. In appeal by the State, the High Court allowed the appeal holding that the suit was barred by limitation. In second appeal preferred by the employee in the Supreme Court it was held that since the appellant was later promoted as Police Sub-Inspector and was retired by the time the second appeal came up for hearing, the dispute centred round the monetary claim and the respondent State was directed to pay the difference between the salary and allowances drawn by the appellant as Head Constable and those payable to him as Police Sub-Inspector, from the date of reversion to the date on which he was again promoted as Police Sub-Inspector. 1979 UJ (SC) 130 : 1978 Serv LC 146 (146).

129. Suit for pension.— (1) Suit for pension — Not maintainable — Pension is an ex gratia payment made out of discretion of the Government — Suit for, not maintainable. A 1963 Mad 49 (49, 50) •• A 1937 PC 27 (29, 30).

[But see 1978 Lab IC 1468 (1470) (Mad). (Where a Government servant was dismissed only on the basis of his conviction by Criminal Court and not as a result of disciplinary proceedings based on misconduct, he would be entitled to claim pension.)]

(2) Suit for pension in cases not covered by Pensions Act is competent. A 1962 Punj 8 (16) (DB).

(3) Gratuity is a matter in the discretion of the Government and a suit by a retired railway servant for recovery of gratuity is incompetent. A 1961 Punj 3 (4, 5).

(4) Where grant of pension or gratuity was not a matter of discretion but was governed by rules detailing conditions when pension was due a claim for pension is actionable. A 1961 Punj 443 (446).

(5) Period of service in the work charged establishment — Not accountable as qualified service for pension benefits on retirement. 1979 Lab IC 1360 (1362) (DB) (Punj). (C. W. P. No. 180 of 1973, D/- 4-8-1975 (Punj), Reversed.)

130. Suit for damages.— (1) A servant wrongfully dismissed is entitled to such damages as will compensate him for the wrong he has sustained. A 1966 Mad 203 (215, 216, 217) (DB).

(2) Civil servant — Wrongful dismissal from service — Suit for damages against Government — Maintainable — Measure of damages is loss suffered by reason of such dismissal. A 1962 Cal 349 (359).

(3) Even though the provisions of Art. 311 may have been contravened in dismissing or removing from service a Government servant, a suit for damages by the Government servant against the Government will not lie and he will only be entitled to a declaration that the order for dismissal or removal is void and inoperative. A 1955 SC 600 (602) •• A 1948 PC 121 (127) •• A 1942 FC 3 (7) •• A 1957 Madh Bha 108 (111).

[But see A 1948 Mad 379 (382) (DB) •• A 1946 Mad 366 (368) (DB).]

(4) A suit against the Union of India instituted by an officer of the Indian Army for a declaration that his dismissal from service was wrongful and for damages is not maintainable. A 1956 Bom 601 (605).

(5) Wrongful dismissal of public servant — Writ to earn damages is not competent. A 1958 Cal 654 (655).

(6) Government servant has no justiciable right to claim promotion to a selection post and hence his suit for recovery of money from the Government on the ground that his promotion was withheld illegally is misconceived. ILR (1962) Cut 243 (244) (DB).

(7) In the case of wrongful dismissal of a temporary servant damages are generally an adequate remedy. A 1962 Raj 244 (246, 247).

131. Suit for mandatory injunction.— (1) A suit for mandatory injunction against the Government by a dismissed Government servant to reinstate him in service will not lie. A 1951 All 205 (219) (DB).

132. Claim for dearness allowance.— (1) A Government resolution fixing the scale of dearness allowance under Rule 44 is "law" within Article 13 (3) (a) and can be declared void if it infringes Article 14. A 1954 SC 493 (495).

(2) A claim against the Government that dearness allowance must be granted at a particular rate is not justiciable. A 1954 SC 493 (495).

(3) Guarantee of equal opportunity in public employment — Guarantee does not extend beyond initial stage of employment. A 1960 All 484 (499).

133. Writ proceedings — See also Articles 226 and 32 — (1) Maintainability of petition under Article 226 not dependent on applicability of Article 311 — Employee not governed by Article 311 can challenge termination of his service under Article 226. 1966 Cur LJ 930 (931) (Punj). •• (1979) 1 Serv LR 861 (868) (Ker).

(2) Rules framed under Article 309 for employment of the physically handicapped,

Articles 310 & 311 — Note 133 (contd.)
can be enforced by an issuance of writ or direction for the governance of Article 41. 1979 WLN 582 (586) (Raj).

(3) Where there is a contravention of constitutional provisions in any case in which the Government servant is removed from service or reduced in rank, he is entitled to apply to the High Court for a proper writ under Artile 226. A 1957 Nag 18 (19) ** A 1956 Tripura 33 (34) ** A 1955 Hyd 48 (51) (DB) ** A 1954 Bhopal 25 (27) ** A 1954 Nag 258 (259) (DB) ** ILR (1954) Cut 684 (704).

(4) Temporary Government Servant — Termination of service — Writ Petition alleging that termination was mala fide — No counter affidavit denying allegation filed — Effect — Onus of proving mala fides lies on petitioner. 1977 Lab IC 977 (All).

(5) So long as it is not complained that there has been an infringement of Art. 310 or 311 of the Constitution, the High Court would not be justified under Article 226 in setting aside the order of the Governor whose pleasure with regard to the termination of the services of a Government servant serving in a State is final. 1958 All LJ 218 (221).

(6) The High Court should interfere only when the order of dismissal was passed on no evidence at all, or when the enquiry was held by an authority not competent to hold it, or when the rules of natural justice were violated or the enquiry was held in violation of statutory rules prescribed for the mode of enquiry or where the conclusion is wholly arbitrary and capricious or where no reasonable opportunity was given or for similar grounds. 1968 Lab IC 1145 (1148, 1149) (Manipur).

(6A) No writ ordinarily can be entertained against the interim orders of a Tribunal unless the jurisdiction of the Tribunal was in question or there was an error apparent on the face of the record. Where objection to the jurisdiction of the Enquiry Officer failed and there was no error apparent on the face of the record and no final orders of dismissal or of any other punishment were passed the disciplinary authority must be held to be still seized of the matter and no writ to quash the enquiry and interim orders of the authorities could be issued. 1978 J & K LR 189: 1978 Lab IC (NOC) 143.

(7) Certiorari — Writ against Government — Order of dismissal of public servant — High Court can enquire whether the order is based on no evidence. A 1964 SC 364 (369).

(8) High Court's powers in writ petition to review findings of Inquiry Officer are restricted but they can consider and hold unlawful and set aside any agency action, findings and conclusions found to be arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law etc. 1965 Punj LR (Supp) 66 (75) (DB) ** A 1970 Punj 81 (85).

(9) The essential factors which a civil Court will examine are: (i) whether the plaintiff has been dismissed by an authority which appointed him; (ii) whether before he was dismissed from service he has been given a reasonable opportunity of showing cause against the action proposed to be taken; (iii) whether the procedure adopted in the departmental enquiry has so prejudiced the plaintiff that it has resulted in the denial of a reasonable opportunity; and (iv) whether on the whole, principles of natural justice have not been violated. (1956) 2 Lab LJ 347 (352) (DB) (Mad).

(10) Disciplinary proceedings against Government servant — Writ petition to quash such proceedings — Court cannot usurp functions of disciplinary jurisdiction of Government over its employees, but it cannot be deterred from enforcing provisions of Article 311, though it might have indirect consequence of interfering with sanctioning which was within exclusive competence of Government. A 1964 Mad 166 (168, 169 (DB).

(11) Scope — Order expressed to be by order of Governor — Even so it cannot be held to be beyond challenge. (1963) 67 Cal WN 859 (869) (DB).

(12) Order quashing orders of dismissal — Proper Order is to leave parties to seek remedies according to law and not to order their reinstatement. A 1971 Mys 99: 1971 Lab IC 461.

(13) Whenever it was urged before the High Court that, as a result of an order passed in a departmental enquiry, a civil servant had been deprived of a reasonable opportunity, the High Court must examine the matter and decide whether the requirements of Article 311 (2) had been satisfied or not. A 1966 Madh Pra 58 (60) (DB).

(14) So far as the jurisdiction of the High Court under Article 226 is concerned it is not confined to cases where there has been a violation of the provisions of the Constitution and such jurisdiction extends also to cases in which there has been a violation of other legal provisions. 1957 MPLJ 115 (119) (DB) (Nag) ** A 1956 Andhra 203 (207, 208) ** A 1955 Nag 160 (163): 1955 Cri LJ 974 (DB)

(15) It is only the violation of Art. 311 that would enable aggrieved officer to invoke jurisdiction of High Court under Article 226. (1961) 2 Andh WR 4 (9) (DB) ** ILR (1956) Punj 1213 (1224).

(16) In a proceeding under Article 226 High Court does not act as a Court of appeal over the decision of the authorities holding a departmental enquiry. A 1963 SC 1723 (1727) ** 1969 Lab IC 896 (898) (DB) (Orissa) ** (1963) 6 FLR 26 (28) (Cal) ** A 1963 Orissa 73 (76, 77) (DB) ** 1977 Lab IC (1260) (1262) (Kant).

(17) Even if the rule of Criminal trial that an offence should be proved beyond reasonable doubt is not applied in departmental enquiry High Court in a petition

Articles 310 & 311 — Note 133 (contd.)
under Article 226, is not competent to declare the order of authorities holding a departmental equiry invalid, as the High Court is not a court of appeal over departmental decision. **A 1963 SC 1723 (1726, 1727).**

(18) Government servant dismissed from service for misbehaviour, gross indicipline and insubordination — Validity of dismissal challenged — Duty of Court — Civil Courts in such cases do not sit in appeal from orders passed by Government in accordance with statutory provisions and the Constitution. 1966 Cur LJ 968 (980) (DB) (Punj).

(19) Jurisdiction of High Court, acting under Article 226, does not enable it to convert itself into Court of appeal and examine for itself correctness of decisions impugned. A 1961 Madh Pra 261 (263) (DB).

(20) In a proceeding under Art. 226 High Court is concerned only with the questions whether the enquiry was held by an authority competent in that behalf and according to the prescribed procedure and whether the principles of natural justice have not been violated. **A 1963 SC 1723 (1727).** (Writ Petn. No. 922 of 1956, D/- 18-11-1959 (A. P.) **Reversed.)** ** (1977) 2 Serv LR 745 (748) (Bom).

(21) High Court can consider under Article 226 propriety or validity of decision of enquiry officer. **A 1961 SC 1623 (1629).**

(22) Misreading of administrative instructions — Causing prejudice to govt. servant — Writ petition maintainable. A 1969 Punj 257: 1969 Lab IC 958.

(23) In writ petition, High Court cannot substitute its own opinion for that of appointing authority as regards merits and suitability of a candidate. A 1958 J and K 40 (41) (DB) ** (1979) 1 Serv LR 94: 1979 Lab IC (NOC) 45 (DB) (Ker). (O. P. No. 985 of 1975 (Ker) **Reversed.)**

(24) Departmental enquiry — Appreciation of evidence — Jurisdiction of High Court as to. A 1969 Manipur 36 (40): 1969 Lab IC 561 ** A 1965 Mys 283 (284) (DB) ** (1965) 1 Mys LJ 323 (328) ** A 1962 Punj 289 (291) ** A 1961 All 284 (285). ** 1977 Serv LJ 188: 1977 Lab IC (NOC) 42 (Delhi).

(25) Where the criterion for selection set before the Departmental Promotion Committee was confidential reports and where the committee had examined those reports, scrutinised the entries and made comments thereon and drawn inference and conclusion therefrom, quashing of its order by the Court was held to be overstepping the limits of interference under Art. 226. 1979 Lab IC 126 (128) (DB) (Ker). **1978 Lab IC 966; A 1978 SC 1132.** (O. P. 2427 of 1971 (Ker) **Reversed.)**

(26) If the adverse entry is not communicated at all for an unusually long period and action is taken on the basis of the adverse entry, a Government servant can ask for an appropriate writ directing the Government to communicate the adverse entry and to dispose of the representation, if any. In appropriate cases depending on facts and circumstances, adverse action taken against the Government servant is liable to be quashed. **1974 Lab IC 1192 (1206) (FB) (Orissa). ILR (1971) Cut 313. Overruled.**

(27) It is not within the scope of an inquiry under Article 226 to canvass the findings of fact of the disciplinary tribunal in a case against a public servant. A 1960 Andh Pra 15 (16) ** 1979 Serv LJ 193: 1978 Lab IC (NOC) 120 (Goa).

(28) The Court has no jurisdiction if the findings of the Enquiry officer or tribunal prima facie make out a case of misdemeanour to direct the authority to reconsider that order. **A 1963 SC 779 (786).** (A 1960 Orissa 68, **Reversed.)** ** 1977 Lab IC (NOC) 45 (DB) (Gauhati) ** 1974 Lab IC 296 (299, 300) (Orissa).

(29) It is not for High Court in petition under Article 226 to enquire into question as to reasonableness, adequacy or propriety of punishment. A 1961 Andh Pra 289 (292, 293).

(30) If the punishment of an employee is based on no evidence, the order of punishing authority is a nullity and will be quashed under Art. 226 — Thus, an order of dismissal passed on the basis of sole evidence of judgment which is a nullity because of its being set aside in appeal, will be quashed. (1971) 1 Cut WR 1.

(31) If order of disciplinary authority is based on no evidence, certiorari will lie, without further proof of mala fides — But if based on any evidence, jurisdiction of High Court cannot be invoked to question its adequacy. A 1967 Orissa 49 (51, 52) (DB) ** A 1978 SC 1277: 1978 Lab IC 1106 ** (1979) 3 Serv LR 580: 1979 Lab IC (NOC) 53 (DB) (Ker) ** A 1977 Orissa 187 (189) (DB) **(1972) 1 Mad LJ 374 ** 1970 UJ (SC) 332.**

[But See A 1960 Assam 141 (147) (DB).]

(31A) Where the finding is clearly totally perverse on an erroneous view of the evidence it would be a case for interference by the High Court. Where the evidence relevant for the consideration of the charge is misconstrued and is not given its legal effect, then also it would be a case for interference by the High Court, for the finding arrived at on such a basis is liable to be characterised as unreasonable and perverse. (1972) 2 Mad LJ 103.

(31B) Petition under Art. 226 alleging order of suspension is mala fide — Petition alleging mala fide on the part of minister in charge — Counter affidavit filed not by minister but by departmental secretary having no personal knowledge regarding the allegations against the minister — Order set aside holding mala fides has been established. **A 1964 SC 72 (81, 85).** (A 1963 Punj 298, **Reversed.)**

(32) It is not the function of the High Court in exercise of its jurisdiction under

Articles 310 & 311 — Note 133 (contd.)
Article 226 to examine whether in a departmental enquiry the materials on record would be taken as sufficient by another authority to hold the Government servant guilty of the charges and whether the punishment was too severe in view of the fact that the charges dealt only with negligence in the discharge of duties and did not involve any element of corruption. These are matters to be considered by the superior officers of Government. A 1960 Orissa 26 (28, 29) (DB).

(33) Supreme Court is not a regular Court of appeal against orders of tribunals — Where there is no error of law or anything contrary to practice obtaining in industrial adjudication, Supreme Court would refuse to interfere with the scheme framed by Tribunal. **A 1967 SC 948 (953, 962).**

(34) Government servant challenging validity of a service rule — Proper remedy available is writ petition to High Court under Article 226 — Writ petition directly to Supreme Court under Article 32 not competent. **A 1964 SC 1585 (1589): 1964 (2) Cri LJ 481.**

(35) **Held** on facts that High Court in the writ petition was not sitting as a Court of Appeal and could not go into correctness or otherwise of the grounds for refusal on the part of the Enquiry Officer. **A 1962 Punj** 355 (358).

(36) Where the entire proceedings resulting in the order of dismissal were vitiated by serious irregularities and breach of rules of natural justice, the Court after quashing the order did not give opportunity to the authorities to revive the old matters. 1973 Lab IC 1369 (1369) (Pat).

(37) A public servant can file a suit in enforcement of his rights: (a) where there is a violation of constitutional rights, (b) where there is a violation of statutory provisions, (c) where there is a violation of rules of natural justice, but he cannot complain where constitutional and statutory provisions are complied wih or in cases of termination of service, according to the terms of the contract even if an allegation of misconduct is specifically stated, provided the termination is on the terms and services of the contract — In these matters, the civil Court is not sitting in appeal over the decision of the departmental authorities. (1957) 70 Mad LW 965 (969).

(38) In a writ petition it could not be urged that the Court was not entitled to look beyond the order of termination and find out what was its real substance and effect. The Court was entitled to examine whether the nature and incidents of the action resulting in the dismissal or removal from service were to be found in the action of compulsory retirement. A 1964 Mad 243 (244 to 246) (DB).

(39) The Court, in exercise of its writ jurisdiction, cannot interfere with jurisdiction vested by statute in administrative agency — It is not proper for High Court to put itself in shoes of agency and consider whether particular decision is reasonable — — But it is always entitled to look at surrounding circumstances, to consider whether decision in dispute is reasonable and will be prepared to revise it, if it is palpably unreasonable, that no reasonable authority could come to that decision. (1967) 2 Mad LJ 297 (301). ** 1980 Lab IC 752 (Guj).

(40) Promotion — Uncommunicated adverse entries in Confidential Character Rolls — In appropriate cases depending upon facts and circumstances, adverse action taken against the Government servant may become liable to be quashed. 1980 Lab IC 658 ** **A 1980 NOC 116: (1980) 49 Cut LT 442 (FB).**

(41) The content of an enquiry contemplated to be made under Sec. 33 of the Industrial Disputes Act before granting permission to terminate employment of a workman cannot be assimilated into the enquiry to be made by the Civil Court, when the public servant claims that he is denied the protection under Article 311 or that his employment has been terminated in violation of rules framed under Art. 309. **A 1963 SC 601 (604, 605): 1963 (1) Cri LJ 491.**

(42) Where the order of dismissal of the Government servant is based in part at least on erroneous assumption of facts the High Court should exercise its jurisdiction under Article 226 to quash the order of the Government. A 1960 Mad 393 (394) (DB).

(43) Disciplinary proceedings — Findings of enquiry authority — High Court has jurisdiction to question whether there is no evidence in support of findings. **A 1966 Him Pra 13 (16).**

(44) Where the entire proceeding is bad because the petitioner did not have an adequate opportunity of calling evidence or meeting evidence called, at original enquiry, the proper order to pass will be to set aside the findings and orders of enquiring officer as well as of Appellate Authority. (1956) 60 Cal WN 692 (702).

(45) It is not open to High Court to delve into motive of the action of authorities in terminating services of an employee, when such step by it, was justified under the relevant rules. **A 1959 Assam** 120 (123).

(46) Departmental enquiry against Sub-Inspector of Police resulting in termination of his probation — Proceedings not vitiated by any error of procedure — Order terminating probation not interfered with. **A** 1969 Mad 275 (280) : 1969 Lab IC 826.

(47) High Court cannot go into factual merits of executive order or substitute it by its own. **A 1965 Ker 108 (109) (DB).**

(48) High Court has no power to interfere with administrative discretion of the Executive. **A 1958 Madh Pra 135 (139, 140) (DB).**

Articles 310 & 311 — Note 133 (contd.)

(49) Where conditions of service depend not upon statutory rules or contractual conditions but upon departmental instructions which are variable, such executive instructions are not statutory rules and writ of mandamus cannot be issued. A 1965 Cal 298 (301).

(50) Government servant who had appeared in test examination appointed to officiate in higher post — Test examination confers no right on him under any law or Rule — Order subsequently reverting him only an administrative order — No writ by way of certiorari or mandamus can be issued. ILR (1957) 1 All 278 (285).

(51) Railway employee ordered to retire according to earlier date of birth in his service register — Order is administrative — Mandamus and not certiorari is appropriate relief. A 1959 Mad 88 (88) (DB).

(52) Where a Government servant is dismissed without giving him a reasonable opportunity to show cause against the action proposed, the order of dismissal being an administrative order, no writ of certiorari can be issued. The appropriate writ to issue would be that of mandamus. A 1961 All 122 (125).

(53) Where the Medical Board had not applied the standard prescribed by revised instructions for examination of direct recruits, mandamus was issued directing the Government to appoint a Medical Board for examination of the candidate. A 1958 Raj 242 (245) (DB).

(54) Termination of service of Government servant — Petition for writ of mandamus — No demand for justice made — Petition held not maintainable. A 1958 Cal 654 (655).

(55) Grievance of petitioners that they were discriminated against when concession was shown to junior officers in the matter of promotion by the Government — Mandamus cannot be issued commanding authority to show indulgence as concession cannot be claimed as of right. A 1967 SC 993 (996).

(56) Mandamus, writ of — Person selected for one post transferred to another post — Other post lacking chances for promotion — Rights of such person are affected and writ can be issued in his favour. 1968 Lab IC 1377 (1381) (Mad).

(57) If an order of reversion to a substantive rank being a penalty or punishment amounts to reduction in rank in the circumstances of a particular case, noncompliance with Section 240 (3) Government of India Act (1935), or Article 311 (2) will justify the grant of mandamus. ILR (1957) 9 Assam 223 (234) (DB).

(58) Non-consideration for promotion of an employee otherwise qualified for consideration — Writ of mandamus can issue. A 1970 Orissa 19 (21, 22) (DB).

(59) Where there is no dispute that the order of reversion is not for exigency of service or for administrative reasons and it is for the alleged involvement of the petitioner in "watch smuggling case" casting a stigma on the character and integrity of the public servant affecting his future chances of promotion the provisions of Article 311 are directly attracted. 1975 Lab IC 1061 (1064) (Cal) (DB).

(60) Contention that compulsory retirement amounted to removal and opportunity to show cause was essential — **Held** that in view of definite pronouncement of Supreme Court that compulsory retirement is not dismissal or removal and that it does not attract Article 311, no question of interpretation of Constitution or any substantial question of law arose. 1955 Madh Bha LJ 1115 (1117).

(61) Where order removing a person from service is quashed by certiorari, it is not necessary to pass a further order directing his restoration to his former position. A 1956 Pat 257 (268) (DB).

(62) The petitioner asked for a declaration that he was entitled to subsistence allowance as promised in the suspension order — The fact that a suit for money would mean delay is no ground for granting a decree for money or a declaratory decree as above, in writ proceedings. A 1956 All 43 (45, 46).

(63) If Article 311 had been infringed in removing petitioner from service, High Court would direct Government to pass legal order after complying with the provisions of the Constitution. A 1954 Mad 1043 (1044).

(64) Although dismissal of a Government servant is only the exercise of administrative power that does not preclude the applicability of Article 226 to such cases. A 1956 SC 285 (291) ** A 1957 Punj 42 (44, 45) (DB).

(65) The dismissal of a civil servant is an administrative matter — Order dismissing the petitioner's appeal, which is administrative in character, cannot be assailed on the ground that it does not disclose in detail the reasons for making it. A 1964 Madh Pra 114 (116) (DB).

(66) Proceedings by way of departmental enquiry and punishment of a Government servant are in the nature of quasi-judicial proceedings. A 1955 Pat 372 (373) (DB) ** A 1954 Bhopal 25 (27) ** A 1954 Bom 361 (363) ** A 1953 Cal 316 (318) : ILR (1952) 2 Cal 254 ** A 1953 Hyd 201 (202, 203) (DB).

(67) The departmental enquiry by Tribunal constituted under Section 7 of Police Act, according to rules prescribed by U. P. State Government is of quasi-judicial nature, in respect of which writ of certiorari can issue. A 1958 All 607 (608) (DB).

(68) Departmental enquiry — Executive instructions regarding it are not mandatory but are regulatory — Breach of, does not

Articles 310 & 311 — Note 133 (contd.)

become justiciable. A 1968 Punj 406 (412) : 1968 Lab IC 1173.

(69) A writ application can be made even in respect of an order of suspension passed against a Government servant as a disciplinary measure where there appear to be no legal grounds for taking disciplinary action against him. A 1956 Mad 220 (222).

(70) Suspension of Government employee — Allegations found untenable — Reinstatement — Proceedings under Article 226 by employee for direction to pay arrears of salary — Writ allowed — Employee entitled to costs. A 1965 Cal 281 (282).

(71) The question of sufficiency or otherwise of the evidence on the basis of which the order of suspension was passed is beyond the scope of writ petition under Article 226. A 1958 Ker 72 (74) (DB).

(72) Suspension — Madhya Bharat Civil Services (Punishment and Appeal) Rules, 1950 — Breach of — Is not by itself ground for interference with order of suspension — Rules are administrative orders. A 1959 Madh Pra 295 (297) (DB).

(73) Power to interfere — Interim order of suspension — Suspension order providing subsistence allowance — Order cannot be challenged in writ proceedings. (1954) 56 Pun LR 1227 (1229, 1230).

(74) High Court cannot go into question whether order of suspension was based on proper materials — Suspension does not amount to dismissal, discharge or reduction in rank — Section 126, Constitution of Jammu and Kashmir (1957) not attracted. A 1964 J and K 14 (16) (DB).

(75) Suspension order passed by person having no authority to do so — High Court would quash the order even though pending the writ petition an order by the proper authority is passed. A 1954 Pepsu 98 (Pr 27).

(76) High Court can interfere with an order of suspension if it is malicious. ILR (1961) 11 Raj 892 (898) (DB).

(77) Suspension of Government servant — Not paid salary nor reinstated after quashing of order of suspension by High Court — Direction for payment of salaries due to him can be issued. A 1967 Pat 318 (319) (DB).

(78) Order of removal void as contravening Article 311 (2) — Though Government cannot be ordered to reinstate petitioner, it can be ordered to pass a legal order after complying with the provisions of the Constitution. A 1952 Sau 40 (43) (DB).

(79) A wrongful dismissal does not mean that Court will have to reinstate wrongfully dismissed person — Wrongfully dismissed person has to adopt the procedure laid down by statute (West Bengal Secondary Education Act) and ask for reinstatement from statutory body which the statute has created and which the statute has expressly clothed with power of reinstatement — It is not for Civil Court to be the substitute for statutory body. (1966) 70 Cal WN 571 (577).

(80) A mere possibility of a threat of reversion in service may not normally justify the intervention of the High Court in a petition filed under Article 226 — But if the impugned order carries with it a real and substantial threat to the rights accrued to the petitioners, it is permissible for the Courts to interdict the trespass on such right. A 1969 Andh Pra 118 (120).

(81) In a writ petition against disciplinary action non-observance of service Rules is not a sufficient ground unless prejudice has been proved on account of that non-observance. A 1963 Manipur 28 (31).

(82) It cannot be said that the Bihar Government Servants' Conduct Rules are given retrospective effect nor is there any illegality in applying the rules against the public servant. A 1967 Pat 43 (48) (DB).

(83) An order for the compulsory retirement of a police officer based on a wrong interpretation of the relevant rules can be quashed in proceedings under Article 226. A 1956 Pepsu 19 (26).

(84) In a petition under Article 226, against the reversion of the petitioner from his post, the Court is concerned only with the question whether there are irregularities in the enquiry which would vitiate it under Article 311 (2). A 1962 Tripura 15 (16).

(85) A mere irregularity which has not prejudiced the petitioner will not be a ground for interference by the High Court with an order terminating the services of the petitioner. A 1958 Andh Pra 240 (249) (DB) ** A 1956 All 476 (477) (DB) ** A 1956 Him Pra 71 (72).

(86) Irregularity in observance of rules in the matter of promotion — Aggrieved servant cannot have recourse to Court of Law. A 1962 Mad 485 (486).

(87) Where the case involves disputed questions of fact which cannot be decided in summary proceedings, the petitioner will not be granted relief under Article 226. A 1957 J & K 1 (3) ** A 1954 Pepsu 98 (103) ** A 1952 Cal 610 (614) ** A 1959 J and K 136 (137).

(88) Where the petitioner is guilty of suppressing material facts, he will not be entitled to relief in a writ application. A 1956 Tripura 33 (35) ** A 1954 Pepsu 98 (102).

(89) The mere fact that the aggrieved Government servant has another remedy open to him, as for instance, by a regular suit or by recourse to higher authorities departmentally, is no bar to the entertainment of his application under Article 226. A 1958 J & K 11 (13) (FB) ** A 1956 Andhra 203 (208) ** A 1956 Cal 662 (668) **

Articles 310 & 311 — Note 133 (contd.)
A 1956 Trav-Co 35 (41, 42) ** A 1955 Hyd 48 (54) (DB).

(90) Order compulsorily retiring Government servant — No violation of Article 311 (2). — Other remedies open to Government servant to vindicate his rights if he was aggrieved by order — Not proper case for exercise of jurisdiction under Article 226. (1960) 2 Lab LJ 464 (467) (Andh Pra) (DB).

(91) A challenge to a Government order forbidding reappointment of compulsorily retired persons as a stigma within the meaning of Article 311 is not an infringement of fundamental rights. Therefore, a petition under Article 32 challenging such order is not maintainable. **A 1977 SC 854 (856).**

(92) Order of compulsory retirement — Assessment of efficiency of employee — Based on record for entire service — Stray entry favourable to employee is of no avail — Conclusion of appointing authority cannot be reassessed by High Court in writ proceedings. 1978 Lab IC 1525 (1528) (Raj).

(93) Rajasthan Service Rules (1951), Rule 54 — Natural justice — Order of reinstatement of Government servant compulsorily retired — Period of absence whether or not to be treated as period spent on duty — Consideration of competent authority is objective and not a subjective function — Principles of natural justice to be followed. 1974 Raj LW 562.

(94-95) When the order of compulsory retirement is challenged, the authorities concerned must disclose some material which is relevant to the question of public interest. Though the sufficiency of the ground or material is not justiciable, it is open to the Court to examine whether such ground or material exists or not. (1978) 1 Serv LR 471 (483) (Andh Pra) ** 1979 Lab IC 1093 : 1979 BBCJ 452 (DB).

(96) Wrongful dismissal — Action by way of suit not pursued — Writ petition may be refused. A 1960 All 647 (648, 650).

(97) Petition for writ against order of dismissal — Though Court should take into consideration the fact that the petitioner could have instituted a suit it should not throw out a petition where it has been pending for a long time on the ground that remedy by way of a suit was open to him. A 1958 All 584 (587) (DB).

(98) In a writ application against an order of dismissal, removal or reduction in rank, the High Court is not concerned with the merits of the order. A 1957 Orissa 21 (23) (DB) ** A 1956 Orissa 99 (102) (DB) ** A 1955 Hyd 48 (51) (DB) ** A 1955 Punj 3 (4) ** A 1954 All 487 (489) (DB) ** A 1952 Bom 37 (42, 43) (DB).

(99) Misreading of administrative instructions — Causing prejudice — Writ petition maintainable. **A 1969 Punj 257 (269) : 1969 Lab IC 958.**

(100) Departmental proceeding against public servant — Mere suspicion should not take place of proof. 1969 Lab IC 896 (898) (Orissa).

(101) Any statutory rule relating to services which is otherwise enforceable can be enforced in a Court of law, including a proceeding under Article 226. 1968 Lab IC 731 (733, 734) (Cal).

(102) The question of violation of any rules or statute enacted under Article 309 regulating the conditions of service of such servants of the State as are not protected by Art. 311 would be a justiciable matter. **ILR (1966) 2 Punj 305 (310) (FB).**

(103) Reversion of Government servant, deputed to other department, to parent department — Service Rule relating to fixation of pay on reversion — Claim under such rule is justiciable right in respect of which relief is obtainable under Article 226. **A 1961 Mys 88 (98) (FB).** (R. A. No. 128 of 1957 (Mys), **(Overruled.)**

(104) Doctrine of President's pleasure — Departmental inquiry against person holding civil post connected with defence — Non-compliance with service rules under Article 309 — Non-compliance would be justiciable — Writ petition can lie. **A 1968 Punj 312 (319) : 1968 Lab IC 967 (FB).** (A 1937 PC 27 and A 1937 PC 31 **held no longer good law**, A 1953 Punj 137, A 1955 Punj 166, A 1956 Punj 42 and (1957) 59 Punj LR 472 and S. A. No. 43-D of 1956, D/- 23-5-1961 (Punj), **Overruled** in view of **A 1961 SC 751.)**

(105) Departmental enquiry — Departmental authority is not bound by conclusions reached by enquiry Committee — Conclusion of disciplinary authority supported by evidence and one which could have been reached by reasonable man — High Court in certiorari jurisdiction would not interfere with that conclusion. **A 1969 SC 966 (968) : 1969 Lab IC 1368.** (A 1963 Punj 336, **Reversed.)**

(106) Service agreement — Employee governed by State Bank of India (Sub-accountants and Head Cashiers) Service Rules, 1959 — Termination of service under rules — Writ petition — Alternative remedy by way of suit is no bar. A 1964 Mad 335 (345, 346).

(107) Contractual post — Mala fide termination before time — Term expiring during pendency of writ petition — No mandamus directing reinstatement will issue. A 1971 Punj 188 : 1971 Lab IC 682.

(108) A writ of certiorari cannot be issued to remedy or set right a breach of a contract which is committed in violation of principles of justice and fair play. (1976) 2 Serv LR 622 (Him Pra).

(109) Dismissal of Government servant not for "substantial misdemeanours" but for minor irregularities — Court will interfere. A 1965 Mad 502 (505, 506).

Articles 310 & 311 — Note 133 (contd.)

(110) Temporary employee complaining of wrongful dismissal must approach under Article 226 without delay. A 1963 Cal 421 (423).

(111) Inquiry held was vitiated because Government servant was found guilty of charge different from what he was originally charged with — Inquiry Report and order of removal from service quashed without prejudice to fresh inquiry being held. (1966) 12 Fac LR 120 (122) (Cal).

(112) Departmental proceedings against Head Constable — Charge of accepting illegal gratification for releasing arrested persons — Head Constable, in absence of Sub-Inspector of Police, demanded and accepted illegal gratification — Constituted serious misconduct — Charge cannot be declared illegal. 1980 Lab IC (NOC) 65 (Kant).

(113) Dismissal of Police Constable for six charges — High Court finding only three charges proved — However question of assessing quantum of punishment is beyond discretion of Court — High Court cannot remand case for awarding suitable punishment for three charges. 1979 Serv LJ 193 : 1978 Lab IC NOC 120 (Goa).

(114) The departmental authorities are sole judges of facts and if there be some legal evidence on which the finding can be based the adequacy or reliability of that evidence cannot be permitted to be canvassed in a proceeding under Article 226 of the Constitution. 1972 Lab IC 457 (459, 460, 462) (Orissa).

(115) Notice to show cause against dismissal — Fact that among the charges the petitioner has been exonerated of the most serious one — Writ against show cause notice — Premature for High Court to give a verdict whether petitioner can be visited with the punishment of dismissal or not. A 1976 Pat 158 (167) (DB).

(116) The guarantee provided in Art. 311 does not refer only to procedural aspect of matter. In a case where the Government have no cause of complaint against petitioner in so far as discharge of his duties is concerned, Government cannot take note of matters unconnected with such official duties in imposing any punishment in relation thereto. 1963 (1) Lab LJ 512 (515) (Mad).

(117) Reversion only not indicating whether it was in usual course or by way of punishment — Court can examine substance and real nature of order. A 1966 Pat 364 (366, 367) (DB).

(118) Any notice issued to a Government servant concerned to show cause why the confirmation order should not be cancelled is invalid and without jurisdiction and calls for interference under Article 226. A 1968 Assam 18 (19) : 1968 Lab IC 919 (DB).

(119) Formal enquiry against officiating Government servant — Reversion of such officer without enabling him to defend himself — It leaves a stigma against his service — Order of reversion must be quashed under Article 226. ILR (1969) 1 Punj 499 (504, 505, 506) (DB).

(120) Complaints as to service conditions — Not amenable to judicial review under Article 226. A 1960 Ker 82 (83).

(121) Whether disciplinary authority is correct or not in appreciating evidence is not open to question in writ proceedings. (1966) 79 Mad LW 428 (434).

(122) Where the case of petitioner is not that, there was no evidence or that the order was mala fide, jurisdiction of High Court under Article 226 would not be attracted by his raising the question of sufficiency of evidence. A 1959 Ker 201 (202) (DB).

(123) Petition under Article 226 by dismissed civil servant for quashing order of dismissal on ground of irregularities and for injunction — Proper remedy held was by way of suit. A 1956 Bom 351 (352).

(123A) Public servant has no right to promotion or to claim seniority in his grade or cadre — Article 311 (2) has no application to such a case — Writ does not lie for enforcing such right or claim. A 1968 Cal 35 (37, 38) ** 1969 Lab IC 56 (57, 58) (Punj).

(124) Satisfaction of President — Is not justiciable. (1967) 2 Lab LJ 767 (771) (All).

(125) Selection Post — Promotion on ground of seniority — Matter not justiciable in writ petition. A 1961 All 316 (319).

(126) Seniority is a matter of administrative nature depending on rules which have been framed by government under Art. 309 — Question of seniority is a matter which is not justiciable in court of law, much less in writ petition. A 1961 All 316 (318) ** ILR (1969) 1 Cal 272.

(127) Railway servant — Reduction in rank by way of seniority — Such order was not as and by way of punishment — Order held not justiciable. A 1959 Mad 68 (71) (DB).

(128) Order of dismissal of Police constable passed after enquiry — Mere fact that he was exonerated by Deputy Inspector-General of Police of three charges and found guilty on fourth charge alone, held, not sufficient to set aside order. (1966) 68 Pun LR 874.

(129) Departmental proceedings — Order of discharge — Revision against the order — Revising Authority passing a cryptic order is no ground to set it aside in writ proceedings. A 1967 Pat 133 (135, 137) (DB).

(130) Issue of second show cause notice under Article 311 (2) by competent authority — No absence of or usurpation or excess of jurisdiction — Writ of prohibition will not issue on ground that findings in

Articles 310 & 311 — Note 133 (contd.)
preliminary enquiry were not supported by evidence. (1965) 2 Lab LJ 645 (648, 654) (Guj).

(131) Where the grievance is that the services of a Government servant have been terminated contrary to the terms of a contract of service, the proper remedy will not be by a writ application under Art. 226, but by means of a suit. A 1956 Cal 532 (537) ** A 1954 Cal 561 (563) ** (1966) 2 Lab LJ 814 (820, 821) (Bom).

(132) Orissa Welfare Officers (Recruitment and Conditions of Service) Rules, 1951, Rule 6 — Dismissal of Welfare Officer on ground of disobedience of superior authority — Order supported by materials on record — Held, no error apparent on face of record — Order cannot be interfered with under Article 226. A 1967 Orissa 26 (28, 29) (DB).

(133) The posting of an officer is a matter entirely within the discretion of the Government and is not justiciable. A 1953 Nag 138 (140) (DB).

(134) The authority to decide whether a ministerial officer continues to be efficient is the appointing authority. It will not be proper for the High Court in exercise of its extraordinary jurisdiction under Article 226 to sit in judgment over the opinion of the appointing authority. A 1958 Orissa 202 (203) (DB).

(135) Ground of misdemeanour entailing dismissal made out — Court will not enquire whether there was violation of rule of natural justice, in respect of other finding. A 1967 Orissa 26 (28, 29).

(136) Removal of Travelling Ticket Examiner for neglect of duty and for deliberately undercharging marriage party — Second charge not proved — Held, it could not be said that competent authority would have inflicted punishment of removal for first charge and therefore order of removal could not be quashed. 1968 Raj LW 272 (286).

(137) High Court will not upset findings of Enquiry Officers in departmental inquiry if it finds that the Enquiry Officer has acted within his jurisdiction and given reasonable opportunity to petitioners to defend himself. A 1960 Punj 646 (652) (DB).

(138) Transfer of School teacher controlled by Municipality — Reduction in rank not established — Writ will not be issued — Courts are not meant for issuing writs only at the choice and whims of parties. 1969 Lab IC 900 (903) (DB) (Pat).

(139) Rajasthan Medical Service (Collegiate Branch), Rules (1956) Rule 30 (4) (as amended on 22nd August, 1966) — Recruitment under — No provision for reference to Public Service Commission for continuation of appointment for more than six months — Relief under Articles 226 or 32 is not available. 1968 Lab IC 1605 (1622) (Raj).

(140) Dismissal of railway servant — Order of appellate Tribunal cryptic but the appellate authority showing in proceedings under Article 226 that it had considered all material in support of original order and this position is not controverted, the cryptic order by itself is not sufficient ground for interference. A 1966 Pat 205 (209) (FB).

(141) Transfer of non-gazetted railway servant from one department to another by Chief Commercial Superintendent — Question about transfer of official is primarily for authorities concerned and it is not for High Court in petition under Article 226 to adjudicate about advisability or propriety of transfer — High Court can interfere only if transfer is violative of any legal provision or is otherwise mala fide. A 1967 Punj 76 (79) ** 1979 Lab IC (NOC) 156 (Kant).

(142) Transfer of Government servant challenged on grounds of mala fides — Mala fides not proved — High Court refused to exercise powers under Article 226 and quash the order of transfer. A 1965 Punj 455 (456, 457).

(143) Where punishment or dismissal is not contrary to rules High Court cannot interfere with the same merely because it appears to be too severe. (1968) 2 Mad LJ 226 (229) : (1968) 2 Lab LJ 804 ** A 1967 Pat 347 (350) (DB).

(144) Final order of dismissal not passed — Writ cannot be issued at the stage of enquiry. A 1962 All 166 (174).

(145) Municipal employee — Dismissal on account of mala fide conduct — Charge-sheet issued and explanation called for — Enquiry held in his presence — High Court refused to exercise jurisdiction under Article 226. A 1958 Bom 260 (262) (DB).

(146) Petition for issue of writ of mandamus directing Electricity Board not to fill posts of Accountants by direct recruitment and to promote employees who are deputed from State Government for working in Board — Petitioners having no vested legal rights on date of filing petition for being appointed as Accountants — Held writ could not be issued. A 1969 Andh Pra 328 (334) : 1969 Lab IC 1080 (DB).

(147) Reversion of employee consequent to abolition of post held by him on purely temporary basis — Reversion neither was by way of punishment nor entailing penalty — Employee having no right to post, held had no cause of action to file writ petition. 1969 Lab IC 1435 (1437) (Punj).

(148) Not applicable to enforce contract of service with Government which is still subsisting — Whatever the grievance of the employee he must seek his remedy under general law and not under Article 226 in the absence of any statutory right or liability even where the contract is with the Government. A 1969 Cal 95 (104) : 1969 Lab IC 142.

Articles 310 & 311 — Note 133 (contd.)

(149) Managing Committee of school granting compulsory leave to teacher and debarring him from coming to school pending decision of committee — Committee superseded by ad hoc committee — Order of termination of service passed by ad hoc committee as per contract of service — No inference held could be drawn that ad hoc committee was actuated by malice — Not a case for interference under Article 226. A 1959 Tripura 27 (32).

(150) Wrongful dismissal or termination of service — Proper writ is writ of certiorari — Certiorari is limited to the quashing of the impugned order — Writ cannot be issued to compel reinstatement to post indicated. A 1959 Tripura 27 (29).

(151) Two courses open to appointing authority in respect of Government servant appointed in temporary service — Appointing authority deciding to terminate service — Court will not interfere. A 1963 Tripura 38 (42).

(152) Tribunal suggesting compulsory retirement as punishment — Recommendation accepted — It is not for High Court in petition under Article 226 to enquire into question as to reasonableness, adequacy or propriety of punishment. A 1961 Andh Pra 289 (292, 293).

(153) Termination of contract of service — Proper inquiry held observing rules of natural justice — Interference with order not possible unless the plea that the authority concerned acted maliciously or for a collateral purpose is made out. **A 1968 SC 292 (300).**

(154) Railway servant — Appointment subject to character and antecedents being verified by civil authorities — Service terminated on receipt of unsatisfactory report — High Court will not interfere. A 1958 Cal 654 (656).

(155) Where the Government officer has only been asked to take leave preparatory to retirement which he has accordingly done, there is no order dispensing with the services of the officer. To such a case Article 311 does not apply and there is no basis for an application under Article 226. A 1952 Trav-Co 409 (411) (DB).

(156) In considering whether a public Officer is guilty of misconduct charged against him, rule followed in criminal trials that an offence is not established beyond reasonable doubt to the satisfaction of Court does not apply and even if that rule is not applied. High Court in a petition under Article 226, is not competent to declare the order of the authorities holding departmental enquiry invalid. **A 1963 SC 1723 (1727).**

(157) Where an employee of a co-operative society is dismissed by the Secretary, no writ can issue against the Registrar, Co-operative Societies, or the State Government. **A 1956 All 43 (46).**

(158) Remarks by superior officer in service book of subordinate officer — Writ for their expungement will not be issued. A 1961 Cal 164 (165).

(159) A company registered under the Companies Act cannot be said to be either a public body or a 'public authority' merely because the Central Government exercises quite an extensive control over the affairs of the company. Hence an employee of such a company cannot be called a 'civil servant' governed by Article 311. The employee of the company, on being dismissed is not entitled to get relief under Article 226. (1968) 72 Cal WN 398.

(160) Any order of dismissal or discharge passed by Corporate Bodies cannot be questioned on the ground that the same was in contravention of Article 311 and the remedy for wrongful dismissal or discharge in such cases is to file a suit for damages. 1976 Lab IC 616 (Pat).

(161) Where an employee serving in private institution not created by statute is removed from service, no writ petition is maintainable against that institution. 1978 Serv LWR 138 (139) (Punj).

(162) Decision of non-statutory body to revert its employee, cannot be challenged in a writ petition under Arts. 226 and 227. 1976 SLWR 46 (51) (Punj).

(163) Domestic tribunal functioning within letter and spirit of law — No interference with its decision. A 1959 Tripura 27 (32).

(164) Domestic enquiry against an employee — Court not to appraise the evidence and substitute its findings for that of inquiring officer. A 1968 Delhi 269 (271) : 1968 Lab IC 402.

(165) Objection to jurisdiction of Anti-Corruption Commission can be raised for first time in writ petition which can be filed before the Commission passed its final order. **A 1967 J and K 98 (102) (FB).**

(166) Dismissal of servant by master, after due notice — Dismissal is not justiciable — No writ lies. A 1968 Kerala 72 (73, 74) : 1968 Lab IC 349.

(167) Central Civil Services (Temporary Service) Rules, 1949, Rule 3 — In view of Rule 3 the Judicial Commissioner's Court cannot take the place of the appointing authority and in a writ petition under Article 226 go into the question of the suitability of the servant in regard to age, qualifications, work and character. A 1963 Tripura 38 (41).

(168) Findings of Enquiring Officer or Tribunal making out a prima facie case against the delinquent — High Court has no jurisdiction to direct that authority to reconsider its order on the ground that in respect of some of its findings, but not all, there appeared to be violation of rules of natural justice. A 1964 Orissa 241 (246) (DB).

(169) Order of reversion of civil servant from officiating post to substantive post —

Articles 310 & 311 — Note 133 (contd.)
Petition challenging validity of order filed nearly after seven years — Refusal to entertain held justifiable. **A 1970 SC 364 (365)** ** A 1958 Punj 16 (17) ** A 1956 Pat 23 (26) ** A 1956 Pepsu 19 (21) ** A 1960 Madh Pra 299 (300, 301) (DB).

(170) Utmost expedition on the part of the public servant is essential for invoking the writ jurisdiction of the High Court and there must be a reasonable explanation for the delay acceptable to Court. (Application challenging dismissal of Government servant dismissed as belated.) 1975 Lab IC 1404 (DB) (Cal) ** (1979) 3 Serv LR 667 : 1979 Lab IC (NOC) 155 (J & K).

(171) Where the delay has been explained by the fact that the applicant was pursuing his remedies by way of appeals, petitions, etc., to departmental authorities and executive heads, the application cannot be thrown out on the ground of delay. **A 1958 J and K 11 (13) (FB)** ** A 1954 Bhopal 25 (27) ** A 1961 All 338 (340) (DB). (Employee proceeding against order departmentally and filing writ petition within 3 months of last order — Petition is not belated and is within time. Writ Petn. D/- 5-3-1958 (All), **Reversed.)**

(172) **Held,** the claim of the petitioner did not become stale as he made repeated representations. However, while agreeing that injustice was done to him, the refixation of seniority was quashed as it would disturb seniority of others after lapse of a number of years. (The Government was directed to pass appropriate orders.) **1979 Lab IC 1294 (1307) : 1979 (2) Serv LR 478 (Delhi) (FB).**

(173) Court will attach importance to the question whether the objection on the ground of delay has been taken by the State in its return to the application, or whether the State has been prejudiced by such delay. A 1956 Sau 14 (16) (DB) ** A 1956 Trav-Co 35 (41).

(174) Dismissal of Civil Servant — Charges serious — Legal position difficult, legal advice necessary — Delay in filing writ was excusable. A 1969 Cal 164 (166) : 1969 Lab IC 406

(175) Writ petition — Filing of — Delay — Transfer of petitioner's services from Government to University — Petitioner filing writ petition after making representation to Government — No laches on his part. 1969 Lab IC 730 (738) (DB) (Mys).

(176) A writ can issue even though the officer who passed the dismissal order has left the office and some other officer has been appointed to the post. A 1956 Pat 257 (268).

(177) Where an order of dismissal passed by an inferior authority is confirmed on revision or in appeal, by a superior authority resident outside the jurisdiction of the High Court, the High Court will have jurisdiction to interfere. 1954 Raj LW 520 (521) (DB).

(178) Certiorari — Territorial jurisdiction — Executive orders — Dismissal of Government servant confirmed in appeal — Doctrine of merger not applicable — Punishing authority amenable to territorial jurisdiction of High Court while appellate authority functioning and residing outside the jurisdiction — Original order of dismissal can be examined. (1961) 3 Fac LR 25 (29) (All).

(179) Suspension of District Judge on charges of corruption — Order of suspension issued by Chief Justice — Not necessary to make High Court party to writ proceedings initiated by aggrieved party. **A 1967 J and K 98 (102) (FB).**

(180) Territorial jurisdiction — Petitioner an employee of Durgapur Steel Project under Hindustan Steel Limited, dismissed without assigning any cause — Petition under Article 226 for violation of Art. 311 and Rules of natural justice — Union of India represented by Secretary, Ministry of Iron and Steel, New Delhi, Secretary Hindustan Steel Limited of Ranchi and General Manager, Durgapur Steel Project made respondents — First two respondents being outside jurisdiction of Calcutta High Court, petition is not maintainable in Calcutta High Court — Fact that third respondent is within jurisdiction does not help the petitioner. A 1963 Cal 421 (423).

(181) Railway servant appointed at K — Subsequently posted at R — Disciplinary proceedings at R — Order of removal passed at B — Employee challenging order at K — Court at K has no jurisdiction to hear petition. 1978 Lab IC 448 (450) (All).

(182) Petition to quash reversion order — Legal representatives of petitioner brought on record after his death — Reversion order being void as offending Article 311 — Legal representatives held entitled to prayer sought. A 1968 Guj 202 (208, 209, 210) (DB).

(183) Bombay Reorganisation Act (1960), Sections 61, 81, 82 — Civil servant serving in Bombay State at Rajkot illegally dismissed in violation of Article 311 (2) — Writ petition against dismissal — Petition does not lie in Gujarat High Court. **A 1964 Guj 1 (4, 5, 6, 7, 8, 9) (FB).**

(184) Decision in writ petition — Operates as res judicata in subsequent suit. A 1965 Punj 342 (346) (DB).

(185) Dismissal of Writ petition against order of dismissal — Subsequent suit challenging dismissal — Decision on points raised in writ will act as res judicata — Suit can be based on new points. A 1969 All 466 (468).

(186) Application under Article 226, dismissed on ground of availability of remedy by way of suit — Observations that provisions of Article 311 were observed — Remarks that merits of case not entered into — Decision is not res judicata in subsequent suit. A 1958 Madh Pra 326 (328).

(187) Suit by employee of Cantonment Board that his dismissal is inoperative and

Articles 310 & 311 — Note 133 (contd.)

void because he was not given adequate opportunity to defend himself against the charge is maintainable. A 1961 Punj 460 (462).

(188) Writ petition challenging order of reversion on ground of discrimination — Persons likely to be affected by order of Court not made parties to petition — Petition is incompetent. 1969 Lab IC 1435 (1436) (Punj).

(189) Necessary parties — Writ petition against State challenging promotions — None of promotees impleaded — **Held**, in case of acceptance of writ, promotees would be affected — Promotees were not only proper but necessary parties, in whose absence no effective order on merits was possible. (1979) 3 Serv LR 667 : 1979 Lab IC NOC 155 (J & K).

(190) Where a suspension order is made by the Financial Adviser and the Chief Accounts Officer, Northern Railways, the question whether he was justified in making that order cannot be gone into by the Allahabad High Court in a proceeding under Article 226 if the Financial Adviser and Chief Accounts Officer was not made a party to the proceeding. A 1957 All 671 (676) (DB).

(191) Termination of service of temporary Government servant — Finding that termination amounts to dismissal from service so as to attract Article 311 (2) arrived at following test laid down in Supreme Court decision — Case held involved no substantial question of law relating to interpretation of Aricle 311 (2) — Case involved at best further interpretation of Supreme Court decision for which no certificate under Article 132 (1) could be granted. A 1961 Tripura 27 (29).

(192) Government of India Act (1935), Section 240 — Contravention of Sec. 240 — Person aggrieved is entitled to suitable remedy at hands of Court. ILR (1954) Cut 684 (DB).

(193) In case of contravention of provisions of Sections 240. 241 of the Government of India Act 1935, the person aggrieved is entitled to suitable remedy at the hands of Court. ILR (1954) Cut 684 (703, 704) (DB).

(194) Functions of an Enquiry Committee appointed to conduct departmental enquiry into the misconduct of railway servants are not quasi-judicial but administrative. Unless final orders are passed on the basis of the report of the Enquiry Committee, application for certiorari to quash proceedings is premature. A 1963 Pat 38 (44, 45) (DB).

(195) If, in an application under Art. 226, it is found that some of the charges against a public servant are untenable either due to failure to comply with rules of natural justice or for some other reason, nevertheless, the High Court has no jurisdiction to remand the case for reconsideration by the competent authority. (1964) 6 Orissa JD 107 (114, 115) (DB).

(196) Writ petition by Government servant challenging order of dismissal from service based on report of enquiry officer — Personal allegations against enquiry officer made in petition — No specific denial of allegation in counter affidavits nor any affidavit denying allegations filed by enquiry officer — **Held** allegations must be accepted as true though enquiry officer was not specifically made party to petition. 1968 Lab IC 1268 (1273) (Tripura).

(197) Civil servant — Punishment given according to civil service rules but not having statutory and constitutional protection cannot form basis of action in Civil Court. ILR (1956) Punj 1213 (1223).

(198) Assam Education Department Rules and Orders are administrative Rules — No scope for issue of any writ in regard to these Rules. ILR (1966) 18 Assam 98 (104) (DB).

(199) Parliament and State Legislatures can make a law laying down and regulating scope and extent of the doctrine of 'reasonable opportunity' embodied in Art. 311 but said law would be subject to judicial review. **A 1961 SC 751 (761) : 1961 (1) Cri LJ 773.**

(200) Recruitment — Illegal Railway strike — Loyal workers given assurances by Government, including preference in employment of their wards — Breach of assurances — Mandamus for appointment of ward issued. 1978 Lab IC 946 (948) (Kant).

(201) Writ petition to quash Government Resolution not to consider Government employees (including petitioner) against whom departmental inquiry is pending, for promotion — Petition filed during pendency of departmental enquiry — Enquiry concluded before the decision of petition — Petition could not be decided overlooking the result of enquiry, even though it was subsequent event. 1978 Lab IC 904 (906) (Guj).

(202) Rule 52 of J. and K. Civil Services (Classification, Control and Appeal) Rules (1956) is a statutory Rule — Government failing to comply — Compliance can be enforced through writ proceedings. 1977 J & K LR 668 : 1978 Lab IC (NOC) 123 (J & K).

(202) Termination of service — Employee, serving with Agricultural Marketing Board — Employee not able to establish that he had any statutory status — No writ can be granted to quash termination order (Ratio that "a breach of a statutory regulation did not entitle an employee to a declaration of continuation of service and relegate him to ordinary remedy of damages" propounded in 1969 Ser LR 799 (S. C.) is now overruled by 1973 S. L. J. 525 (SC). **1977 Serv LJ 372 (FB).**

(203) Staff Regulations 1960, Life Insurance Corporation of India are not statutory provisions — Enquiry against employee — No writ lies. (1971) 75 Cal WN 26.

(204) High Court allowing a government letter to be brought on record by way of additionol evidence — Letter prima facie supporting plea of mala fides and showing that evil consequences are involved — After admitting letter on record High Court cannot refuse to consider it. **A 1971 SC 1224 (1227).**

(205) A statute or statutory rule or administrative action contrary to natural jus-

Articles 310 & 311 — Note 133 (contd.)
tice can be struck down by High Court only if it is unconstitutional. In other words, it is only if the principle of natural justice underlying a constitutional provision (such as a fundamental right or the procedure prescribed in Art. 311 (2)) is violated that the order of dismissal can be quashed. **1972 Lab IC 736 (740) (FB) (Delhi).**

134. Equality clauses in the Constitution.— (1) Although the State Government has power to make a law altering unilaterally the conditions of service of a Government servant such law should not be repugnant to Article 311 or Art. 14 or Article 16 of the Constitution. 1969 Lab IC 730 (737): (1968) 2 Mys LJ 479 (DB).

(2) A rule prescribing a language qualification for entry into State Service does not offend Article 15 or 16 and is not invalid on that account. A 1955 Orissa 113 (115) (DB).

(3) Employee unqualified for post wrongly appointed — Reversion — Involves no malice — No violation of Art. 16. 1978 Lab IC (NOC) 118: 36 Fac LR 227 (DB) (All.)

(4) Appointments and promotions of officers to Gazetted post — Post of Deputy Director and Project Officer shown in different classes and in different categories carrying different pay scales — Rejection of petitioner's claim for post of Deputy Director — Non-consideration of his claim for the post of Project Officer for which he was eligible amounts to violation of Articles 14 and 16 of the Constitution. 1973 Lab IC 1300 (J & K).

(5) The selection of persons for retrenchment is principally a subjective matter and does not violate Art. 16. A 1955 Nag 289 (290) (DB) ** A 1952 Trav-Co 7 (10).

[See however A 1957 Pat 617 (622, 629).]

(6) Equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State is confined not only to the initial appointments but includes also the terms and conditions of service as well as promotion to selection posts. A 1968 Punj 436 (439) ** 69 Pun LR 194 (202) ** A 1961 Ker 203 (206) (DB).

(7) The guarantee under Article 16 extends to every employment whether permanent or temporary. All along during the continuance of employment every citizen is assured of that equality of opportunity and the same principle must govern the case when the appointment or employment is sought to be terminated. A 1959 Bom 134 (139) (DB). (Reversed in A 1962 SC 630 on another point.) ** A 1959 All 134.

(8) There is nothing in the rules for the Recruitment of Ministerial Staff which would take away the discretion of Government to appoint to a selection post any member of the Staff when it conziders him fit to hold that post. An employee having accepted an officiating chance, cannot, complain on his being reverted to substantive post that his rights have been infringed. ILR (1966) 2 All 42 (47, 49) (DB).

(9) All employees in the same time scale pertorming the same or similar duties are certainly entitled to the protection guaranteed by Art. 16 and some of them cannot at the sweet will of the Government be discriminated against inter se, in the matters of their service, without their consent. 69 Pun LR 194 (204).

(10) This rule of 18 months even if administrative and not statutory, is in no way inconsistent with any rules framed under any statute or under Art. 309 of the Constitution and does create a right in favour of a Railway servant to continue in officiating appointment wherefrom he cannot be reverted except by way of penalty. That right can be enforced in writ jurisdiction of the High Court.

The Railway Board having applied that rule in respect of other Railway servants, denial of that benefit to the petitioner would only result in unreasonable discrimination in violation of Articles 14 and 16 of the Constitution. (1975) 2 SLR 110: (1974) 78 Cal WN 408.

(11) Government servants — Proposal to raise scales of pay — Imposition of test for qualifying servants to higher scale in one section while exempting servants in other section of same department — Working in section subject to tests more difficult but offering better chances than working in other section — Action of Government held not discriminatory. A 1960 All 484 (499, 500).

(12) Article 16 clause (1) does not apply to compulsory retirement, as such retirement is not "employment" or "appointment" to any office. A 1954 All 343 (347) (DB).

(13) Rule 285 of Mysore Civil Services Rules 1958 under which Government is entitled in public interest to retire Government servant prematurely is not open to challenge under Article 14 or 16 (1). A 1965 SC 280 (282).

(14) Termination of services of one of temporary Government employees — Article 16 is not violated — There is no denial of equal opportunity of employment merely because he was selected for termination of services. (1961) 2 Guj LR 268 (270).

(15) Termination of services of temporary employee while retaining his juniors in service — The termination would be hit by Article 16 if it is necessitated by exigencies of services. 1968 All LJ 735 (737).

(16) There is no violation of Art. 14 in the termination of the service of a Government servant after notice in accordance with contract of service. A 1953 SC 250 (252) ** A 1955 All 496 (499).

(17) Discrimination in the matter of confirmation of servants similarly situated is violative of Article 14 and Art. 311 is attracted. A 1968 Manipur 58 (62, 63): 1968 Lab IC 1065.

(18) A provision, empowering Government in its absolute discretion to compulsorily retire any person who has put in twenty-five years of service, is not ultra vires under Article 14, as that article does not control Article 310, Clause (1). A 1954 All 343 (348) (DB).

Articles 310 & 311 — Note 134 (contd.)

(19) Compulsory retirement — Memorandum issued by Govt. as general order raising retirement age to 58 years — Provision prescribing compulsory retirement after the Government servant has completed 55 years of age but without assigning any reason — Provision offends Article 14 but not Article 311 (2). **A 1970 Assam 1 (5, 10): 1970 Lab IC 11 (FB).**

(20) The selection of a person for promotion to a higher appointment, which under the rules has to be made on the basis of merit and ability, and not merely of seniority, cannot involve any infringement of the provisions of Art. 14. **A 1957 J and K 29 (30) (FB).**

(21) If an order of reversion of a civil servant stands in the way of his earning future promotion to the higher rank even by a subsequent display of merit it is certainly a penal consequence within the meaning of that case. Thus, where a civil servant holds a superior post even on a temporary basis his claims to other equal posts to which juniors were promoted could not be ignored and by doing so there is a denial of equal opportunity guaranteed by Article 16 of the Constitution. 1969 Jab LJ 1079: 1970 Lab IC 607 (610, 611) (DB) (Madh Pra).

(22) Submission of names of some appointees only to the Public Service Commission for regularisation of appointments — Others reverted on the ground of their appointments not having been regularised — Order is discriminatory and must be quashed — Case is governed by Art. 14 and Arts. 310 and 311 have no application. A 1962 Ker 29 (30).

(23) The general principle that all employment under the Union or State is durante bene placito does not in the least militate against constitutional prohibition in Art. 16 that there shall be no arbitrary discrimination between one citizen and another in matters of service. A 1959 Bom 134 (138) (DB). **(Reversed in A 1962 SC 630 on another point.)**

(24) The provisions of Articles 310 and 311 are not immune from the equality clauses of the Constitution and the termination of service even of a temporary employee by arbitrarily picking him out for such termination would be void under Article 16. A 1959 Bom 134 (137, 138) (DB).

(25) If the services of a temporary Government servant are terminated, arbitrarily, and not on the ground of his unsuitability, unsatisfactory conduct or the like which would put him in a class apart from his juniors in the same service, a question of unfair discrimination may arise, notwithstanding the fact that in terminating his service, the appointing authority was purporting to act in accordance with the terms of the employment. Where a charge of unfair discrimination is levelled with specificity, or improper motives are imputed to the authority making the impugned order of termination of the service, it is the duty of the authority to dispel that charge by disclosing to the Court the reason or motive which impelled it to take the impugned action. Excepting perhaps, in cases analogous to those covered by Art. 311 (2), proviso (c), the authority cannot withhold such information from the Court on the lame excuse, that the impugned order is purely administrative and not judicial, having been passed in exercise of its administrative discretion under the rules governing the conditions of the service. **A 1979 SC 429: 1979 Lab IC 146 (151).**

(26) Government servant — Seniority and promotion — Arbitrary order affecting seniority — No reasons assigned — Violates Art. 16. 49 Cut LT 323: 1980 Lab IC NOC 72 (DB).

(27) The rule of master and servant in its original absolute form is not applicable to Government servants. To bring it in tune with vastly changed and changing socio-economic conditions and mores of the day, much of this old, antiquated and unjust doctrine of master and servant has been eroded by judicial decisions and legislation, particularly in its application to persons in public employment, to whom the constitutional protection of Arts. 14, 15, 16 and 311 is available. **A 1979 SC 429: 1979 Lab IC 146 (152).**

(28) The Rule of "last come first go" is well recognised in retrenchment in industrial law. The non-compliance of the rule, whether in the matter of retrenchment or reversion would constitute an infraction of the fundamental guarantee envisaged in Art. 16 of the Constitution of India. Such a departure from the rule would be liable to be struck down unless there was something in the statute or statutory regulations or otherwise in the conditions of service which would justify such a deviation. 1977 Lab IC (NOC) 17: 1976 Serv LC 577 (Delhi).

(29) The applicability of Art. 14 cannot be excluded on the ground that Article 310 is a special provision dealing with special or particular matter and Art. 14 is a general provision. A 1960 All 484 (489, 499).

(30) Executive order of Government — Refusal to pay arrears according to refixation of salary of Government servant — Government servant can invoke Art. 14 and challenge order under Art. 226 on ground of discrimination. A 1959 Ker 338 (339, 340).

(31) Merely because the enquiry is held not under the Public Servants (Inquiries) Act, 1850, which only applies to officers who are not removable without the sanction of the Government but under the rules of the particular State, does not mean that there is any violation of the equality clause. A 1955 Punj 1 (3).

(32) Alleged discrimination in the conduct of enquiry proceedings — Joint enquiry against two persons — Enquiry Officer granted adjournments to one person and refused adjournment to another person and proceeded ex parte — Reasons were not recorded for granting adjournments — It cannot be said that there were no reasons to seek adjournments—No discrimination to another person. 1975 WLN (UC) 299: (1976) 1 Serv LR 614 (Raj).

Articles 310 & 311 — Note 134 (contd.)

(33) Delinquent remained absent on date of proceeding without sufficient cause — Enquiry Officer proceeding ex parte — No denial of reasonable opportunity. 1975 WLN (UC) 299: (1976) 1 Serv LR 614 (Raj).

(34) There is no infringement of Art. 14 involved in the fact that the Pubic Servants (Inquiries) Act, 1850, which is a Central Act, is applicable only to servants who cannot be dismissed without the sanction of the Government, while there is another set of rules applicable to subordinate services. A 1955 Punj 3 (4).

(35) Enquiry against dismissed Officer — Pepsu Public Servants (Inquiries) Ordinance (2006 B. K.) — Applicability — Ordinance applies only when Government holds public inquiry against dismissed Officer and not to departmental inquiry — Government has option to hold either of the inquiries — Departmental inquiry is governed by Pepsu Services Regulations — Latter provisions do not contravene provisions of Art. 14. A 1960 Punj 646 (652) (DB).

(36) Scope — Judicial Officer, in service of State — Proceedings started against officer under Travancore Public Servants (Inquiries) Act, 1122 — Proceedings not started against him under Kerala Civil Services (Classification, Control and Appeal) Rules 1957, though these rules were in existence — Though procedures in such proceedings slightly differ, still guarantee given under Art. 311 (2) is not discriminatory. A 1963 Ker 92 (97, 98).

(37) Police services — Enquiry against police officer commenced before the Constitution but completed after the Constitution — Order of dismissal is not invalid under Article 14 where the substance of the special procedure followed after the Constitution is the same as in a trial by normal procedure. **A 1961 SC 1245 (1253, 1254).**

(38) Madras Police Subordinate Service (Disclipline and Appeal) Rules 1950, Rules 3 (b), 2 and 5 — Madras Civil Services (Disciplinary Proceedings Tribunal) Rules 1948. Rule 8 — Enquiry against Police Officer — Procedure to be followed under Police Rules as well as under Tribunal Rules is substantially same and satisfies requirements of natural justice — No discriminatory treatment. **A 1965 SC 1103 (1107).**

(39) With repeal of Sec. 243 of Government of India Act, provisions of Art. 311 of Constitution which is a substitute for Section 240 of Government of India Act, 1935 are made applicable to members of Subordinate Police force — Rules under U. P. Regulations are not discriminatory. A 1959 All 569 (571).

(40) U. P. Disciplinary Proceedings (Administrative Tribunal) Rules (1947), Rule 8 — Procedure for trial under — Not more onerous or less favourable than that under Civil Service Rules. A 1960 All 754 (759).

(41) Proceeding started in 1947 against Sub-Inspector of Police for enquiry into alleged misdemeanour — Procedure, either under U. P. Disciplinary Proceedings (Administrative Tribunal) Rules, 1947 or under U. P. Police Regulations open to authorities, at a time when Art. 14 was not in force — Writ petition by Sub-Inspector after Constitution — He cannot challenge validity of enquiry on the plea of equal protection of the laws. **A 1961 SC 1245 (1251).**

(42) Enquiry for misdemeanour — Two sets of rules under which enquiry could be ordered — Disciplinary Proceedings (Administrative Tribunal) Rules (1951) and Bihar and Orissa Subordinate Services Discipline and Appeal Rules (1935) — Enquiry held under Disciplinary Proceedings (Administrative Tribunal) Rules (1951) — Those rules more drastic than Bihar and Orissa Subordinate Services Discipline and Appeal Rules (1935) — Case of discrimination. arises. **A 1961 SC 1715 (1717).**

(43) Life Insurance Corporation — Field Officer — Who is — Includes inter alia Superintendent of Agencies — Discrimination — Definition not ultra vires of Life Insurance Corporation Act (1956), or illegal under Article 14 of Indian Constitution (1950). A 1964 Cal 388 (390, 391).

(44) Reorganisation of States — Integration of services of former Mysore State into new State of Mysore — Cadres of men teachers and women teachers equated — Preparation of inter-State Seniority list by Central Government — Application of different standards in allocating seniority to men teachers and women teachers, held, discriminatory — Seniority list held, invalid. 1969 Lab IC 1032 (1034) (Mys).

(45) Andhra Civil Services (Disciplinary Proceedings Tribunal) Rules 1953, Rules 4 (2) and 5 (b) — Validity — Rule 4 (2) not violative of Art. 14. A 1962 Andh Pra 303 (307) (DB).

(46) No objection can be taken under Article 14 to the power of the Government to appoint any person it likes to conduct the inquiry against a public servant. A 1955 Punj 3 (4) ** **A 1968 Punj 312 (319): 1968 Lab IC 967 (FB).**

(47) Rule 10 (b) (iii) of Kerala State and Subordinate Service Rules (1958) is applicable to all persons alike, without distinction; and it does not, spell a violation either of Art. 16 or Article 311. If a person is ousted without being afforded an opportunity to show cause, the rule is likely to be used to perpetuate favouritism or victimisation by the Government. But the mere prospect of abuse of a statutory provision is no ground to strike down the provision itself. (1979) 1 Serv LR 94: 1979 Lab IC (NOC) 45 (DB) (Ker).

(48) Judicial review of justifiability of an order of transfer is permissible if such transfer is made in mala fide exercise of power or vitiated by hostile discrimination thereby rendering the action ultra vires and attracting the inhibition enshrined in Article 14. In this case, the transfer of the announcer of the All India Radio appointed by virtue of an agreement entered into by him with the Govt. of India was neither mala fide nor was it vitiated by any vindictive motive, therefore even if there was any breach of the agreement the remedy under Art. 226 could not be availed by him. (1979) 2 Andh LT 99 (104, 105).

135. Lien.— (1) As soon as a Government servant is substantively appointed to a per-

Articles 310 & 311 — Note 135 (contd.)
manent post, he gets a right to that post which is known as "lien." **A 1958 SC 36 (43) ** A 1952 Orissa 285 (289)(DB) ** ILR (1970) 20 Raj 453 : 1970 WLN Part-I 302.**

(2) Termination of service of a promotee with a lien in parent department without following the procedure prescribed in Article 311 is illegal. 1972 Cur LJ 109 (Punj).

(3) Unless both the elements, namely, permanency of the post and substantiveness of the appointment, co-exist, no lien will be created. A 1957 Raj 81 (84) (DB).

(4) If a person is holding a post only temporarily, he has no lien on that post and cannot complain if he is transferred to some other post outside the cadre. A person who is appointed substantively to a post acquires a lien on that post and he cannot be removed from that post except on disciplinary grounds. 1974 Lab IC 1457 (1458) : (1974) 1 Cut WR 587 (Orissa).

(5) Mysore Civil Service Rules, Rule 162 — Government servant refused leave and asked to report on duty — On failure his lien on post cancelled under Rule 162 — This amounted to removal from service without necessary enquiry — Rule 162 so far as is repugnant to Art. 311 is void — Order cancelling his lien was held bad. 1968 Lab IC 1384 (1385) : (1968) 1 Mys LJ 519.

(6) Government servant confirmed on permanent post of lower division clerk in Forest Department — Transferred to Jail Department but not substantively — Voluntary declaration by servant that he would not claim any lien on his permanent post — Later on, his services in jail Dept. terminated and placed at disposal of Forest Department which refused to reappoint him — **Held**: refusal to replace him on his permanent post contravened Rules 14 and 14-A of Fundamental Rules which continued to be operative and effective as laws in force and are statutory provisions. A 1969 Madh Pra 60 (61, 62) (DB).

(7) Lien on transfer is not lien on particular post when none is held before transfer. A 1964 Cal 388 (390, 391).

(8) Position of Government servant is more one of status than of contract and his terms of service are governed by statute or statutory rules — Punjab Civil Services Rules, Vol. I Rule 3.17 — Government has power to transfer a Government servant from one post to another and to retransfer him to the post on which he held a lien. 1970 Lab IC 1009 : A 1970 Punj 315.

(9) A temporary servant on deputation, on coming back to his parent post, after the deputation loses his job, when that parent post, also comes to an end with the abolition of the scheme under which it was created. (1972) 1 Lab LJ 381 : ILR (1971) Cut 1117 (DB).

(10) It has been held that not being allowed an opportunity to avail oneself of a lien on a substantive appointment while being discharged from a temporary appointment does not give a Central Government servant a cause of action as the service is during the pleasure of the President. A 1956 Punj 42 (44).

(11) A member of a defence service, to whom Art. 311 does not apply and in whose case the 'pleasure doctrine' would apply with all its rigour would have no right to the post more so on attaining the age of compulsory retirement where the rules made a provision in that behalf. (1976) 1 Serv LR 772 (790) : ILR (1975) 1 Delhi 546 (DB).

(12) Incumbent of permanent post — Loss of lien due to conversion of post — Government creating a supernumerary post in the State Cadre and providing him with lien on that post from the date he lost lien on any permanent post — Post so created was permanent and not a temporary one — Incumbent was fully qualified for pension under Rule 361 of Madras Pension Rules — Complaint of prejudice by him was without force. **A 1967 SC 1864 (1868).**

(13) Temporary promotion of an official to a higher post, does not confer on him any right to hold that post. He does not acquire any lien on that post and is liable to be reverted to his substantive post. Only where such reversion is mala fide or capricious or based on irrelevant grounds it would be vitiated. Otherwise, the official who is so reverted, cannot have any grievance in law. (1979) 2 Serv LR 267 (268) (DB) (Kant).

(14) Government servant on his punishment being set aside cannot claim restoration to the post he was holding as a stop gap arrangement. His restoration to substantive post is not assailable. 1971 Lab IC 937 (938) : (1971) 1 Mys LJ 364.

136. Public Service Commission consultation with — See also Article 320.— (1) Article 320 (3) (c) does not confer any rights on a public servant so that the absence of consultation or any irregularity in consultation with the Public Service Commission would not afford him a cause of action in a Court of law, or entitle him to relief under the special powers of a High Court under Article 226 of the Constitution. A 1962 Guj 197 (202) (DB).

(2) Order appointing employee to post communicated by Deputy Secretary by and in name of Governor — Order published in Government Gazette and communicated to employee — Order amounts to contract of employment — Order is not invalid because sanction of Public Service Commission was not obtained. A 1963 Bom 13 (16).

(3) Question whether Government Authority applied its own mind or mechanically followed advice of Public Service Commission depends on facts and circumstances of each particular case. A 1968 Punj 324 (327) ** A 1970 Madh Pra 162 (167) : 1970 Lab IC 992.

(4) Article 320 (3) (c) is not mandatory and it does not confer any rights on the public servant and the absence of consultation with the Public Service Commission or any irregularity in consultation does not afford him a cause of action in a Court of

Articles 310 & 311 — Note 136 (contd.)
law. Article 311 is not controlled by Article 320. **A 1962 SC 1344 (1346).**

(5) Dismissal of public servant — Requirement of consultation with Public Service Commission before removal is only directory — Government not following opinion of Public Service Commission nor giving reasons for not following the opinion — Order not vitiated. 1980 Lab IC 681 (682) (DB) (Raj).

(6) Dismissal — Rule 10 of Assam Services Discipline and Appeal Rules does not make prior consultation with Public Service Commission necessary. **A 1971 SC 2004: 1971 Lab IC 1182.**

(7) Relaxation of age limit for certain classes for certain posts — Power of Government — Advertisement issued by Public Service Commission providing for relaxation of age limit only in respect of certain classes — Petitioner not coming within such class representing to Government — Relaxation made by State Government — Such relaxation being authorised by virtue of Notification No. 29 (5) 11/175-36/39 dated 31-7-1911 issued under Sec. 241 (1) (b) of Government of India Act cannot be withdrawn merely because there was no provision in the advertisement — Nor can it be cancelled because Public Service Commission was not previously consulted by Government. 1977 Lab IC 1099 (All).

(8) The Civil Services (Classification, Control and Appeal) Rules were not framed after consultation with the Public Service Commission or the High Court nor any such consultation was necessary. The State Government was under no obligation to consult the Public Service Commission or the High Court in issuing the notification dated 4th August, 1961, deleting clause (3) of Rule 55 of the Civil Services (Classification, Control and Appeal) Rules. 1976 Lab IC 1569 (All).

(9) Power of President to review orders — The President alone must consider the question whether the order in question requires to be reviewed and what further or other order should be made — President merely relying on advice of Public Service Commission — There is abdication of power under Rule 32 of the Central Civil Services (CCA) Rules 1957 and order is violative of Art. 311 (2) . (1971) 1 Andh WR 297.

(10) For an inquiry against Government servant, it is only when the President is the disciplinary authority that consultation with the Union Public Service Commission is required. A 1972 Cal 27 (33): 1972 Lab IC 221.

(11) Central Civil Services (Temporary Service) Rules (1965), Rr. 3, 5 — Appointment of petitioner on ad hoc basis — Petitioner not approved by Public Service Commission — Benefit of R. 3, not available to petitioner. **1974 Lab IC 1302 (Gau) (FB).**

137. Public Servants (Inquiries) Act, 37 of 1850.— (1) The Public Servants (Inquiries) Act, 1850, provides for inquiries into the conduct of public servants not removable from service without the sanction of the Government. The Act merely provides for inquiries and not for the punishment of such public servants. A 1956 Punj 58 (70) (DB).

(2) An inquiry under the Public Servants (Inquiries) Act is not a compulsory preliminary before a Government servant to whom the Act applies is dismissed or removed from service. **A 1954 SC 375 (378): 1954 Cri LJ 993.**

(3) An inquiry under the Act may precede the inquiry under Art. 311, Cl. (2). **A 1954 SC 375 (378): 1954 Cri LJ 993.**

(4) The object of the inquiry under the Public Servants (Inquiries) Act, 1850 is to enable the Government to make up its mind as to the action to be taken before the notice to show cause is issued under Article 311, clause (2). The inquiry is purely for the Government's own benefit. **A 1954 SC 375 (378): 1954 Cri LJ 993 ** A 1957 Assam 77 (82) (DB).**

(5) An inquiry under the Act of 1850 is not a prosecution for an offence within the meaning of Art. 20, clause (2). **A 1955 SC 160 (165) ** A 1954 SC 375 (378): 1954 Cri LJ 993.**

(6) There is no power given to the Inquiry Officer under Public Servants (Inquiries) Act to compel an officer against whom an enquiry is being held to produce any document or evidence which may incriminate him. 1961-63 Pun LR 780 (787) (DB).

(7) An enquiry under the Act will not be bad merely on the ground of misjoinder of charges as the provisions of the Criminal Procedure Code relating to joinder of charges do not apply to such an inquiry. A 1956 Punj 58 (71) (DB).

(8) The Act of 1850 is not bad as contravening Art. 14. A 1956 Punj 58 (70) (DB).

(9) The fact that the State Government had no power to order an inquiry under the Public Servants (Inquiries) Act, will not affect the validity of the proceedings based upon the inquiry and report of the Commission. A 1956 Punj 58 (62) (DB).

(10) Public Servants (Inquiries) Act 1850, Section 2 — Disciplinary proceedings against members of I. C. S. — Enquiry — Act applies — No obligation to hold enquiry under Rule 55, Civil Services (Classification, Control and Appeal) Rules — Holding of enquiry under Act does not violate Art. 14. **A 1960 SC 493 (497, 499, 500).**

(11) If bias is proved against a tribunal holding inquiry under the Public Servants (Inquiries) Act, the proceedings may be quashed. A 1955 Pat 131 (132, 133) (DB).

(12) An inquiry under the Travancore Public Servants (Inquiries) Act, 1122, may be ordered by the Council of Ministers and it is not necessary that the Governor himself must order such inquiry. **A 1955 SC 160 (165).**

Articles 310 & 311 (contd.)

138. High Court's power of superintendence under Article 227.— (1) Neither the Government nor the Disciplinary Proceedings Tribunal would fall within Article 227 and come within the superintendence of the High Court. A 1951 Mad 882 (883) (DB).

(2) There is no discrimination if an enquiry is held under the Public Servants (Inquiries) Act and not under All India Services (Disciplinary and Appeal) Rules, 1955. (1961) 63 Punj LR 780 (789) (DB).

(3) The inquiry under Public Servants (Inquiries) Act 1850, may be held by a Judge of the High Court and the fact that he has not been permitted by the President to hold the inquiry will only affect the question of his salary and not the validity of his inquiry. A 1956 Punj 58 (70) (DB).

(4) Where on grounds of convenience the Commissioner under the Public Servants (Inquiries) Act, is asked to inquire into the conduct of an officer to whom the Act does not apply the mere non-compliance with the provisions of the Act in the conduct of the inquiry will not invalidate an order of dismissal based on the result of the inquiry. A 1956 Trav-Co 158 (159).

(5) Enquiry under Public Servants (Inquiries) Act — Charges framed make out ingredients of an offence under Indian Penal Code — It does not per se affect the jurisdiction of the Superior Officer to enquire into the truth of the charges in a departmental enquiry. (1961) 63 Punj LR 780 (790) (DB).

(6) The Act of 1850 is applicable to members of the Indian Civil Service and also it is open to a State Government to order an inquiry under the Act against a member of an I. C. S. A 1956 Punj 58 (64) (DB).

139. Practice.— (1) In a suit for a declaration that the dismissal of the plaintiff was illegal and void, a plea of automatic termination of services, abandoned in the High Court by the Government, may be reopened in the Supreme Court on appeal where the plea is purely one of law. **A 1955 SC 817 (819).**

(2) In a suit for declaration that an order of compulsory retirement against the plaintiff was illegal and void, an application for amendment of the plaint at the appellate stage by including a claim for arrears of salary was refused on the ground of laches. A 1956 All 439 (442) (DB).

(3) Writ appeal — New plea — Question of bias of enquiring officer cannot be allowed to be raised for the first time. ILR (1965) 1 Mad 487 (496) (DB).

(4) Substantial question of law as to interpretation of Constitution — Question whether Proviso (a) to Article 311 (2) would also apply in respect of a conviction before entry of public servant in service is substantial question of law involving interpretation of Constitution. A 1961 Tripura 27 (28).

(5) Failure to supply report of enquiry to delinquent — Difficulty in defending case not complained of while contesting show cause notice or filing appeal and memorial — Plea raised for first time in writ application held not maintainable. (1962) 1 Lab LJ 468 (Cal).

(6) Disciplinary proceedings against Government servant for misconduct — Departmental enquiry or public trial available — Former course followed — Proceedings whether violate Article 14 — (Quaere). A 1961 Cal 1 (11) (DB).

(7) Removal of Sub-Inspector of Police from service — Order passed by D. I. G. of Police — Contention of breach of Article 311 (1) on ground that he was appointed by I. G. Police — District Judge held that he had been appointed by D. I. G. of Police — That being finding of fact is binding on Supreme Court in special appeal against the decision of the High Court. **A 1969 SC 1020 (1023) : 1969 Lab IC 1402.**

(8) Where there is a complaint about failure of natural justice, party complaining need not also establish prejudice. ILR (1965) 1 Mad 487 (497) (DB).

(9) Absence of finding as to whether servant held the post of purely temporary nature or a quasi-permanent post — Case liable to be remanded to U. P. Public Services Tribunal for determination of the question. 1978 Lab IC 1207 (1208) (All).

(10) Departmental proceedings — Evidence to justify dismissal order — Appeal to Supreme Court — Reassessment of evidence — Supreme Court does not reassess evidence in appeal — Rules of evidence in Evidence Act — Not applicable. **A 1976 SC 1080.**

(11) Probationer — In contradistinction with a confirmed Government servant has no right to hold his post — Termination of his service per se does not visit him with any evil consequences. **A 1977 Punj 7 (11)** (DB).

(12) Ad hoc appointments meant only for a temporary period, are mostly made to meet immediate needs and exigencies of service and as such it cannot be laid down as a rule that before making any such ad hoc appointments due consideration of the cases of all eligible candidates must be made as of principle. There is no sanction in law for such a proposition and such an imperative rule would adversely affect the management of public institutions by disabling them from urgently filling up important and emergent vacancies which might arise at times due to various contingencies. 1970 Lab IC 1476 (1478) (Orissa).

(13) Dismissal — Validity — Charges framed on basis of absence condoned and for absence not so condoned — Dismissal — Proper course to be adopted is to remand case to disciplinary authority to reconsider whether the authority would dismiss even on account of absence on the occasions which was condoned. 1978 Lab IC 1424 (1427) (Goa).

312. All-India services.— (1) Notwithstanding anything in [a][Chapter VI of Part VI or Part XI], if the Council of States has declared by resolution supported by not less than two-thirds of the members present and voting that it is necessary or expedient in the national interest so to do, Parliament may by law provide for the creation of one or more all-India services [b][(including an all-India judicial service)] common to the Union and the States, and, subject to the other provisions of this Chapter, regulate the recruitment, and the conditions of service of persons appointed, to any such service.

(2) The services known at the commencement of this Constitution as the Indian Administrative Service and the Indian Police Service shall be deemed to be services created by Parliament under this article.

[c][(3) The all-India judicial service referred to in clause (1) shall not include any post inferior to that of a district judge as defined in article 236.

(4) The law providing for the creation of the all-India judicial service aforesaid may contain such provisions for the amendment of Chapter VI of Part VI as may be necessary for giving effect to the provisions of that law and no such law shall be demed to be an amendment of this Constitution for the purposes of article 368.]

(a) Substituted for words "Part XI" by Constitution (Forty-second Amendment) Act, 1976, S. 45 (3-1-77).

(b) Inserted, ibid.

(c) Inserted, ibid.

JAMMU AND KASHMIR

In its application to the State of Jammu and Kashmir, in Art. 312, after the words 'the States' the brackets and words '(including the State of Jammu and Kashmir), shall be inserted — Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (9) (as substituted by C. O. 56).

Article 312

1. Officer of All-India Service — Who is.— (1) Where an officer belonging to a State service is appointed to officiate as an officer of an All-India service, he cannot be deemed to be an officer of the All-India service. **A 1949 FC 50 (54).**

(2) Article 312 refers to a situation when new services of all India character are to be instituted — Condition fixing amount of pension payable to retired member of ICS is not governed by Article 312. (1970) ILR 49 Pat 8 (51) (DB).

(3) Article 309 of the Constitution does not contemplate Legislation in respect of a service or post which is concerned with the Union and the State. Provision for such legislation has been made by Article 312. 1975 Lab IC 1667 (1671) (Him Pra).

(4) Union Territories are "States" for the purpose of Article 312 (1) of the Constitution. Union Territories cadre of the Service is common to the Union and the States within the meaning of Article 312 (1) of the Constitution and Central Government could make the Indian Administrative Service (Cadre) Rules (1954) in consultation with the State Governments. **A 1976 SC 1856 (1860).** (ILR (1969) 2 Delhi 1214, Reversed.)

2. The All India Services Act, 1951.— (1) This Act was passed for regulating the conditions of service of persons appointed to All-India services and under this Act, rules have been made for the purpose. **A 1957 Pat 515 (526) (DB).**

(2) Section 3, All India Services Act, 1951 is not invalid and the All India Services (Discipline and Appeal) Rules 1955, promulgated under it cannot be attacked on this ground. **A 1959 SC 512 (517).**

(3) All India Services Act, 1951 is not unconstitutional though passed by provisional Parliament without requisite majority. **A 1959 SC 512 (516).**

(4) Under Section 3 of All India Services Act, 1951 persons who had been appointed to the Secretary of State's Service, Indian Police, were to be included in the Indian Police Service, and were governed by the provisions of the Act and the Indian Police Service (Recuritment) Rules (1954). **A 1968 SC 1372 (1375).**

(5) The general principle is, as to the rules made under Section 3 of the All India Services Act 1951 enacted by virtue of Article 312 of the Constitution, is that if the parent statute does not expressly or by necessary implication provide for the framing of rules with retrospective operation such rules cannot be made validly. 1975 Lab IC 1667 (1671) (Him Pra).

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[a][312A. **Power of Parliament to vary or revoke conditions of service of officers of certain services.**— (1) Parliament may by law—

(a) vary or revoke, whether prospectively or retrospectively, the conditions of service as respects remuneration, leave and pension and the rights as respects disciplinary matters of persons who, having been appointed by the Secretary of State or Secretary of State in Council to a civil service of the Crown in India before the commencement of this Constitution, continue on and after the commencement of the Constitution (Twenty-eighth Amendment) Act, 1972, to serve under the Government of India or of a State in any service or post;

(b) vary or revoke, whether prospectively or retrospectively, the conditions of service as respects pension of persons who, having been appointed by the Secretary of State or Secretary of State in Council to a civil service of the Crown in India before the commencement of this Constitution, retired or otherwise ceased to be in service at any time before the commencement of the Constitution (Twenty-eighth Amendment) Act, 1972:

Provided that in the case of any such person who is holding or has held the office of the Chief Justice or other Judge of the Supreme Court or a High Court, the Comptroller and Auditor-General of India, the Chairman or other member of the Union or a State Public Service Commission or the Chief Election Commissioner, nothing in sub-clause (a) or sub-clause (b) shall be construed as empowering Parliament to vary or revoke, after his appointment to such post, the conditions of his service to his disadvantage except in so far as such conditions of service are applicable to him by reason of his being a person appointed by the Secretary of State or Secretary of State in Council to a civil service of the Crown in India.

(2) Except to the extent provided for by Parliament by law under this article, nothing in this article shall affect the power of any legislature or other authority under any other provision of this Constitution to regulate the conditions of service of persons referred to in clause (1).

(3) Neither the Supreme Court nor any other court shall have jurisdiction in—

(a) any dispute arising out of any provision of, or any endorsement on, any covenant, agreement or other similar instrument which was entered into or executed by any person referred to in clause (1), or arising out of any letter issued to such person, in relation to his appointment to any civil service of the Crown in India or his continuance in service under the Government of the Dominion of India or a Province thereof;

(b) any dispute in respect of any right, liability or obligation under article 314 as originally enacted.

(4) The provisions of this article shall have effect notwithstanding anything in article 314[b] as originally enacted or in any other provision of this Constitution.]

(a) Inserted by Constitution (Twenty-eighth Amendment) Act, 1972, S. 2 (29-8-72).

(b) Omitted ibid, S. 3 (29-8-1972).

313. Transitional provisions.— Until other provision is made in this behalf under this Constitution, all the laws in force immediately before the commencement of this Constitution and applicable to any public service or any

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Article 312-A

(1) Former Secretary of State Service Officers (Conditions of Service) Act (1972), Ss. 8 and 12 — Respondent former Secretary of State Service Officer staying in Uganda — His pension shall be computed in the rupee equivalent of the amount fixed in sterling at a rate of exchange not exceeding the rate of rupees thirteen and one-third to the pound sterling. **A 1976 SC 218 (219).** (1973 Lab IC 995 (Mad), **Reversed.**)

Article 313

1. Cases regarding Service Rules and Regulations may also be found under Articles 309 and 311 of the Constitution.— (1) This Article gives constitutional sanctity to all laws in force immediately before commencement of the Constitution and applicable to any public service, till appropriate laws are made by the Parliament or the State Legislature. **A 1964 Andh Pra** 206 (210) (DB).

post which continues to exist after the commencement of this Constitution, as an All-India service or as service or post under the Union or a State shall continue in force so far as consistent with the provisions of this Constitution.

[Government of India Act (1935), S. 276.]

Article 313 — Note 1 (contd.)

(2) The provision in the article seems really to be included in Article 372 which is general in its terms, while this article refers only to laws relating to public services under the State, both at the Centre and in the States. A 1955 Cal 451 (455) (DB) ** A 1954 Cal 383 (386) ** A 1953 Cal 316 (318) : ILR (1952) 2 Cal 254 ** **A 1961 SC 1245 (1250) ** A 1961 SC 751 (758) : 1961 (1) Cri LJ 773.**

(3) Article 310 has to be read subject to Article 313. A 1967 All 197 (200).

(4) Person appointed in connection with affairs of a province in accordance with Section 241 of Government of India Act, 1935, continuing in service after the Constitution — His service must be held to continue in connection with the affairs of the State concerned. A 1963 Punj 298 (306) (DB). (Reversed in A 1964 SC 72 on another point.)

(5) The Governor also has the power of making other provision within the scope of Article 313 and thus can change the rules — Rules of 1941 could only continue till Punjab Civil Services Rules (1959) were made. A 1963 Punj 298 (306, 307) (DB). (Reversed in A 1964 SC 72 on another point.)

(6) The words "so far as consistent with the provisions of the Constitution" are significant and hence, a rule providing for an appeal to the Governor exercising his individual judgment would not be applicable after the Constitution. A 1957 Andh Pra 794 (806).

(7) The proviso to Section 241 (2) (b) of Government of India Act, 1935 is apparently not consistent with the provisions of Article 309 as there is no such inhibition in the powers of the Governor to frame rules in regard to temporary Government Servant as was contained in Section 241 (2) (b). The reference to the provisions of Government of India Act 1935 in R. 2 of the Fundamental Rules to the extent of inconsistency cannot be given effect to by reason of Article 313. 1972 All LJ 905 (907).

(8) The expression "laws in force" in this article will include rules and regulations. **A 1956 SC 285 (291) ** A 1965 SC 868 (870) **** A 1969 Madh Pra 60 (61) (DB) ** A 1964 Guj 154 (153) (DB) ** A 1964 Punj 242 (245) (DB) ** A 1961 Mys 247 (252) (DB) ** A 1960 Bom 14 (15) ** A 1956 Bom 483 (486).**

(9) The expression 'laws in force' includes Government Notifications under statutory power. A 1957 Pat 676 (678) (DB).

(10) The notification issued by the Governor-General in Council on 17-2-1941 in exercise of the powers conferred on him under S. 241 of the Government of India Act 1935 continued in force after the commencement of the Constitution Art. 313. ILR (1974) 2 Delhi 450 (452).

(11) Army instructions cannot be called a law. A 1955 Cal 543 (547) (DB).

(12) The correspondence between the Central Government and the Union Public Service Commission regarding qualification of promotees (letter dated 16-1-1950 in this case) has no force of law, because of Article 313 — Article 313 did not change the legal character of the document. An administrative instruction or order is not a statutory rule. **A 1977 SC 757 (767) : 1977 Lab IC 295.**

(13) Civil Service Regulations, which were in force when the Government of India Act, 1919, was passed, acquired statutory force by virtue of Section 96-B (4) of that Act. **A 1954 SC 369 (371, 372).**

(14) The pre-existing fundamental Rules framed under S. 96-B of the Government of India Act, 1915 are not "laws in force", as "other provisions" have been made by the West Bengal Service Rules under Section 241 of the Governcent of India Act, 1935. **A 1961 Cal 1 (9) (SB).**

(15) Draft rules prepared by Federal Public Service Commission for regulating the promotion of officers of the State Police Service to the Indian Police Service were continued in force after the Constitution. (1967) 9 Orissa JD 139 (178, 179).

(16) President could during President's Rule supersede Patiala State Regulations and other State Rules and Order by issuing Bank of Patiala Management and Regulation Order, 1954 and could authorise Board of Directors of the Bank to frame rules viz., Bank of Patiala (Staff) Rules 1954 under that Order. A 1963 Punj 345 (350) (DB).

(17) Punjab Tahsildari Rules 1932, framed under Sections 9 and 29 of Punjab Land Revenue Act (17 of 1887) continued to remain in force even after the Act was amended by the Adaptation of Indian Laws Order, 1937. **A 1962 SC 219 (223).**

(18) Only statutory rules applicable to any public service and not executive instructions of the Government are continued under this Article. A 1962 Assam 28 (30).

(19) Rules relating to recruitment to the Indian Audit and Accounts Service made by the Governor-General in Council on 30-6-1938 in exercise of the powers conferred on him by Rule 31 (2) of the Civil Services (Classification, Control and Appeal) Rules continue to be in force after the commencement of the Constitution by virtue of Article 313 as the President has not made any rules under Article 148 (5) which abrogate the Rules. (1975) 1 Kant LJ 39 (44).

(20) Pre-existing Rules and Regulations cannot be classed as being the "express provision" in the Constitution simply by their continuance. A 1958 Bom 283 (286) (DB).

(21) Railway Services (Revision of Pay) Rules (1947), framed under Section 241 (2), Government of India Act (1935) — Article 313 preserved those rules — Benefit accrued to employees under Rule 6 could not be taken away so long as rules were consistent and were not superseded by other rules made under Art. 309. 1969 Lab IC 1265 (1268) (DB) (Delhi).

(22) The N. W. F. P. Rules even though are rules for the purpose of S. 18 (1) of the Indian Independence Act (1947), would refer to service under or in the N. W. F. Province and not anywhere else. Article 313 cannot be applied to them because the continuance of laws that it envisages are laws governing an All-India Service or a service or post under the Union or the State. **A 1975 Delhi 82 (88) (FB).**

314. [omitted by the Constitution (Twenty-eighth Amendment) Act, 1972, S. 3, [29-8-72].]

CHAPTER II
PUBLIC SERVICE COMMISSIONS

315. Public Service Commissions for the Union and for the States.— (1) Subject to the provisions of this article, there shall be a Public Service Commission for the Union and a Public Service Commission for each State.

(2) Two or more States may agree that there shall be one Public Service Commission for that group of States, and if a resolution to that effect is passed by the House or, where there are two Houses, by each House of the Legislature of each of those States, Parliament may by law provide for the appointment of a Joint State Public Service Commission (referred to in this Chapter as Joint Commission) to serve the needs of those States.

(3) Any such law as aforesaid may contain such incidental and consequential provisions as may be necessary or desirable for giving effect to the purposes of the law.

(4) The Public Service Commission for the Union, if requested so to do by the Governor [a][* * *] of a State, may, with the approval of the President, agree to serve all or any of the needs of the State.

(5) References in this Constitution to the Union Public Service Commission or a State Public Service Commission shall, unless the context otherwise requires, be construed as references to the Commission serving the needs of the Union or, as the case may be, the State as respects the particular matter in question.

[Government of India Act, 1935, S. 264.]

(a) Words 'or Rajpramukh' were omitted by the Constitution (Seventh Amendment) Act, 1956, S. 29 and Sch. (1-11-1956).

316. Appointment and term of office of members.— (1) The Chairman and other members of a Public Service Commission shall be appointed, in the case of the Union Commission or a Joint Commission by the President, and in the case of a State Commission, by the Governor [a][* * *] of the State:

Article 313 — Note 1 (contd.)

(23) Central Civil Services (Temporary Services) Rules 1949 framed under S. 241 of the Govt. of India Act 1935 were continued in force by Article 133 of the Constitution. **ILR (1975) 1 Delhi 284 : (1975) 1 Serv LR 216 (288) (FB).**

Article 315

(1) The Public Service Commission has a distinct status under the Constitution, apart from the Government of the Union or of the State and cannot be identified with such Government. **A 1955 Madh B 56 (60) (DB).**

(2) Public Service Commission is an independent entity under the State Constitution and cannot be said to be the Government or a department of the Government so as to claim privilege under Sections 123 and 124 of the Evidence Act. 1971 Kash LJ 350.

(3) Public Service Commission is an important institute to whom is entrusted a valuable and important task of selecting personnel who may be entrusted with the duty of running the administration of the State. Thus the administration or so to say the destiny of the people in the State depends very much on the fair and just decisions of the Commission. 1978 Lab IC 417 (418) (Punj).

(4) The power conferred on the Commission must be deemed to necessarily carry with it the power to regulate the manner in which the Commission should discharge its functions. In exercise of this power the commission can, by convention, practice or resolution, assign its functions to the chairman and/or one or more of its members. 1979 Lab IC (NOC) 17 : 1978 MPLJ 784 (DB).

(5) Governor General's approval to Governor's reference to Federal Public Service Commission need not be separate for every case under Section 264 (3) of the Government of India Act, 1935 but general approval to Governor's references to the Commission is sufficient. A 1959 All 393 (399).

Article 316

(1) State Public Service Commission already constituted before 26th January, 1950 continuing working thereafter — Plea that appointment of its members is not made in compliance with Article 316 — De facto doctrine is attracted — Public policy requires that acts done by de facto officers must be considered valid — Plea is not sustainable, and more so after lapse of long period. **A 1970 Ker 165 (170) : 1970 Lab IC 967 (FB).**

(2) The proviso to Article 316 (1) only means that as far as possible at least one-half of the members of the Public Service Commission should be persons who have held office under the Government for a period of ten or more years. The Proviso does not mean that not more than half the members must be such persons. A 1955 Orissa 113 (116) (DB).

Provided that as nearly as may be one-half of the members of every Public Service Commission shall be persons who at the dates of their respective appointments have held office for at least ten years either under the Government of India or under the Government of a State, and in computing the said period of ten years any period before the commencement of this Constitution during which a person has held office under the Crown in India or under the Government of an Indian State shall be included.

[b][(1A) If the office of the Chairman of the Commission becomes vacant or if any such Chairman is by reason of absence or for any other reason unable to perform the duties of his office, those duties shall, until some person appointed under clause (1) to the vacant office has entered on the duties thereof or, as the case may be, until the Chairman has resumed his duties, be performed by such one of the other members of the Commission as the President, in the case of the Union Commission or a Joint Commission, and the Governor of the State in the case of a State Commission, may appoint for the purpose.]

(2) A member of a Public Service Commission shall hold office for a term of six years from the date on which he enters upon his office or until he attains, in the case of the Union Commission, the age of sixty-five years, and in the case of a State Commission or a Joint Commission, the age of [c][sixty two years], whichever is earlier :

Provided that—

(a) a member of a Public Service Commission may, by writing under his hand addressed, in the case of the Union Commission or a Joint Commission, to the President, and in the case of a State Commission, to the Governor [a][* * *] of the State, resign his office;

(b) a member of a Public Service Commission may be removed from his office in the manner provided in clause (1) or clause (3) of Art. 317.

Article 316 (contd.)

(3) The expression "as nearly as may be one-half" in the Proviso indicates only approximation. The expression cannot be read as equivalent to not more than half. A 1955 Orissa 113 (116) (DB).

(4) The difference between S. 265 (1) proviso of the Government of India Act (1935) and Article 316 (1) proviso may be succinctly put thus : Under Section 265, the service quota would be half at the minimum while under Article 316, the Governor has the discretion to reduce the service quota to less than half. Out of three members, two must be from the Service under the 1935 Act while under the Constitution, the proviso can be complied with if only one out of the three is from service. For filling up the residue, there is no restriction on the discretion of the Governor in either case. A 1970 Orissa 205 (207) : 1970 Lab IC 1499.

(5) Where the membership of a Public Service Commission originally consisted of 4 members including Chairman of which one member and Chairman are persons who held office for at least 10 years under Government and subsequently after retirement of Chairman the remaining three members continued to function as Commission held that in view of the expression "as nearly as may be" in Proviso of Article 316, the condition in Proviso is satisfied as one member satisfies the test. ILR (1974) AP 696 (713).

(6) Assam Public Service Commission Regulation (1951), Regulation 4 — Public Service Commission functioning with Chairman and one member — Vacancy of another member not filled — Commission does not cease to be Commission under Article 316 (1) read with Article 318 (a) and Regulation 4 — Governor's power to fill vacancy is discretionary. Assam LR (1969) Assam 202 (209).

(7) Clause (1) of this Article refers to the Chairman and other members, for the purpose that the President or Governor will have the right to appoint a Chairman. A 1966 Cal 290 (301) (FB).

(8) While a member and a Chairman of a Public Service Commission both are members, they hold different offices. The tenure of his office starts under Article 316 (2) 'from the date on which he enters upon his office' which, in the case of a Chairman appointed directly as such or originally as member and later elevated as Chairman, begins when he starts functioning as Chairman. A 1973 SC 2555 (2563, 2564) : 1974 Lab IC 251. (A 1966 Cal 290 (FB) Majority view Overruled, Minority view Approved. (1973) 2 Mys LJ 54 Affirmed.) ** 1973 Lab IC 960 (962, 963) : (1973) 2 Serv LR 565 ** ILR (1973) Mys 545 (557) (DB) ** 1971 BLJR 1092 (1095).

(9) Public Service Commission holding competitive examinations for recruitment to services of the State is an independent body distinct from the State. A 1955 Madh B 56 (60) (DB).

(10) Interview by Public Service Commission — The presence of all the members of the Commission is not necessary. Any one or two members may be entrusted with the duty in the absence of any rule to the contrary. A 1971 Assam 136 (138, 139, 140) : 1971 Lab IC 1245. ((1969) Assam LR 202, Affirmed.)

(11) When the terms of office of any member of Public Service Commission (Chairman in

(3) A person who holds office as a member of a Public Service Commission shall, on the expiration of his term of office, be ineligible for re-appointment to that office.

[Cf: Government of India Act (1935), S. 265 (1).]

(a) Words 'or Rajpramukh' were omitted by the Constitution (Seventh Amendment) Act, 1956, S. 29 and Sch. (1-11-1956).

(b) Inserted by the Constitution (Fifteenth Amendment) Act, 1963, S. 11 (5-10-1963).

(c) Substituted by Constitution (Forty-first Amendment) Act, 1976, S. 2.

317. Removal and suspension of a member of a Public Service Commission.— (1) Subject to the provisions of cl. (3), the Chairman or any other member of a Public Service Commission shall only be removed from his office by order of the President on the ground of misbehaviour after the Supreme Court, on reference being made to it by the President, has, on inquiry held in accordance with the procedure prescribed in that behalf under article 145, reported that the Chairman or such other member, as the case may be, ought on any such ground to be removed.

(2) The President, in the case of the Union Commission or a Joint Commission, and the Governor, [a][* *] in the case of a State Commission, may suspend from office the Chairman or any other member of the Commission in respect of whom a reference has been made to the Supreme Court under clause (1) until the President has passed orders on receipt of the report of the Supreme Court on such reference.

(3) Notwithstanding anything in clause (1), the President may by order remove from office the Chairman or any other member of a Public Service Commission if the Chairman or such other member, as the case may be—

(a) is adjudged an insolvent; or

(b) engages during his term of office in any paid employment outside the duties of his office; or

(c) is, in the opinion of the President, unfit to continue in office by reason of infirmity of mind or body.

(4) If the Chairman or any other member of a Public Service Commission is or becomes in any way concerned or interested in any contract or agreement made by or on behalf of the Government of India or the Government of a State or participates in any way in the profit thereof or in any benefit or emolument arising therefrom otherwise than as a member and in common with the other members of an incorporated company, he shall, for the purposes of clause (1), be deemed to be guilty of misbehaviour.

(a) Words 'or Rajpramukh' were omitted by Constitution (Seventh Amendment) Act, 1956, S. 29 and Sch. (1-11-1956).

318. Power to make regulations as to conditions of service of members and staff of the Commission.— In the case of the Union Commission or a Joint

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Article 316 (contd.)

this case) has ended but the member is holding over without the authority of law, he cannot be deemed to be the de facto officer and cannot sit in Selection Committee. 1972 All LJ 286 (289).

(12) Clause (2) of Article 316 merely fixes the term of office of a member including the chairman of a Commission. It has nothing to do with the bar to reappointment of a member or chairman or their ineligibility to hold posts under the Government of India or the State Governments. That bar is contained in Cl. (3) of Art. 316 and Art. 319 subject to the exceptions mentioned in Cls. (a) (c) and (d). ILR (1973) Mys 545 (557).

Article 317

(1) The provisions under this Article and Article 319 are merely consequential to the provision of Article 316 (1). A 1966 Cal 290 (301) (FB).

(2) The word "misbehaviour" when employed in respect of holders of high offices has a well understood and well defined meaning according to the tradition and standard maintained by the members of a particular service or office. (1961) 63 Punj LR 780 (784).

Article 318

(1) This Article refers to the members of the Public Service Commission and the word member includes the chairman. A 1966 Cal 290 (301) (FB).

Commission, the President and, in the case of a State Commission, the Governor [a][* *] of the State may by regulations—

(a) determine the number of members of the Commission and their conditions of service, and

(b) make provision with respect to the number of members of the staff of the Commission and their conditions of service:

Provided that the conditions of service of a member of a Public Service Commission shall not be varied to his disadvantage after his appointment.

[Government of India Act (1935), S. 265 (2).]

(a) Words 'or Rajpramukh' were omitted by the Constitution (Seventh Amendment) Act, 1956, S. 29 and Sch. (1-11-1956).

319. Prohibition as to the holding of offices by members of Commission on ceasing to be such members.— On ceasing to hold office—

(a) the Chairman of the Union Public Service Commission shall be ineligible for further employment either under the Government of India or under the Government of State;

(b) the Chairman of a State Public Service Commission shall be eligible for appointment as the Chairman or any other member of the Union Public Service Commission or as the Chairman of any other State Public Service Commission, but not for any other employment either under the Government of India or under the Government of a State;

Article 318 (contd.)

(2) This Article and Article 317 are merely consequential to the provision of Art. 316 (1). **A 1966 Cal 290 (301) (FB).**

(3) So far as staff of the Public Service is concerned conditions of service are regulated by Regulations made by the Governor under Article 318 and the matters of recruitment are regulated by legislation or rules made under Article 309. (1976) 2 Serv LR 527 (532) (Ker).

(4) Under the Constitution it is not mandatory for the State Govt. to consult the Commission and the Governor can limit such consultation. It is therefore permissible for the State Legislature to say how and in what manner that consultation with the Commission shall take place, whether through all the members or through the chairman or one or more members of the Commission. 1976 Lab IC 1603 (1606) (Raj).

(5) Sub-rule (2) of Rule 4 of Andhra Pradesh Public Service Commission Rules of Procedure is concerned with the stage at which the Public Service Commission is considering the suitability of the candidate before it came to final decision. 1970 Lab IC 1427 (1431) (AP).

(6) Andhra Pradesh Public Service Commission Rules of Procedure Rule 4 (2) applies both to temporary and permanent appointments of candidates inasmuch as recruitment means replenishment or addition to the State service. 1970 Lab IC 1427 (1431) (AP).

(7) The expression "as may be determined by the Governor from time to time" in Regulation 4 of Assam Public Service Commission Regulation (1951) means — as may be decided by the Governor from time to time. This determination under Regulation 4 is an executive decision of the Governor whereas the determination under Article 318 (a) is a legislative determination by which the Governor fixes limit of the number of members constituting the Commission. There is no bar to fixing the limit of number of members of the Commission under Art. 318 (a) containing the minimum and the maximum of the strength. The regulation is therefore not ultra vires Article 318 (a). 1969 Assam LR 202 (209).

(8) Public Service Commission functioning with Chairman and one member — Vacancy of another member not filled — Commission does not cease to be Commission under Art. 316 (a) read with Article 318 (a) and Regulation 4 of Assam Public Service Commission Regulation (1951) — Governor's power to fill vacancy is discretionary. (1969) Assam LR 202 (209).

(9) Presence of adviser or expert at the time of taking interview by Public Service Commission — No irregularity. 1969 Assam LR 202 (209).

(10) W. B. Public Service Commission (Conditions of Service and Miscellaneous Provisions) Regulations (1953) Regns. 4 and 5 — Express order relaxing operation of Regulations is necessary. A 1966 Cal 356 (358) (DB).

(11) Rule 5 of Punjab Public Service Commission (Conditions of Service) Regulations, 1958 is a statutory one and it cannot be affected by executive instructions even of the Government of India. 1969 Lab IC 1037 (1039, 1040) (Punj).

Article 319

(1) This Article relates to prohibition on "ceasing to hold office". A 1966 Cal 290 (301).

(2) The expression "on ceasing to hold office" with which Art. 319 opens governs Clauses (a) to (d) of the said article. ILR (1973) Mys 545 (556) (DB).

(3) Clause (d) of Article 319 enables the members of State Commission to become Chairman thereof. The moment a member is appointed Chairman, he ceases to be a member. The cessation of the membership and the functioning as Chairman both operate simultaneously, the former preceding the latter. The restriction that a member should cease to be a member, in other words that he cannot function both as member and chairman relates only to the point of time and not to the intrinsic merit or qualification of the person. **A 1970 Orissa 205 (208): 1970 Lab IC 1499.**

(4) Member of Public Service Commission — Appointed as its chairman in middle of his term

(c) a member other than the Chairman of the Union Public Service Commission shall be eligible for appointment as the Chairman of the Union Public Service Commission or as the Chairman of a State Public Service Commission, but not for any other employment either under the Government of India or under the Government of a State.

(d) a member other than the Chairman of a State Public Service Commission shall be eligible for appointment as the Chairman or any other member of the Union Public Service Commission or as the Chairman of that or any other State Public Service Commission, but not for any other employment either under the Government of India or under the Government of a State.

[Government of India Act, 1935, S. 265 (3).]

320. Functions of Public Service Commissions.— (1) It shall be the duty of the Union and the State Public Service Commissions to conduct examinations for appointments to the services of the Union and the services of the State respectively.

(2) It shall also be the duty of the Union Public Service Commission, if requested by any two or more States so to do, to assist those States in framing and operating schemes of joint recruitment for any services for which candidates possessing special qualifications are required.

Article 319 (contd.)

of six years — Gets a fresh term of six years or till his superannuation whichever is earlier. **A 1973 SC 2555 (2564) : 1974 Lab IC 251.** (Majority view of A 1966 Cal 290, **Overruled.** Minority view approved.)

(5) The term employment must take its colour and content from its context and cannot be read in isolation. The constitutional bar contained in Article 319 (d) is against future Government employment and does not relate to a constitutional office like that of a Governor. The office of Governor of a State is not an employment under the Government of India within the meaning of Art. 319 (d) of the Constitution. Therefore appointment of an ex-member of a State Public Service Commission as Governor of a State is not invalid. **A 1978 Raj 72 (80) (FB) °° A 1979 SC 1109 : 1979 Lab IC 818 (823) °° A 1974 SC 1109 (1114) °° 1977 Raj LW 390 (394).**

ARTICLE 320 — SYNOPSIS

1. Government of India Act, 1935.
2. Clause (1) — Examination conducted by Public Service Commission.
3. Clause (3) — General.
4. Clause (3) (a).
5. Clause (3) (b).
6. Clause (3) (c) — Scope and object of.
7. Stage at which the Public Service Commission is to be consulted.
8. "All disciplinary matters."
9. Persons to whom Clause (3) (c) is applicable.
10. "Including memorials or petitions relating to such matters."
11. Clause (3) (d).
12. Clause (3), Proviso.
13. Clause (4).
14. Clause (5).
15. Position of the Public Service Commission vis-a-vis Government.

1. Government of India Act, 1935.— (1) The corresponding section in the Government of India Act, 1935, was Section 266. Under subsection (4) of that section, consultation with the Public Service Commission was not necessary in matters connected with subordinate ranks of Police Services. **A 1952 Nag 172 (175) : 1952 Cri LJ 870 (DB).**

2. Clause (1) — Examination conducted by Public Service Commission.— (1) The examination conducted by the Public Service Commission under Clause (1) for the purpose of appointment to services under the Government, need not be competitive but may be merely selective. **A 1956 Mys 20 (22) (DB).**

(2) The examinations contemplated in Article 320 (1) of the Constitution are selective and not merely competitive. In selection examinations a standard has to be set for pass and only candidatees who secure the marks for a pass and above can be declared to have passed the test and therefore to be suitable for appointments. **1970 Serv LR 593 (Ker).**

(3) Where the test of examining the candidates was assigned to one or more members of the Public Service Commission, the examination would not be illegal on the ground that other members were not directly associated with it. 1972 Raj LW 22 (24).

(4) If the criteria laid down by the Public Service Commission for calling candidates for interview were reasonable, no objection could be taken to the course adopted. **1979 Lab IC (NOC) 17 : 1978 MPLJ 784.**

(5) A Court will not examine the propriety of the objective principles adopted by Public Service Commission for determining relative merits and proficiency of the candidates. **ILR (1971) 1 Delhi 375 (381) (DB).**

(6) Competitive examination of Public Service Commission — Omission of Commission to declare before examination the objective principles that will be followed while determining inter se merits of candidates securing equal marks in aggregate does not violate principles of natural justice. **ILR (1971) 1 Delhi 375 (380) (DB).**

(7) Where qualifications for eligibility are not prescribed by Rules, broad decisions as to method of recruitment are taken in consultation with the Commission, where the essential qualifi-

(3) The Union Public Service Commission or the State Public Service Commission, as the case may be, shall be consulted—

(a) on all matters relating to methods of recruitment to civil services and for civil posts;

(b) on the principles to be followed in making appointments to civil services and posts and in making promotions and transfers from one service to another and on the suitability of candidates for such appointments, promotions or transfers;

(c) on all disciplinary matters affecting a person serving under the Government of India or the Government of a State in a civil capacity, including memorials or petitions relating to such matters;

(d) on any claim by or in respect of a person who is serving or has served under the Government of India or the Government of a State or under the Crown in India or under the Government of an Indian State, in a civil capacity, that any costs incurred by him in defending legal proceedings instituted against him in respect of acts done or purporting to be done in the execution of his duty should be paid out of the Consolidat-

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Article 320 — Note 2 (contd.)

cations were prescribed in consultation with the Commission it can relax the qualification in deserving cases. **1980 Lab IC (NOC) 8 : (1979) Lab LJ 273 (SC).**

(8) In matters involving consideration of questions regarding adequacy or sufficiency of "training", the Public Service Commission, having the benefit of expert opinion, is better situated to judge whether the particular candidate is qualified for a particular post and High Court under Article 226 should hesitate to interfere with the direction of the appointing authority so long as it is exercised bona fide. **A 1976 SC 1404 (1408).**

(9) The power of Public Service Commission to conduct examinations conferred under Article 320 (1) implies a power to hold enquiries into the malpractices or misconduct of the examinees or to punish such delinquents. A 1961 Andh Pra 378 (381, 382) (DB).

(10) There cannot be any doubt that under Article 320 (1), the Commission has the right to conduct examination and such right includes the right to publish the results of the same and in appropriate cases even to withhold and cancel them. But when action, cancelling candidature has been taken after the results were published and the parties had acted on the basis of them or even when the results were not given effect to or acted upon, the Court must be satisfied about the basis and bona fides of such determination or the facts of each case and find out whether the commission were duly satisfied about the commission of guilt and that too on what basis and whether the basis as considered, was reasonable. 1978 Lab IC 459 (462) (Cal).

(11) Rules made by Madras State Public Service Commission for Regulating Conduct of Examinations, Rr. 14 and 15 — Rule 14 confers power on Commission to cancel results and to debar a candidate while Rule 15 confers power to hold re-examination. A 1961 Andh Pra 378 (382, 383) (DB).

3. Clause (3) — General.— (1) Clause (3) is only directory and not mandatory in the sense that non-compliance with it will invalidate the action taken by the Government. **A 1957 SC 912 (918)** ** 1980 Lab IC 681 (682) (DB) (Raj) ** A 1957 Punj 191 (196) (DB) ** A 1957 Punj 97 (99) ** A 1955 Cal 451 (457, 458, 459) (DB) ** A 1954 Cal 60 (63) (DB) ** **A 1970 SC 158 (160)** ** **A 1962 SC 1344 (1346)** ** A 1968 Ker 244 (249) : 1968 Lab IC 1159 ** **A 1966 Mys 220 (227) (FB)** ** (1963) 2 Lab LJ 766 (768, 769) (Andh Pra) ** A 1963 Bom 13 (16) ** A 1962 Guj 197 (202) (DB) ** A 1960 Orissa 62 (64) ** (1959) 2 Lab LJ 261 (264) (Andh Pra) ** A 1958 Manipur 35 (37) ** 1979 Lab IC 1287 (1290) (Cal) ** 1977 All Serv LJ 188 (193) : 1977 Lab IC (NOC) 42 (Delhi) ** Assam LR (1972) Assam 57 : 1972 Lab IC 1496 (1501) ** 1973 BLJR 223 (237) : ILR (1972) 51 Pat 882 (DB) ** ILR (1971) Cut 1146 (1154) (DB) ** **A 1970 SC 158 (160)** ** A 1970 Madh Pra 189 (190) (DB).

The following decisions are not good law in view of A 1957 SC 912 :— A 1958 Bom 167 (175) (DB) ** A 1958 Madh Pra 135 (142) (DB) ** ILR (1957) Andh Pra 715 (725) (DB) ** A 1955 Pepsu 106 (109) ** A 1954 Raj 12 (15) (DB) ** (1953) 57 Cal WN 157 (161).

(2) Although, the provision is not mandatory and although the advice of the Public Service Commission is not binding on the Government, it is highly improper to ignore the provision altogether as a matter of regular practice. **A 1957 SC 912 (916)** ** A 1957 Punj 97 (99) ** A 1955 Cal 451 (458, 459) (DB) ** ILR (1972) 51 Pat 765 (DB) ** A 1972 Pat 4 (5).

(3) From the scheme of Article 320 (3) it is apparent that the Public Service Commission is an advisory body and it has to advise on matters referred to it by the State Government. The Commission, on the basis of a representation directly made to it by any aggrieved candidate, cannot reconsider the respective merits of the candidates and alter or modify its earlier recommendation. 1976 BLJR 342 (349) (DB) (Pat).

(4) Though the requirement to consult the Public Service Commission is directory, in the sense that non-compliance with that requirement would not render the action taken by the Government a nullity, it does not mean that a direction can be issued to the Government not to consult the Commission, where the Constitution requires the Commission to be consulted. 1972 Cur LJ 168 (179) (DB) (Punj).

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ed Fund of India, or, as the case may be, out of the Consolidated Fund of the State;

(e) on any claim for the award of a pension in respect of injuries sustained by a person while serving under the Government of India or the Government of a State or under the Crown in India or under the Government of an Indian State, in a civil capacity, and any question as to the amount of any such award,

and it shall be the duty of a Public Service Commission to advise on any matter so referred to them and on any other matter which the President, or, as the case may be, the Governor [a][* *] of the State, may refer to them.

Provided that the President as respects the all-India services and also as respects other services and posts in connection with the affairs of the Union, and the Governor [b][* * * * *] as respects other services and posts in connection with the affairs of a State, may make regulations specifying the matters in which either generally, or in any particular class of case or in any particular circumstances, it shall not be necessary for a Public Service Commission to be consulted.

Article 320 — Note 3 (contd.)

(5) It is permissible for the State legislature to say how and in what manner the consultation with the Public Service Commission shall take place, viz. whether through all the members or through the chairman or one or more members of the Commission. 1976 Lab IC 1603 (1606) (DB) (Raj).

(6) Ad hoc list of officers considered fit for officiation in senior post in consultation with Chairman of Public Service Commission — Approval of officiation granted from date of preparation of list can be granted without further reference to Public Service Commission. **A 1970 Pat 397 (405) : 1970 Lab IC 1518 (SB).**

[See however 1978 Lab IC 1049 (1057) (DB) (MP). (Selection by Chairman, the only member sitting at interview — Selection and subsequent appointment on that basis is in contravention of Cl. (3) of the Article.)]

(7) It cannot be said that where consultation with the Public Service Commission is provided for under any legislative enactment, failure to carry it out may be merely an irregularity, and where such provision has been made in the Rule it must be treated as violative of an imperative provision. **A 1970 Pat 397 (405) (FB).**

(8) On question of requirement of consultation with or rendering advice by Public Service Commission there is no distinction between various Cls. (a) to (e) in Art. 320 (3). Mere incorporation of requirement of Art. 320 (3) (b) in a statutory rule does not make it any more mandatory. **A 1971 Punj 297 (301) (FB).**

(9) Normally the Government servants, to whom the article applies, are entitled to the constitutional protection provided in the clause. **A 1956 SC 285 (292).**

(10) Rule 8 of the Rules framed by Punjab Government under the Proviso to Article 309 is not ultra vires of Article 320 — Government by its own rules binding itself to accept Commission's selections for promotion — Act of Government in refusing to accept Commission's selection is invalid. A 1964 Punj 302 (304) (DB). (C. W. No. 410 of 1961, dated 4-5-1962 (Punj), **Reversed.**)

(11) Disciplinary proceedings — Government referring matter for consultation with Public Service Commission — View expressed by Commission, not accepted — Government need not state reasons therefor. (1978) 2 Serv LR 372 (379) (DB) (Kant).

(12) Under Section 56 (1) of the Patna Municipal Corporation Act (1952) for making temporary appointment, prior consultation with Public Service Commission is not at all necessary. 1966 BLJR 697 (700, 701) (DB).

(13) Initial order of appointment by Government nullity — Concurrence asked for from the Public Service Commission or one accorded by the Public Service Commission is altogether of no avail as there can be no concurrence to the appointment of a person who was not eligible for appointment at the relevant time in accordance with the rules then in force. 1974 Raj LW 584 (593).

(14) Indian Administrative Service (Regulation of Seniority) Rules (1954), Rule 3 (3) second proviso — Provision of retaining power in Government of India in consultation with Commission to approve or not to approve period for purposes of seniority is not violative of Art. 14. 1968 Lab IC 1426 (1429) (Pat).

4. Clause (3) (a).— (1) The civil services and civil posts mentioned in Cl. 3 (a) are used in contradistinction with military services and military posts. **A 1956 Raj 104 (106) (DB).**

(2) Once the Public Service Commission has already advised candidates from the ranked list, the Department has only to act on the basis of such advice and it is not expected to concern itself with the question as to whether the select list from out of which the advice was tendered has subsequently become time expired. 1979 Lab IC 95 (99) (DB) (Ker).

5. Clause (3) (b).— (1) Consultation with Public Service Commission in matters of appointment is not mandatory — Omission to consult does not invalidate appointment and affords no cause of action to any one interested in the appointment. **1972 BLJR 739 : 1972 Lab IC 1325 (1336, 1356) (Pat) (FB).**

(2) Public Service Commission — Advice for appointment — Advice made under some mistake — Rule 3 (c) of Kerala State Subordinate Service Rules (1958) allows cancellation. 1980 Lab IC 109 (111) : 1979 Ker LT 665 (DB). (1977 Ker LT 776, **Reversed.**)

(3) Cancellation of appointment of person selected by Public Service Commission — Cancellation for want of qualification on date of

(4) Nothing in clause (3) shall require a Public Service Commission to be consulted as respects the manner in which any provision referred to in clause (4) of article 16 may be made or as respects the manner in which effect may be given to the provisions of article 335.

(5) All regulations made under the proviso to clause (3) by the President or the Governor [a][* *] of a State shall be laid for not less than fourteen days before each House of Parliament or the House or each House of the Legislature of the State, as the case may be, as soon as possible after they are made, and shall be subject to such modifications whether by way of repeal or amendment, as both Houses of Parliament or the House or both Houses of the Legislature of the State may make during the session in which they are so laid.

[Government of India Act (1935), S. 266.]

(a) Words 'or Rajpramukh' were omitted by Constitution (Seventh Amendment) Act, 1956, S. 29 and Schedule (1-11-1956).

(b) Words "or Rajpramukh, as the case may be", were omitted, ibid.

Article 320 — Note 5 (contd.)

application — Basis for action was instruction in application to the effect that "qualifications acquired or reported after submission of application will not be considered" — No criteria prescribed by instructions for deciding when qualification can be said to have been acquired — Cancellation held invalid. 1979 Lab IC (NOC) 81 (DB) (Ker).

(4) It is not correct to say that S. 133 (2) (b) of Jammu and Kashmir Constitution, which corresponds to Cl. (3) (b) of this Article, is not at all attracted in matters of making promotions in the same services. **A 1979 SC 586 (587) : 1979 Lab IC 294.** (1972 Lab IC 521 (J & K), **Reversed.**)

(5) Requirement as to consultation with Public Service Commission in matter of promotions etc. — Nature of — It is directory and not mandatory — Action taken in violation of that requirement cannot be struck down. A 1972 Pat 4 (5).

(6) In cases of appointment by promotion from Subordinate Agricultural Service as District Agricultural Officer, non-compliance with requirement of consulting Public Service Commission does not affect validity of appointment nor entitles person aggrieved by such promotion to approach High Court for relief under Article 226, Civil Writs Nos. 967 and 831 of 1961, D/- 30-1-1970 (Punj & Har), **Reversed. 1971 Lab IC 863 : A 1971 Punj 297 (300 to 302) (FB).** (**Reversed** on another point in A 1976 SC 367 : 1976 Lab IC 294.)

(7) Consulting the Public Service Commission while making the promotion means inviting its opinion after it has considered the cases of all officers whether proposed to be promoted or superseded. 1972 BLJR 205 (209).

(7-A) The consultation contemplated in Cl. (3) (b) of the Article is with reference to the person who is proposed to be appointed or promoted by the State Government. The proposal as such, therefore, will have to go in some form or other to the Commission. Hence, where the petitioner's name was not proposed as such for promotion, subsequently the Commission could not be asked for considering his name for recommendation. (1980) 1 Mad LJ 514 (517) (Mad).

(8) Departmental letter on promotions — First paragraph containing a decision 'requiring consultation with State Public Service Commission in superseding permanent Government employees' — Second paragraph informing 'accordingly' the requirement 'to obtain the Commission's advice in matters of promotion' — **Held** both paragraphs should be read together — Consultation of the Commission in all cases of promotion irrespective of any supersession was not intended. 1970 BLJR 14 (21) (DB).

(9) Promotion to post of Superintendents of Industrial Centres — Selection by Public Service Commission — Promotees selected from two services of Industries Department — Inter se seniority of promotees — To be determined by State Government according to service rules — Consultation with Public Service Commission — Not necessary. 1979 Lab IC 23 (26) (DB) (Pat).

(10) Expression "from one service to another" occurring in Cl. 3 (b) of the Article — It is used in relation to the word "transfer" and does not govern the word "promotion" so as to mean "promotion from one service to another". A 1972 Pat 4 (5).

(11) Promotion — The promotion of Supervisor to the cadre of Sub-Engineer comes within the purview of Article 320 (3) (b) of the Constitution. **1973 Lab IC 139 (168) (Andh Pra) (FB).**

(12) Officiating promotion on a temporary basis — Reversion on ground of unsatisfactory confidential record as advised by Public Service Commission — State Government, held could not be said to have acted mechanically. 1977 Lab IC 1959 (1969) (Bom).

(13) Where the Government promoted a Reader in Physics as professor subject to concurrence of the Public Service Commission and when the Commission did not concur, the Government passed an order of reversion, without independently reviewing the matter, **Held** that as the Government is the ultimate power to promote the official, and the Commission being only an advisory body, the Government had abdicated its duty in the matter of promotion of the petitioner. 1975 Lab IC 1393 (1395) (Kant).

(14) Functions in regard to appointment and promotion — Cannot be abdicated by Government in favour of Public Service Commission — Government acting on advice of Public Service Commission — Inference that Government acted on it mechanically without applying its

Article 320 — Note 5 (contd.)
mind cannot be drawn readily. A 1970 Madh Pra 167 (167) (DB).

6. Clause (3) (e).— Scope and object of.— (1) The advice of the Public Service Commission is not binding on the Government. A 1957 SC 912 (916) °° 1980 Lab IC (NOC) 97 (All) °° (1953) 57 Cal WN 157 (161) °° A 1962 SC 1130 (1133) °° A 1966 Mys 220 (225) (DB).

[See A 1956 Mys 20 (27) : ILR (1955) Mys 597 (DB).]

(2) The object of Clause (3) (c) is to give an assurance to the services that an independent body has considered the action proposed to be taken against a particular person and also to afford the Government unbiased advice on matters affecting morale of the public services. A 1957 SC 912 (916).

[See (1959) 2 Lab LJ 261 (264) (Andh Pra). (Consultation with Public Service Commission before dismissal is not mandatory.) °° A 1955 Punj 1 (3).]

(3) The report received by the Council of Ministers from the Public Service Commission under Article 320 (3) (c) is privileged document as its disclosure would lead to injury to public interest. A 1961 SC 493 (512). (A 1921 Cal 282 and A 1944 Lah 434, Overruled; A 1960 Punj 407, Reversed.)

(4) Though the Union Public Service Commission has to be consulted in all disciplinary matters, it is not an appellate authority over the Enquiry Officer. A 1962 SC 1130 (1132, 1133).

(5) The power to revert a gazetted Government servant vests exclusively in the Government and not in the Public Service Commission, though the latter has to aid and advice Government by their opinion. A 1966 Orissa 173 (183) °° A 1964 Cal 265 (270).

7. Stage at which the Public Service Commission is to be consulted.— (1) It is enough if the Public Service Commission is consulted at some stage before the final order imposing the penalty is passed. A 1957 Andh Pra 794 (804) (DB).

[See A 1957 SC 882 (883).]

(2) Where the Public Service Commission is consulted before the show cause notice under Article 311 (2) is given to the Officer and he does not show any cause in reply to the notice, it is not necessary to consult the Public Service Commission again before the final order is passed against the officer. A 1955 SC 160 (166).

(3) A Government servant cannot claim that notice issued to him to show cause against the action proposed to be taken against him should have been issued to him after the expression of opinion by the Public Service Commission. A 1960 Mad 393 (393) °° (1956) 2 Mad LJ 145 (147).

(4) Once the Governor has passed an order imposing the penalty no question of consultation with the Public Service Commission arises. ILR (1956) Punj 1213 (1230).

8. "All disciplinary matters".— (1) Clause (3) (c) applies to every kind of disciplinary action proposed to be taken in respect of a particular person. A 1956 SC 285 (292).

(2) Suspension proceedings partake of the nature of the disciplinary matter within the meaning of Clause (3) (c). A 1958 Ker 72 (74) (DB) °° A 1954 Cal 60 (63) (DB).

(3) The termination of service of a person in accordance with the terms of contract of service, is not a disciplinary matter requiring consultation. A 1953 Pat 92 (95) (DB).

(4) If a person is appointed to a temporary post, his period of appointment will expire when the post itself is abolished. In such a case there is no question of any disciplinary action so as to make the consultation with the Public Service Commission necessary. A 1955 Pat 353 (357) (DB).

(5) Reduction in rank being a disciplinary matter requires consultation with the Public Service Commission. A 1952 Pepsu 152 (155) (DB).

(6) Where the reversion of a Government servant from the higher officiating post to his original substantive post is by way of penalty, the Public Service Commission must be consulted in the matter. A 1955 Pepsu 106 (109) °° A 1954 Pepsu 98 (104) °° A 1952 Nag 288 (289) (DB) °° A 1952 Pepsu 152 (155) (DB).

(7) Where the order reverting to a lower post does not amount under the Fundamental Rules to a penalty, there is no need to consult the Public Service Commission. A 1957 Punj 191 (196) (DB) °° A 1954 Pepsu 98 (104).

(8) Clause (3) (c) is inapplicable where a Government servant is made to retire compulsorily on account of Government Policy and not as a matter of disciplinary action. A 1953 Trav-Co 140 (144) (DB).

[See also A 1954 Pat 187 (190) : ILR 32 Pat 708 (DB).]

(9) Where there is no question of punishment or disciplinary action, consultation with the Public Service Commission is not necessary. A 1954 Trav-Co 32 (33) (DB) °° A 1953 Trav-Co 140 (144) (DB).

(10) Where a Government servant applies for leave preparatory to retirement and is retired thereafter, there is no need to consult the Public Service Commission. A 1952 Trav-Co 409 (411).

(11) High Court exercising power by promoting some members to higher posts in supersession of plaintiff's claim according to seniority list — Consultation with State Public Service Commission not necessary. A 1962 SC 1704 (1710).

(12) Kerala Public Service Commission (Consultation) Regulation (1957), Rule 9 — There is no obligation on State Government to consult Commission in matters relating to judicial officers — Public Service Commission still consulted before terminating services of judicial officer — There is no irregularity or illegality. A 1963 Ker 92 (100).

(13) Decision to take disciplinary action against a public servant and to set up the actual disciplinary Tribunal and its personnel should form subject-matter of consultation. A 1961 Cal 1 (6) (SB).

9. Persons to whom Clause (3) (c) is applicable.— (1) The clause does not apply to servants of Sindri Fertilizers and Chemicals Ltd., as they are not servants of Union or State Government. A 1957 Pat 10 (14) (DB).

(2) The phrase "persons serving under the Government of India or the Government of a State" seems to have reference to such persons in respect of whom the administrative control is vested in the respective executive Governments. A 1956 SC 285 (294).

(3) The clause does not apply to members of the staff of High Court. A 1956 SC 285 (294).

(4) High Court recommending to Governor dismissal of judicial officer — Governor to ac-

Article 320 — Note 9 (contd.)
cept such recommendation — Public Service Commission not to be consulted — Judicial Officers although holding post in civil capacity do not serve under Government of a State. A 1976 SC 2490 (2497) ** A 1975 Punj 265 (278) (FB).

(5) Clause (3) (c) applies only to those persons to whom Clause (1) of Article 320 applies, that is, to those who are recruited through examination held by the Public Service Commission. A 1954 Cal 60 (63) (DB) ** A 1955 Cal 183 (186).

(6) A Notification issued under the Proviso to Clause (3) may have the effect of removing from the operation of Cl. (3) (c) a particular class of persons. A 1955 Mad 468 (469).

(7) Employees of the State Bank of India are servants of a statutory corporation and are not civil servants of the Union Government within the meaning of Art. 320 (3) (c). A 1958 Pat 418 (419) (DB).

10. "Including memorials or petitions relating to such matters."— (1) A petition of appeal presented by a dismissed Government servant comes under the words "memorials or petitions" and it cannot, therefore, be rejected without first consulting the Public Service Commission. ILR (1951) 1 Raj 134 (150) (DB) ** 1952 Raj LW 118.

(2) An application for review would be covered by the words "memorials and petitions." A 1957 SC 912 (916).

(3) Article 320 does not mean that the State should consult the commission as many times as the Government servant against whom disciplinary action is taken, may choose to file review petitions. A 1955 SC 160 (166).

11. Clause (3) (d).— (1) Where a Government servant is prosecuted for the offence of cheating by submitting false travel bills and taking money on them and is acquitted, his claim to reimbursement of expenses incurred by him in defending himself should be dealt with under Clause (3) of this Article. A 1957 Assam 143 (145) (DB).

12. Clause (3), Proviso.— (1) The proviso governs all the clauses of sub-article (3) of Article 320. A 1958 Andh Pra 35 (37) (DB).

(2) The proviso enables the President or the Governor to make regulations specifying the matters in regard to which consultation with the Public Service Commission is not necessary. A 1957 Manipur 7 (9).

(3) A regulation made by the Governor under the Proviso to Cl. (3) of this Article, like the rules made by the Governor under Article 309, has statutory force and is quasi-legislative in character. Therefore, the character of such regulation is completely different from the character of an order made in exercise of the executive powers of the State under Article 166. ILR (1973) Andh Pra 649 : 1974 Lab IC 200 (202).

(4) It is within the powers of the Governor to limit the functions of the Public Service Commission and if any appointment is taken out of the purview of the Public Service Commission, it is well covered by the provisions of the Constitution. If such appointments have been taken out from the purview of the Public Service Commission by enacting a valid rule, the Government is fully empowered to make appointment for any length of period against any post without consulting the Public Service Commission. 1968 Lab IC 1605 (1622).

(5) Consultation with the Public Service Commission may be dispensed with in regard to disciplinary matters in cases mentioned in the Regulation. A 1958 Andh Pra 35 (37) (DB) ** A 1958 Ker 72 (74) (DB) ** ILR (1957) Andh Pra 715 (725) (DB) ** A 1957 Pat 676 (678) (DB) ** A 1956 Mad 220 (222) ** (1960) 2 Lab LJ 165 (168) (Andh Pra) (DB) ** (1957) 2 Andh WR 425 (430) ** ILR (1957) 9 Assam 223.

[See A 1958 Andh Pra 240 (251) (DB).]

(6) Where a notification dispensing with the need to consult the Public Service Commission with reference to appointment to certain office is issued after the appointment is made, such appointment without consulting the Public Service Commission will be valid where it is to take effect after the notification. A 1957 Mad 17 (19) (DB).

(7) Though the Public Service (Commission) Consultation Regulations under the proviso dispensing with consultation with the Public Service Commission came into force only after the inquiry against a public servant had started, they will apply if they are in force at the time when Government was satisfied that action was necessary. A 1956 Trav-Co 158 (159).

[But see A 1958 Bom 167 (169) : ILR (1957) Bom 120 (DB).]

(8) The Public Service Commission Regulations (1955), framed under proviso to Cl. (3) of the Article, merely provide that under certain circumstances consultation with the State Public Service Commission is not necessary. They cannot and do not confer any power to make any appointment. These Regulations cannot be treated as a source of power to make appointment. 1977 Lab IC 1397 (1403) (DB) (Cal).

(9) The expression "other services and posts in connection with the affairs of a State" means services and posts other than all-India Services and other services and posts in connection with the affairs of the Union. A 1956 Trav-Co 158 (159).

(10) Regulations and Notifications made under the corresponding Section 266 (3) of the Government of India Act, 1935, making it unnecessary to consult the Public Service Commission in any matter, continue in force even after the Constitution, under Article 313. A 1957 All 436 (438) ** A 1957 Pat 676 (678) (DB) ** A 1956 Pat 228 (232) (DB) ** A 1955 Nag 163 (165) (DB) ** A 1954 All 813 (814, 815) (DB).

(11) Under the Hyderabad Rules the Government is not prohibited from consulting the Commission nor does it act illegally if it consults the Commission. A 1968 Andh Pra 364 (370) : 1968 Lab IC 1499.

(12) Imposition of any punishment on a Government servant by the Governor under Rule 26 of the Mysore Civil Service (Classification, Control and Appeal) Rules (1957), does not require consultation with Public Service Commission, in view of Regulations 3 and 5 of the Mysore Public Service Commission (Consultation) Regulations (1958), framed under proviso to Cl. (3) of this Article. (1972) 1 Mys LJ 142 (145, 146) (DB).

(13) Under the Jammu and Kashmir Public Service Commission (Limitation of Functions) Regulation, 1957 the Public Service Commission

321. Power to extend functions of Public Service Commissions.— An Act made by Parliament or, as the case may be, the Legislature of a State may provide for the exercise of additional functions by the Union Public Service Commission or the State Public Service Commission as respects the services of the Union or the State and also as respects the services of any local authority or other body corporate constituted by law or of any public institution.

[Government of India Act (1935), S. 267.]

322. Expenses of Public Service Commissions.— The expenses of the Union or a State Public Service Commission, including any salaries, allow-

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Article 320 — Note 12 (contd.)

has to be consulted in all appointments like that of a Principal. If apointment to the post of a Principal is made without consulting the Commission and in spite of its protest the appointment is not in accordance with law and the Constitution. A 1968 J and K 26 (31, 32) : 1968 Lab IC 132.

(14) Regulation under Cl. (3) of the Article — Assam Public Service Commission (Limitation of Functions) Regulation (1951), Regulation 3 (f) — Taking over of private college by Government — Continuance of existing staff as temporary employees under Regn. 3 (f) is legal. Assam LR (1969) Assam 202 (207) (DB).

(15) Where the President proposes to make an order of dismissal, removal or reduction in rank after being satisfied that such action is necessary in the interest of the security of the State it shall not be necessary for the President to consult the Commission. A 1958 Bom 283 (290) (DB).

(16) Promotion from Grade IV to integrated Grades II and III of General Cadre of I. F. S (B) — As posts in Grade IV and those of integrated Grades II and III belong to one and the same Central Service Class II the Commission need not be consulted in matters of such promotion. 1972 Lab IC 603 (610) (Delhi).

13. Clause (4).— (1) The Public Service Commission need not be consulted by the State Government with respect to the making of provisions for reservation of appointments in favour of backward classes of citizens. A 1956 Mys 20 (25) (DB).

14. Clause (5).— (1) The provision in Cl. (5) as to laying of the Regulations before the Legislature has been held to be only directory and not mandatory. A 1955 Cal 451 (459) (DB) °° A 1955 Pepsu 97 (102).

[But see A 1957 Manipur 7 (9).]

(2) Clause (5) of this article applies only to Regulations made under the proviso to Cl. (3) and cannot be considered as requiring that the Regulations made under the Government of India Act, 1935, should be laid before the Legislature. A 1954 All 813 (815) (DB) °° (1953) 57 Cal WN 157 (161).

[See also A 1956 Sau 14 (20) (DB).]

(3) Where there is nothing on the record to show whether or not the old Regulations framed under Section 266 (3) of the Government of India Act, 1935 were laid before the Parliament after their adaptation by the Adaptation of Laws Order, 1950, it must be deemed that the provisions of Cl. (5) of Art. 320 were complied with. A 1958 Manipur 35 (36, 37).

15. Position of the Public Service Commission vis-a-vis Government.— (1) The Public Service Commission in an independent body and is not an authority subordinate to the Government. See A 1955 Madh B 56 (60) (DB).

(2) Government cannot dictate the procedure to be adopted by the Public Service Commission — It is for the Commission to regulate its own procedure. 1971 J & K LR 211 (219) (DB).

(3) The Public Service Commission is not an authority exercising any power under the Constitution. A 1956 Mys 20 (25) (DB).

(4) The function of the Public Service Commission is purely advisory and its advice is not binding on the Government. A 1958 Madh Pra 135 (142) (DB) °° A 1956 Manipur 34 (40) °° A 1958 Tripura 28 (31) °° A 1978 MP 59 (63) °° 1978 Lab IC 594 (FB) (Madh Pra) °° 1970 Lab IC 160 (162) : 35 Cut LT 1223 (DB) (Orissa).

(5) It is not open to the Public Service Commission to refuse any information wanted by the Government. A 1956 Mys 20 (27) (DB).

(6) The Public Service Commission is a constitutional body charged with certain constitutional rights, duties and obligations. Article 321 does recognise the possibility of extending the functions of the Public Service Commission. But it can only be done by an Act of the State Legislature under Article 321. A 1958 Cal 345 (348, 349, 350).

(7) Public Service Commission cannot identify itself with Government Authorities — Commission cannot change its decisions to suit the views of Government Authorities. 1968 Lab IC 1377 (1380) : (1968) 1 Mad LJ 348.

(8) Public Service Commission — Duty of — Qualifications laid down by Public Service Commission for recruitment to certain post — Invitation for applications for the posts does not hold out any promise for selection and for appointment — Government can alter qualifications and Public Service Commission can select candidate on basis of altered qualifications. 1970 Ker LR 22 (30) : (1969) 1 Lab LJ 215.

Article 321

(1) Constitution does not recognise in Article 321 the possibility of extending the functions of the Public Service Commission. Under this provision only additional function can be entrusted to the State Public Service Commission. But it can only be done by an Act of the State legislature. It cannot be done by any private or departmental arrangement between the Commission and the Government. A 1958 Cal 345 (350).

(2) The State Financial Corporation (Kerala) really comes within State sphere in its activities and Article 321 enables the Legislature to give such additional functions to the State Public Service Commission in respect of recruitment of the personnel to the State Financial Corporation. ILR (1976) Ker 674 (690).

ances and pensions payable to or in respect of the members or staff of the Commission, shall be charged on the Consolidated Fund of India or, as the case may be, the Consolidated Fund of the State.

[Government of India Act (1935) S. 268.]

323. Reports of Public Service Commissions.— (1) It shall be the duty of the Union Commission to present annually to the President a report as to the work done by the Commission and on receipt of such report the President shall cause a copy thereof together with a memorandum explaining, as respects the cases, if any, where the advice of the Commission was not accepted, the reasons for such non-acceptance to be laid before each House of Parliament.

(2) It shall be the duty of a State Commission to present annually to the Governor [a][* *] of the State a report as to the work done by the Commission, and it shall be the duty of a Joint Commission to present annually to the Governor [a][* *] of each of the States the needs of which are served by the Joint Commission a report as to the work done by the Commission in relation to that State, and in either case the Governor [b][* * * *] shall, on receipt of such report, cause a copy thereof together with a memorandum explaining as respects the cases, if any, where the advice of the Commission was not accepted, the reasons for such non-acceptance to be laid before the Legislature of the State.

(a) Words "or Rajpramukh" were omitted by the Constitution (Seventh Amendment) Act, 1956, S. 29 and Schedule (1-11-1956).

(b) Words "or Rajpramukh, as the case may be," were omitted, ibid.

[a][PART XIVA
TRIBUNALS

323A. Administrative tribunals.— (1) Parliament may, by law, provide for the adjudication or trial by administrative tribunals of disputes and complaints with respect to recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India

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Article 323

(1) As under the Government of India Act, 1935, the status of the Public Service Commission is advisory under the Constitution. But there is a provision under Article 323 which was not to be found in the Act of 1935, viz., that annually the President or the Governor or Rajpramukh shall have to explain to the Legislature the reasons why in the particular cases the advice of the Commission could not be accepted. A 1956 Manipur 34 (40).

(2) It is not incumbent on the State Government under Rule 13 (3) of M. P. Educational Service (Collegiate Branch) Recruitment Rules (1967) to fill vacant posts in accordance with recommendations of the Public Service Commission. However if the vacancy has to be filled up the Government has to make appointments strictly in accordance with list sent by the Commission. The Government cannot alter the order of merit. **A 1978 MP 59 (64) : 1978 Lab IC 594 (FB).**

(3) Where the Government does not accept the recommendation of the Public Service Commission the matter is not justiciable except on the ground of fraud or mala fides. **A 1978 MP 59 (63) (FB).**

(4) Functions of Public Service Commission are only advisory — Government is not bound to follow the advice or recommendation tendered by the Commission. A 1958 Tripura 28 (31).

(5) Public Service Commission cannot withhold any information wanted by Government. A 1956 Mys 20 (26) (DB).

(6) Section 137 of the Constitution of J. and K. (1956) which corresponds to Article 323 is directory and not mandatory. A 1968 J and K 26 (31).

Article 323A

(1) The intention in enacting Art. 323A is that in case the Parliament in exercise of the powers conferred on it by the said article chooses to make a law as contemplated by the said article, the provisions contained in Article 254 of the Constitution will be attracted. It is not the intention of the Parliament to cover the whole field in regard to Administrative Tribunals. Hence there cannot be said to be any repugnancy between the U. P. Public Services (Tribunals) Act (17 of 1976) and the Central law. 1979 Lab IC 181 (183) : (1979) 1 Lab LN 241 (All).

(2) At the time the U. P. Public Services (Tribunals) Act 1976 was enacted Entry 3 of the State list contained the words "Administration of Justice". Now the same power is contained in the concurrent list and gives jurisdiction to both the State and the Central Legislature to make Law concerning the establishment of Administrative Tribunals. 1977 Lab IC (NOC) 48 (All).

or under the control of the Government of India or of any corporation owned or controlled by the Government.

(2) A law made under clause (1) may—

(a) provide for the establishment of an administrative tribunal for the Union and a separate administrative tribunal for each State or for two or more States;

(b) specify the jurisdiction, powers (including the power to punish for contempt) and authority which may be exercised by each of the said tribunals;

(c) provide for the procedure (including provisions as to limitation and rules of evidence) to be followed by the said tribunals;

(d) exclude the jurisdiction of all courts, except the jurisdiction of the Supreme Court under article 136, with respect to the disputes or complaints referred to in clause (1);

(e) provide for the transfer to each such administrative tribunal of any cases pending before any court or other authority immediately before the establishment of such tribunal as would have been within the jurisdiction of such tribunal if the causes of action on which such suits or proceedings are based had arisen after such establishment;

(f) repeal or amend any order made by the President under clause (3) of article 371D;

(g) contain such supplemental. incidental and consequential provisions (including provisions as to fees) as Parliament may deem necessary for the effective functioning of, and for the speedy disposal of cases by, and the enforcement of the orders of, such tribunals.

(3) The provisions of this article shall have effect notwithstanding anything in any other provision of this Constitution or in any other law for the time being in force.

323B. Tribunals for other matters.— (1) The appropriate Legislature may, by law, provide for the adjudication or trial by tribunals of any disputes, complaints, or offences with respect to all or any of the matters specified in clause (2) with respect to which such Legislature has power to make laws.

(2) The matters referred to in clause (1) are the following, namely :—

(a) levy, assessment, collection and enforcement of any tax;

(b) foreign exchange, import and export across customs frontiers;

(c) industrial and labour disputes;

(d) land reforms by way of acquisition by the State of any estate as defined in article 31A or of any rights therein or the extinguishment or modification of any such rights or by way of ceiling on agricultural land or in any other way;

(e) ceiling on urban property;

(f) elections to either House of Parliament or the House or either House of the Legislature of a State, but excluding the matters referred to in article 329 and article 329A;

(g) production, procurement, supply and distribution of foodstuffs (including edible oilseeds and oils) and such other goods as the President may, by public notification, declare to be essential goods for the purpose of this article and control of prices of such goods;

(h) offences against laws with respect to any of the matters specified in sub-clauses (a) to (g) and fees in respect of any of those matters;

(i) any matter incidental to any of the matters specified in sub-clauses (a) to (h).

(3) A law made under clause (1) may—

(a) provide for the establishment of hierarchy of tribunals;

(b) specify the jurisdiction, powers (including the power to punish for contempt) and authority which may be exercised by each of the said tribunals;

(c) provide for the procedure (including provisions as to limitation and rules of evidence) to be followed by the said tribunals;

(d) exclude the jurisdiction of all courts, except the jurisdiction of the Supreme Court under article 136, with respect to all or any of the matters falling within the jurisdiction of the said tribunals;

(e) provide for the transfer to each such tribunal of any cases pending before any court or any other authority immediately before the establishment of such tribunal as would have been within the jurisdiction of such tribunal if the causes of action on which such suits or proceedings are based had arisen after such establishment;

(f) contain such supplemental, incidental and consequential provisions (including provisions as to fees) as the appropriate Legislature may deem necessary for the effective functioning of, and for the speedy disposal of cases by, and the enforcement of the orders of, such tribunals.

(4) The provisions of this article shall have effect notwithstanding anything in any other provision of this Constitution or in any other law for the time being in force.

Explanation.—In this article, "appropriate Legislature", in relation to any matter, means Parliament or, as the case may be, a State Legislature competent to make laws with respect to such matter in accordance with the provisions of Part XI.]

(a) Inserted by Constitution (Forty-second Amendment) Act, 1976, S. 46 (3-1-77).

PART XV
ELECTIONS

324. Superintendence, direction and control of elections to be vested in an Election Commission[b].— (1) The superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every State and of elections to the offices of President and Vice-President held under this Constitution [a][* * *] shall be vested in a Commission (referred to in this Constitution as the Election Commission).

ARTICLE 324 — SYNOPSIS

1. Scheme of Part 15.
2. Executive authority of Election Commission.
3. Election Tribunal.

1. Scheme of Part 15.— (1) Part XV of the Constitution is really a Code in itself providing the entire ground work for enacting appropriate laws and setting up suitable machinery for the conduct of elections. **A 1952 SC 64 (68, 69).**
[See A 1964 Raj 126 (130) (DB).]

(2) The purpose behind part XV of the Constitution is that the conduct of elections should be left unhindered in the hands of the Election Commission and the working of the election machinery should up to the stage of declaration of the election results be not arrested by judicial or as far as may be by any other process. A 1952 All 511 (512, 513) (DB).

(3) Upon the resignation of a member in the Legislature the seat becomes vacant under Article 190 (3) (b) of the Constitution. Section 150 of the Representation of the People Act cannot whittle down its force and effect. (1967) 2 Andh WR 53 (DB).

(4) The word "election" in Part XV connotes the entire procedure to be gone through to return a candidate to the legislature. A 1968 Manipur 84 (93).

(5) The power to decide a dispute regarding recognition to political parties and allot symbols is a part of the State's judicial power and power was conferred on the Election Commission by Article 324 of the Constitution. **A 1977 SC 2155 (2165).**

(6) Functions referred to in Art. 324 (6) include powers as well as duties. The Commission is entitled to exercise certain powers under Article 324 itself on its own right in an area not covered by the Representation of the People Act and the Rules. The Election Commission is competent in an appropriate case to order re-poll of an entire constituency where necessary. It will be an exercise of power within the ambit of Article 324. **A 1978 SC 851 (894).**

(7) Powers of Election Commission — Each one of two groups in 'Shiromani Akali Dal' claiming that their group was 'Shiromani Akali Dal' — Press as well as public calling one group as 'Master Tara Singh Group' and the other as 'Sant Fateh

"A" in the citations stands for AIR

(2) The Election Commission shall consist of the Chief Election Commissioner and such number of other Election Commissioners, if any, as the President may from time to time fix and the appointment of the Chief Election Commissioner and other Election Commissioners shall, subject to the provisions of any law made in that behalf by Parliament, be made by the President.

(3) When any other Election Commissioner is so appointed the Chief Election Commissioner shall act as the Chairman of the Election Commission.

(4) Before each general election to the House of the People and to the Legislative Assembly of each State, and before the first general election and thereafter before each biennial election to the Legislative Council of each State having such Council, the President may also appoint after consultation with the Election Commission such Regional Commissioners as he may consider necessary to assist the Election Commission in the performance of the functions conferred on the Commission by clause (1).

(5) Subject to the provisions of any law made by Parliament, the conditions of service and tenure of office of the Election Commissioners and the Regional Commissioners shall be such as the President may by rule determine:

Provided that the Chief Election Commissioner shall not be removed from his office except in like manner and on the like grounds as a Judge of the Supreme Court and the conditions of service of the Chief Election Commissioner shall not be varied to his disadvantage after his appointment:

Article 324 — Note 1 (contd.)
Singh Group' — Election Commission accepting that nomenclature — **Held** on facts and circumstances of the case Commission could not be said to have adopted arbitrary course and that such power was implied in Article 324 and also in its power to allot symbols. (1967) 29 Elec LR 53 (58) (Delhi).

2. Executive authority of Election Commission.— (1) The executive authority of the Election Commission under this article cannot be limited by any law passed by Parliament under the provisions of Article 327. There is also no provision in any article of the Constitution as to the manner in which the Election Commission would exercise its authority under Article 324. It is a matter of internal arrangement over which the Election Tribunal has full competence and control. A 1953 Pat 293 (294) (DB).

(2) It is not open to the Election Commission to prescribe a form of oath for a presidential candidate. Such power cannot be spelt out of Article 324. **A 1968 SC 904 (910).**

(3) (Obiter) — In matters governed by the Representation of the People Act, the Election Commission is bound to follow the provisions of the Act in respect of the express directions contained in the Act passed by the Parliament, in the exercise of its powers under Article 327. Article 327 has been made subject to the provisions of the Constitution and Article 324 (1) is one of such provisions, but the power contained in Article 324 (1) is a general power. A 1958 All 794 (799) (DB).

(4) In a case where the Electoral Registration Officer by mistake or by misconception prepared electoral roll for a particular constituency including in it an area which does not belong to the constituency, he must be held to have exceeded the jurisdiction vested in him. In such a case, the Election Commission can in exercise of its executive power under Article 324 of the Constitution and Section 21 (3) of the Representation of the People Act direct a special revision of the electoral roll for the said constituency. A 1968 Andh Pra 218 (221) (DB).

(5) Articles 324 and 327 show that the conduct of elections is vested in the Election Commission though the law is to be made by Parliament. A 1958 Madh Pra 299 (301) (DB).

(6) The Union and State Governments adopted the arrangement that State Government would initially bear all expenses and collect all receipts of sale proceeds and finally liabilities would be divided half and half. By this arrangement, District Election Officer, a State servant, can exercise the power to collect sale proceeds of electoral rolls which remain with State Government. A 1969 Orissa 263 (264, 265).

(7) Article 324 provides that superintendence, direction and control of elections shall be vested in Election Commission. It, therefore, cannot be said that when commission issues direction, it does so not on its own behalf but as the delegate of some other authority. **A 1972 SC 187 (200).**

(8) When an order of fresh poll under Art. 324 (1) of the Constitution is made it cannot be questioned except by an election petition under the Act. **A 1978 SC 851 (894).**

(9) Under Article 324 the Election Commission is entrusted with the superintendence, direction and control of the conduct of elections. This implies that the Commission must take all necessary measures to ensure that a proper and fair poll is taken in every election and if the commission becomes satisfied that on account of some circumstances that has supervened since the original date of polling was fixed, a

Provided further that any other Election Commissioner or a Regional Commissioner shall not be removed from office except on the recommendation of the Chief Election Commissioner.

(6) The President, or the Governor [c][* *] of a State, shall, when so requested by the Election Commission, make available to the Election Commission or to a Regional Commissioner such staff as may be necessary for the discharge of the functions conferred on the Election Commission by clause (1).

[Government of India Act (1935), Section 29.]

(a) Words "including the appointment of election tribunals for the decision of doubts and disputes arising out of or in connection with elections to Parliament and to the Legislatures of the States", are omitted by the Constitution (Nineteenth Amendment) Act, 1966, S. 2 (11-12-1966).

(b) This Article came into force on 26-11-1949.

(c) Words "or Rajpramukh", were omitted by the Constitution (Seventh Amendment) Act, 1956, S. 29 and Sch. (1-11-1956).

JAMMU AND KASHMIR

In its application to the State of Jammu and Kashmir, in clause (1) of Art. 324, the reference to the Constitution shall, in relation to elections to either House of the Legislature of Jammu and Kashmir, be construed as a reference to the Constitution of Jammu and Kashmir.

—See Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (10)(a) (as substituted by C. O. 60, w.e.f. 26-1-1960.)

325. No person to be ineligible for inclusion in, or to claim to be included in a special, electoral roll on grounds of religion, race, caste or sex.— There shall be one general electoral roll for every territorial constituency for election to either House of Parliament or to the House or either House of the Legislature of a State and no person shall be ineligible for inclusion in any such roll or claim to be included in any special electoral roll for any such constituency on grounds only of religion, race, caste, sex or any of them.

JAMMU AND KASHMIR

In Article 325, reference to a State shall be construed as not including a reference to the State of Jammu and Kashmir.

——See Constitution (Application to Jammu and Kashmir) Order, 1954, Para. 2, sub-para. (10) (b) (as substituted by C. O. 75.)

Article 324 — Note 2 (contd.)

fair poll cannot be taken on that original date, it is the overriding duty of the Commission to fix a fresh date for the poll. (1971) 45 Ele R 575 (587) (All) ** A 1978 NOC 14 : ILR (1977) 2 Delhi 265.

(10) In case of a direction for fresh poll issued by the Election Commission no enquiry as such is contemplated and therefore no hearing is intended. A 1978 NOC 14 : ILR (1977) 2 Delhi 265.

(11) Fair hearing is a postulate of decision-making. Cancellation of poll, although a fair abridgment of that process is permissible. Article 324 vests wide power and where some direct consequence emanates from its exercise, the giving of fair hearing must be considered a functional obligation though not a statutory obligation. **A 1978 SC 851 (881).**

(12) The Election Commission has to work within the framework of Article 324 and subject to such other Rules or orders which have been framed by virtue of the power conferred under Section 169 of the Representation of the People Act 1951. If the Election Commission acts in a manner contrary to the provisions of the law or the Rules, the High Court has jurisdiction to examine the correctness of the decision arrived at by the Election Commission. A 1980 Raj 166 (174).

3. Election Tribunal.— (1) Although the Election Tribunal owes its constitution to the Election Commission, it is appointed to decide a petition according to its own lights. It is in no sense a servant of the Election Commission nor can the Commission dictate to it as to how it should decide a petition. **A 1954 Nag 166 (182, 183) (FB).**

(2) This article does not prohibit the appointment of more than one Election Tribunal to function in the same area. A 1958 All 137 (140) (DB).

Article 325

(1) Correction made under Sections 22 and 23 of Representation of the People Act (1950). Non-inclusion in electoral roll does not postpone effect. A 1959 Pat 356 (361) : 1959 BLJR 179 (DB).

326. Elections to the House of the People and to the Legislative Assemblies of State to be on the basis of adult suffrage.— The elections to the House of the People and to the Legislative Assembly of every State shall be on the basis of adult suffrage; that is to say, every person who is a citizen of India[a] and who is not less than twenty-one years[d] of age on such date as may be fixed[b] in that behalf by or under any law made by the appropriate Legislature and is not otherwise disqualified under this Constitution or any law[c] made by the appropriate Legislature on the ground of non-residence, unsoundness of mind, crime or corrupt or illegal practice, shall be entitled to be registered as a voter at any such election.

(a) See Articles 5 to 11 above and Citizenship Act, 1955, Sections 3 to 10.

(b) See Section 19 read with Section 21 of the Representation of the People Act, 1950 (43 of 1950).

(c) See the Representation of the People Act, 1950 (43 of 1950), S. 16 and Representation of the People Act, 1951 (43 of 1951), Ss. 42, 141.

Article 326

1. Scope.— (1) This article does not apply to elections to elected bodies other than those specified in the article itself. A 1958 Raj 96 (100) (DB).

(2) Section 19 of the Representation of the People Act 1950 is in consonance with Article 326 of the Constitution wherein the minimum qualifying age of 21 years is laid down as a qualification for voter for election to the House of People and to the Legislative Assembly of every State. Consequently those provisions do not govern the qualifications of a voter for inclusion of the voters' list prepared under the M. P. Panchayats Act. A 1979 Madh Pra 1 (3). **** A 1979 Pat 130 (142) (FB).** (Section 4 of the Bihar Panchayat Raj Act (7 of 1948) is not against the basic structure of Art. 326 and is not ultra vires.)

(3) What the article provides is that every adult citizen of India, who is not disqualified in any of the ways mentioned in the article, is entitled to get himself enrolled as a voter in the electoral roll. A 1954 Orissa 87 (91) (DB). **** A 1973 SC 2602 (2607).**

(4) Mere attainment of the age of 21 years on the qualifying date does not confer the right to vote because such a person may be otherwise disqualified. Article 326 does not impose an obligation upon any body to include in the electoral roll the name of every person who is above the age of 21 years. It merely gives a right to such a person unless he is otherwise disqualified to have his name included in the electoral roll. ILR (1971) 2 Delhi 614 (618).

(5) If a person's name is not entered on the electoral roll and he is consequently deprived of the right of voting, his remedy is to proceed under the provisions of the Representation of the People Act, to get the omission rectified. A 1954 Orissa 87 (91) (DB).

(6) The adult suffrage as envisaged by the article gives only a right to vote and not also a right to stand for election to a particular body. A 1958 Raj 96 (100) (DB).

(7) Where the nomination of the candidate is rejected, it is not open to an elector to come to the Court alleging that his right to vote for any candidate he likes is infringed by the rejection of the nomination. A 1954 Orissa 87 (91) (DB).

(8) Rule 27-A of the Representation of the People (Preparation of Electoral Rolls) Rules (1956) cannot be challenged on ground that it curtails right of franchise granted by Article 326. A 1961 Cal 289 (295, 296, 297).

(9) Omission of names in electoral rolls — Does not amount to non-compliance with the Article. A 1968 Ker 284 (291).

(10) Residence is not a qualification prescribed under Article 326 — It cannot, therefore, be tried by Court trying election petition under Section 100 (1) (d) (iv) of Representation of the People Act (1951). A 1969 Cal 267 (275).

(11) Article 326, while mentioning the qualifications for being entitled to be registered as a voter, does not add that the person so qualified shall have a right to vote. **A 1968 Punj 1 (6) (FB).**

(12) A right to vote and a right to vote at a particular place are two different things. The former is a substantive and a statutory right whereas the latter is a question of convenience and it does not confer a right on a voter. A 1979 Pat 210 (211).

2. Electoral roll — Entry in — Effect of. — (1) The entry of a person's name as a voter in the electoral roll is only prima facie evidence that he is qualified to vote, but it is not finally conclusive. A 1955 Andhra 109 (111, 112).

(2) Per Full Bench — In the case of a person whose name appears in the electoral roll and who has exercised his vote the Election Tribunal can go into the question whether or not he had attained the age of twentyone on the qualifying date, and, on the finding that he had not, exclude his vote from the count. **A 1962 Ker 190 (191, 192, 193, 210) (FB).**

(3) Election challenged on ground of want of qualifying age — Section 36 (7) of 1951 Act no bar for enquiry into — Entries in electoral rolls — No presumption that they must be accepted as conclusive proof of age. A 1964 Raj 126 (132) (DB).

(4) Inclusion of name of voter who is under 21 years of age, in the electoral roll — Breach of Constitution in preparing

(d) See Section 4 of the Indian Majority Act, 1875, which lays down the principle in regard to computation of age.

JAMMU AND KASHMIR

In Art. 326, reference to a State shall be construed as not including a reference to the State of Jammu and Kashmir.

——See Constitution (Application to Jammu and Kashmir) Order, 1954, Para. 2, sub-para. (10) (b) (as substituted by C. O. 75.)

327. Power of Parliament to make provision with respect to elections to Legislatures.— Subject to the provisions of this Constitution, Parliament may from time to time by law make provision[a] with respect to all matters relating to, or in connection with, elections to either House of Parliament or to the House or either House of the Legislature of a State including the prepa-

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Article 326 — Note 2 (contd.)

electoral roll rendering roll a nullity so far as voter's name is concerned and his name entered in roll must be deemed as non est for purposes of acceptance or reception of his vote. A 1967 Mad 244 (246) (DB) ** **A 1970 Andh Pra 56 (67) (FB).**

(5) Election Tribunal has no jurisdiction to permit evidence being led for determining the question whether a voter is below the age of 21 years and therefore is disentitled to vote. A 1969 Guj 334 (335, 336). (A 1962 Ker 190 (FB) and A 1955 Andhra 109 and A 1967 Mad 244, **Dissented from.**)

(6) Election tribunal can enquire into age qualification of candidate despite fact that his name appears in electoral roll, as a voter. **A 1970 Andh Pra 56 (67) (FB).**

Article 327

1. "Subject to the provisions of this Constitution".— (1) The Parliament cannot make, under this article, a law which conflicts with the other provisions of the Constitution. **A 1954 Nag 166 (186) (FB).**

(2) The opening words of Article 327 "subject to the provisions of this Constitution" indicate that any law made by Parliament in exercise of the powers conferred by Article 327 would be subject to the other provisions of the Constitution including Article 324. **A 1972 SC 187 (201).**

(3) The executive authority of the Election Commission under Article 324 cannot be limited by any law passed by Parliament under the provisions of this article. A 1953 Pat 293 (294) (DB) ** **ILR (1972) 1 Punj 1 (20) (FB).**

(4) Section 170 of the Representation of the People Act, 1951 is not ultra vires. A 1953 Cal 98 (102).

(5) The Representation of the People Act 1951 has been enacted by Parliament under provisions of Article 327. Article 327 is subject to provisions of Article 324. A 1958 All 794 (799) (DB).

(6) Combined effect of Articles 324 and 327 is that conduct of elections is vested in the Election Commission, though the law is to be made by Parliament. A 1958 Madh Pra 299 (301) (DB).

(7) The Representation of the People Act 1951 itself has been enacted by Parliament under Article 327. Hence it cannot be contended that the Election Commission need not await the disposal of an Election Petition. (1967) 2 Andh WR 53 (DB).

(8) Law made by Parliament pursuant to Article 327 has to be read as supplemental to and not in derogation of Article 173. A 1968 Mys 18 (28).

2. Scope of legislation by Parliament.— (1) The words "all matters relating to or in connection with elections" are wide enough to include all matters arising out of or connected with any stage of the entire election process. **A 1957 SC 694 (698)** ** A 1952 All 511 (513) (DB).

(2) Parliament had full competence to legislate with regard to election offences in the manner provided under Sections 131 (1) (b) and 136 (1) of Representation of the People Act which therefore are not ultra vires. A 1954 Pat 356 (357) : 1954 Cri LJ 1132.

(3) The Representation of the People Act, 1950, prescribes the mode in which a person can get himself registered as a voter in the electoral roll and if his name is not registered in the electoral roll and he fails to follow the procedure laid down in the Act to get the omission rectified, he cannot subsequently complain that he has been deprived of the right to vote. A 1954 Orissa 87 (89) (DB).

(4) Provisions of Act of 1950 providing for preparation of electoral rolls are in accordance with Article 327. A 1968 Manipur 84 (93).

(5) Article 327 particularly empowers Parliament to make provisions with respect to elections of Legislature. Sections 33, 34 and 158 of the Representation of the People Act (1951) are matters pertaining to conduct of elections and are beyond the pale of challenge under Article 329 of the Constitution. A 1976 Guj 66 (72).

(6) The manner in which a vote cast by a registered voter is to be challenged is a matter for legislation by Parliament under Article 327. **A 1968 Punj 1 (5) (FB).**

(7) The power of the State legislature to make a law on the subject of election is subordinate to the Parliament's power. A 1954 Madh B 111 (112) (DB).

(8) Parliament has no power to legislate regarding contingencies provided in Articles 101 and 190. A 1968 J & K 46 (50, 51) (DB).

(9) Secrecy of ballot — Voter cannot be compelled to divulge for whom he voted — Ban under Section 87, Representation of the People Act (1951) is not absolute — Voter can voluntarily disclose in larger interest of free and fair elections. **A 1980 SC 1362 (1369).**

ration of electoral rolls, the delimitation of constituencies and all other matters necessary for securing the due constitution of such House or Houses.

[Government of India Act (1935), S. 291.]

(a) See the Representation of the People Act, 1950 (43 of 1950), the Representation of the People Act 1951 (43 of 1951); the Representation of the People (Miscellaneous Provisions) Act, 1956 (88 of 1956); the Delimitation Commission Act, 1972 (76 of 1972).

JAMMU AND KASHMIR

In article 327, the reference to a State shall be construed as not including a reference to the State of Jammu and Kashmir.

——See Constitution (Application to Jammu and Kashmir) Order, 1954, Para. 2, sub-para. (10) (b) (as substituted by C. O. 75.)

328. Power of Legislature of a State to make provision with respect to elections to such Legislature.— Subject to the provisions of this Constitution and in so far as provision in that behalf is not made by Parliament, the Legislature of a State may from time to time by law make provision with respect to all matters relating to, or in connection with, the elections to the House or either House of the Legislature of the State including the preparation of electoral rolls and all other matters necessary for securing the due constitution of such House or Houses.

JAMMU AND KASHMIR

Article 328 shall be omitted — See Constitution (Application to Jammu and Kashmir) Order, 1954, Para. 2, sub-para. (10) (c) (as substituted by C. O. 75).

329. Bar to interference by courts in electoral matters.— Notwithstanding anything in this Constitution [a][* * *]—

(a) the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under article 327 or article 328, shall not be called in question in any court;

Article 327 — Note 2 (contd.)

(10) Vote cast by duly registered voter though below 21 years of age on qualifying date, is valid. **A 1968 Punj 1 (4) (FB).**

3. Delimitation Commission Act.— (1) Orders under Sections 8 and 9 of the Delimitation Commission Act (1962) and their publication under Section 10 (1) have same effect as if they were law made by Parliament itself under Article 327 — Such orders are not mere administrative directions. **A 1967 SC 669 (672, 674, 676).**

(2) (As it stood after amendment in 1956) — Power of delimitation of constituencies is given not by Article 82 but by Art. 327 — Reference to Article 82 in Statement of Objects and Reasons of Delimitation Commission Act, 1962 does not mean that the Act was law made under Article 82. **A 1967 SC 669 (671, 672).**

(3) Provisions of the Delimitation Commission Act cannot be challenged in an election petition. A 1968 Raj 249 (262, 263).

(4) Delimitation Commission Act 1962 was made by Parliament in exercise of its power under Article 327. A 1968 Raj 249 (262) ** A 1968 Andh Pra 218 (222) (DB).

Article 328

(1) The power of the State Legislature under this article is subject to any law that the Parliament may have made. Hence, it is not correct to say that a Tribunal appointed under the Representation of the People Act, 1951, which is an Act passed by Parliament, is not competent to try the petition calling in question an election to the State Legislature. A 1954 Madh B 111 (112) (DB).

(2) In the absence of any legislation of Parliament the manner in which a vote cast by a registered voter is to be challenged is a matter for legislation by the State under Article 328. **A 1968 Punj 1 (5) (FB).**

(3) Use of words "with respect to all matters relating to or in connection with" in Articles 327 and 328 does not indicate that the word 'election' does not cover every part of the process of the election of representative. A 1952 All 511 (513) (DB).

(4) Although the Conduct of Election Rules 1961 did not contemplate a discretion to the Election Commission in the matter of selection of symbols, there was some jurisdiction in the Commission to regulate or restrict choice of symbols in particular circumstances. (1967) 71 Cal WN 799.

ARTICLE 329 — SYNOPSIS

1. Election.
2. Election Disputes.
3. Election Disputes — Applications under Article 226 or 227.
4. Elections — Other than for legislative bodies.

1. Election.— (1) The term "election" in this context connotes the whole process by which a candidate is returned to the Legislature and does not refer only to the last stage in such process at which a candidate is declared elected. **A 1952 SC 64 (68)** ** A

(b) no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature.

(a) Words "but subject to the provisions of article 329A" omitted by Constitution (Forty-fourth Amendment) Act, 1978, S. 35 (20-6-79).

JAMMU AND KASHMIR

(i) In article 329, reference to a State shall be interpreted as not including a reference to the State of Jammu and Kashmir; and

(ii) the words and figures "or article 328", shall be omitted.

——See Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-paras. (10) (b) and (c) (as substituted by C. O. 75).

Article 329 — Note 1 (contd.)

1955 SC 233 (238) ** A 1952 Madh B 97 (102) (FB) ** A 1968 Manipur 84 (93) ** A 1965 Assam 83 (85) (DB) ** (1964) 68 Cal WN 270 ** A 1961 Cal 289 (294) ** A 1958 Bom 397 (399) (DB) ** A 1971 Punj 379 (381). (Case under Punjab Municipal Election Rules (1952), Rule 10.)

(2) Election commences with issue of notification that polls would be held. A 1968 Manipur 84 (93).

(3) Election commences with issuance of notification for holding election and culminates with return of candidate to Legislature. (1969) 71 Punj LR 708 (711) (DB).

(4) Election covers the entire process from the issue of the notification under Section 14 of the Representation of the People Act to the declaration of the results under Section 66 of the Act. When the Election Commission amends its notification and extends time for completion of the elections by ordering a fresh poll it is an order during the course of the process of election. A 1978 SC 851 (894).

(5) The word election comprises the entire election process culminating in a candidate being declared elected. The provision for registration of political parties and their recognition as national and State parties by Election Commissioner are only for the purposes of allotment, reservation and specification of symbols at elections. The order recognising Bangla Congress as a State party would be bound to affect and interfere with the election process which has been already set in motion. Hence bar under Art. 329 (b) is attracted. A 1973 Cal 184 (190, 191).

(6) The steps taken for the purpose of obtaining photographs for the identity cards is a part of the proceedings relating to the election. A 1961 Cal 289 (295).

(7) The delimitation of constituencies or the preparation revision or amendment of the electoral roll cannot be regarded as a stage in the process of any particular election. A 1969 Guj 292 (298) (DB).

(8) Notification by Government effecting territorial division of Municipality and allotment of seats — Matter relates to steps anterior to election — Notification can be challenged under Article 226. (1969) 17 LR 757 (DB).

2. Election Disputes.— (1) Any irregularity or illegality taking place in the course of an election cannot be called in question till the election is over and even then it can be called in question only by an election petition challenging an election. A 1952 SC 64 (68) ** A 1955 All 536 (538) ** A 1955 Andh 180 (181) ** A 1954 Pepsu 118 (121) (DB) ** A 1963 All 363 (364, 365). ** (1973) 52 ELR 225 (230) (MP).

(2) In Art. 329 there is a blanket prohibition for interfering during the process of election as an election can only be challenged by an election petition after the result is announced. A 1979 Raj 130 (133).

(3) The underlying principle of shutting out legal proceedings to agitate election matters when the election is in progress is that election proceedings must not be retarded or protracted and must be concluded as speedily as possible. A 1952 SC 64 (68 to 71).

(4) The right to challenge an election is a special right conferred under a special law and the court will have to seek answer to the questions raised within the four corners of the Act and the Courts are circumscribed by its provisions. An election petition cannot be equated with a plaint in a civil suit. A 1974 SC 1185 (1190).

(5) A suit to set aside an election is not competent. A 1955 SC 233 (238) ** A 1968 Manipur 84 (93) ** (1964) 68 Cal WN 270.

(6) Issuance of notification under Section 147 (1), Representation of the People Act was a part of the election process and can be challenged only by an election petition. Writ petition is not sustainable. (1969) 71 Pun LR 708 (711) (DB). ** A (1977) All 426 (429).

(7) The rejection of a nomination paper by a Returning Officer does not amount to calling in question an election and so is not barred by Cl. (b) of this article. A 1952 SC 64 (72).

(8) The question of improper rejection of a nomination paper has to be brought up before the election tribunal by means of an election petition after the conclusion of the election. A 1971 Madh Pra 195 (196) (FB).

Article 329 — Note 2 (contd.)

(9) Representation of the People Act (1950), Section 30 — Correctness of — Electoral rolls — Cannot be challenged in election under Article 329 (b). A 1969 Mys 84 (89).

[But see A 1968 Manipur 84 (93). (Dispute about the validity of draft electoral rolls arises in the process of election and can be agitated only by way of an Election Petition.)]

(10) Sections 33, 34 and 158 of the Representation of the People Act are matters pertaining to the conduct of election and are beyond the challenge under Art. 329 (b) of the Constitution. A 1976 Guj 66 (72).

(11) Election petition claiming composite relief under Section 84 pending — By-election cannot be called during the pendency of such election petition. (1967) 1 Andh LT 253 (DB).

(12) Article 329 (b) applies to election to the Legislative Assembly of a Union Territory. A 1968 Manipur 84 (93, 94).

(12-A) An election petition challenging the election of a successful candidate must strictly conform to the requirements of the law. A 1963 Raj 219 (220) (DB).

(13) Rajasthan High Court Rules are not in violation of Art. 329 of the Constitution — Rules are mandatory — Election appeal filed without complying with rules — Appeal should be dismissed. A 1965 Raj 58 (64, 65) (DB).

(14) The tendency to be hyper-technical annihilating the real substance of the law, is also to be deprecated, if there is substantial compliance with the requirements of law. A 1963 Raj 219 (220, 221) (DB) ** A 1964 All 523 (525) (DB).

(15) Allotment of reserved seats after compliance with Section 9, Delimitation. Commission Act — Decision of Commission cannot be challenged in court of law, unless arbitrary. A 1969 Andh Pra 1 (2) (DB).

(16) Provisions of Delimitation Commission Act cannot be challenged in an election petition. A 1968 Raj 249 (262).

(17) An order made by the Election Tribunal cannot be challenged in a civil Court, nor can High Court interfere with it. 1954 Madh BLJ (HCR) 179 (DB).

(18) Objection to delimitation of constituencies can be entertained only before date specified under Section 9 (2) of Delimitation Commission Act and after their publication in Gazette, they can no longer be reagitated in court of law. **A 1967 SC 669 (675)**

(19) The power of the Parliament, under Article 329 (b), would also extend to providing an appeal and also an authority to decide it. A 1959 Madh Pra 141 (142) (DB) ** A 1961 Madh Pra 127 (130, 131) (DB).

(20) An order under Section 8 or 9 of the Delimitation Commission Act (1962) and published under Section 10 (1) would not be called in question in any 'Court'. But if by the publication of the order in the Gazette of India it is to be treated as law made under Art. 327, Article 329 would prevent any investigation by any Court of law. **A 1967 SC 669 (674).**

(21) Article 329 requires that three conditions must be fulfilled. the first being that there should be an election petition, the second, it should be presented to the appropriate authority and the third that it should be presented in the manner provided by law made by the appropriate legislature, A 1963 Raj 219 (220) (DB).

(22) A petition, application or proceeding would be barred by clause (b) of Art. 329 only if the following four conditions are fulfilled :—

(i) The application is other than an election petition, presented in the prescribed manner to the prescribed authority;

(ii) The attack is made in the application on matters connected with the election proceedings.

(iii) The attack is one on the decision of which the Court competent to try an election petition can set aside the election or declare it to be void; and

(iv) adjudication of the authority or the tribunal on the matter connected with the election proceedings referred to in clause (iii) above is invoked by the applicant, notwithstanding the fact whether the authority is or is not empowered to adjudicate upon the matter. ILR (1972) 1 Punj & Har 1 (23).

(23) Section 30 (a) of Representation of the People Act (1950), not protected by Article 329 (a). A 1969 Guj 292 (298) (DB).

(24) Representation of the People Act (1951), Section 80 — Election petition by voter — Written statement by defeated candidate raising pleas which should have formed subject of election petition — Pleas cannot be allowed to be raised. A 1972 Madh Pra 167 (170).

(25) The amendment of Rule 93 of the Conduct of Election Rules (1961) empowering the Election Commission to allow inspection of documents without giving any decision on the merits of the allegations against the validity of the election, is not in any manner ultra vires Article 329 (b) of the Constitution. **ILR (1972) 1 Punj 1 (23) (FB).**

(26) The Election Commission has no jurisdiction or power to express any opinion with regard to the validity or otherwise of the accepted or rejected ballot papers nor can he give any relief with regard thereto. The allowing of inspection. thereof does not affect the election of the returned candidate nor does it decide any matter with regard to any part of the process of election which can be challenged only by means of an election petition and, therefore, the returned candidate or any other candidate has no right to claim that he must be heard before the order for inspection is made. **ILR (1972) 1 Punj 1 (105) (FB).**

(27) It is not possible to accept the contention that Cls. (4) and (5) of Art. 329-A (now omitted) are unconstitutional on the ground that by those provisions the election of the Prime Minister is placed beyond the purview of Court. **A 1975 SC 2299.**

3. Election Disputes — Applications under Article 226 or 227.— (1) The improper rejection or acceptance of a nomination paper by the Returning Officer cannot be made

Article 329 — Note 3 (contd.)
the subject-matter of a writ proceeding under Article 226. **A 1952 SC 64 (68, 69, 70, 71) ** A 1952 Madh B. 97 (102) (FB)** ** A 1957 Madh Pra 122 (125) ** A 1967 Delhi 68 (69, 70) (DB) ** A 1963 All 363 (364 365).

(2) Writ jurisdiction of High Court cannot be exercised for deciding a dispute relating to delimitation of constituencies in view of Art. 329 (a) of the Constitution A 1973 Orissa 136 (139).

(3) The opening words of the article "notwithstanding anything in this Constitution" show that the constitutional remedy under Article 226 is limited and made unavailable by another provision of the Constitution itself, irrespective of any legislative provision. **A 1952 Madh B 97 (100) (FB)** ** A 1955 Andhra 180 (181) ** A 1954 Orissa 87 (92) (DB) ** A 1953 Cal 98 (100, 101) ** A 1952 All 511 (514) (DB) ** A 1952 Bom 277 (281) (DB) ** A 1957 Madh Pra 142 (144) (DB).

(4) Under Art. 329 (b) an election can be challenged only by way of an election petition. If a petitioner cannot challenge the electoral roll or if he cannot file an election petition not being an elector in the Constituency, that itself cannot leave him scope to challenge the election by way of a writ petition — To permit a person to do so will be to violate the provisions of Art. 329 (b) of the Constitution. A 1979 Raj 18 (26). (A 1967 Raj 239 **held no longer good law** in view of A 1978 SC 891.)

(5) Although under this article an election can be called in question only by means of an election petition, yet the jurisdiction of the High Court under Articles 226 and 227 and of the Supreme Court under Article 136 to interfere with the decision of the election tribunal is not affected by this article. **A 1955 SC 233 (238) ** A 1954 SC 440 (446) ** A 1954 SC 202 (204) ** A 1954 SC 749 (752) ** A 1954 SC 520 (522) ** A 1954 SC 513 (516) ** A 1954 SC 510 (513).**

(6) The High Court under Article 226 did not interfere with the decision of an Election Tribunal on merits, when the Tribunal had acted within its jurisdiction. A 1953 All 633 (637) (DB) ** A 1963 Madh B 267 (269) (DB).

(7) The High Court in trying the election petition can very well go into all questions involving interpretations of the Constitution to see if holding of such an election is at all permitted. (1969) 41 ELR 206 (211) (Cal).

(8) The Supreme Court in appeal under Article 136 will not ordinarily interfere with the findings of fact of the Election Tribunal. **A 1957 SC 242 (245) ** A 1954 SC 411 (413).**

(9) While under Article 226 the High Court can only annul the decision of the Election Tribunal, it can under Art. 227 do that and also issue further directions in the matter. **A 1955 SC 233 (243).**

(10) The High Court of Madras cannot issue any writ under Article 226 to Election Commission having its offices permanently located at New Delhi. **A 1953 SC 210 (213)**

(11) Article 329 (b) does not oust the jurisdiction of High Court under Art. 133. A 1960. Orissa 1 (3) (DB).

(12) Before results of election are declared and election petition is filed, High Court has no jurisdiction under Art. 226 or 227 or under Civil P. C. or under the Representation of the People Act, 1951. A 1968 Pat 49 (49, 50) (DB).

(13) The provisions of Article 329 (b) apply as a bar to the maintainability of applications challenging the orders for obtaining identity photographs and until and unless the election is completed and until and unless the remedies under the Act and the Rules are exhausted, applications by way of writ petitions cannot be entertained. A 1961 Cal 289 (295).

(14) The preparation of electoral rolls is not a stage in an election process but is something anterior to the election therefore the bar under Cl. (b) of Art. 329 does not affect the jurisdiction of the High Court under Art. 226 to give a declaration that the electoral rolls have been prepared in violation of the material provisions of the Representation of People Act 1950. **A 1972 Ker 5 (10, 13) (FB).**

(15) One seat contested by two candidates — Election of elected candidate declared void — Notification issued to elect a person to fill in the vacancy so caused — Petition of the other candidate does not lie under Article 226, for a writ to cancel and recall the Notification and to be declared elected, till the said Notification is set aside. (1964) 68 Cal WN 270.

(16) If Article 329 applies the powers of the High Court to issue writ under Art. 226 would be excluded. A 1969 Guj 292 (294) (DB).

4. Elections — Other than for legislative bodies.— (1) Municipal election — High Court has power to interfere even at pre-election or prepolling stage as there is no restrictive provision like Article 329 (b) under the Bengal Municipal Act. A 1962 Cal 53 (57) (DB) ** A 1960 Mys 189 (189, 190) (DB) ** A 1958 Madh Pra 181 (182).

(2) Provision takes away jurisdiction of the Courts in matters relating to elections to Parliament and State Legislature. But there is no similar provision barring the jurisdiction of High Courts in matters relating to Municipal Elections. ILR (1960) 10 Raj 540. **(Overruled** on another point in **A** 1961 Raj 250 (FB).) ** A 1969 Manipur 13 (19).

(3) The provisions of Art. 329 (b) are restricted in their application to an election to either House of Parliament or to either House of Legislature of a State. The Article being a provision of the Constitution taken away the jurisdiction of High Court under Art. 226. But the jurisdiction of High Court under Sec. 226 cannot be taken away by any other law. 1969 Jab LJ 1039 (1044). (The jurisdiction of High Court under Art. 226 cannot therefore be taken away by Section 20 of the M. P. Municipalities Act (1961) even a remedy by way of election petition is provided therein.)

329A.— [Omitted by Constitution (Forty-fourth Amendment) Act, 1978, S. 36, (20-6-79).]

PART XVI

SPECIAL PROVISIONS RELATING TO CERTAIN CLASSES

330. Reservation of seats for Scheduled Castes and Scheduled Tribes in the House of the People.— (1) Seats shall be reserved in the House of the People for—

(a) the Scheduled Castes;

(b) the Scheduled Tribes [b][except the Scheduled Tribes—

(i) in the tribal areas of Assam;
(ii) in Nagaland;
(iii) in Meghalaya;
(iv) in Arunachal Pradesh; and
(v) in Mizoram; and]

(c) the Scheduled Tribes in the autonomous districts of Assam.

(2) The number of seats reserved in any State [a][or Union Territory] for the Scheduled Castes or the Scheduled Tribes under clause (1) shall bear, as nearly as may be, the same proportion to the total number of seats allotted to that State [a][or Union territory] in the House of the People as the population of the Scheduled Castes in the State [a][or Union territory] or of the Scheduled Tribes in the State [a][or Union territory] or part of the State [a][or Union territory], as the case may be, in respect of which seats are so reserved, bears to the total population of the State [a][or Union territory].

[c][(3) Notwithstanding anything contained in clause (2), the number of seats reserved in the House of the People for the Scheduled Tribes in the autonomous districts of Assam shall bear to the total number of seats allotted to that State a proportion not less than the population of the Scheduled Tribes in the said autonomous districts bears to the total population of the State.]

Article 330

(1) A Mahar continues to be a Mahar and a member on a scheduled caste notwithstanding his conversion to the Mahanubhava Panth. **A 1954 SC 236 (244, 245).**

(2) Valuable right conferred on persons belonging to scheduled castes and scheduled tribes — To take away that right very satisfactory evidence establishing facts contemplated by paragraph 3 of Constitution (Scheduled Caste) Order (1950) must be tendered. A 1958 Bom 296 (299, 300) (DB).

(3) Where an educated person belonging to Scheduled Castes asserts that he is a Hindu and not a Budhist and his marriage was according to Hindu form, his assertion must be taken at its face value in the absence of contrary evidence and he must be considered eligible to contest election from a reserved constituency. **A 1975 SC 420 (425).**

(4) Constitution (Scheduled Tribes) Order, 1950, Part III, Item 25 — Members embracing Christianity do not cease to be Oraons and are entitled to rights and privileges of tribals — They can contest election to Parliamentary seat meant for Scheduled Tribes. A 1964 Pat 201 (206) (DB).

(5) Change from lower to higher caste — Unilateral acts cannot be taken to prove claim to higher status. **A 1959 SC 1318 (1327).**

(6) Section 54 (4) of the Representation of the People Act (43 of 1951), is not ultra vires and inconsistent with Arts. 14 and 330. **A 1959 SC 1318 (1323).**

(7) Use of word seat or of expression "fill a seat" in Article 330 of Constitution or sections of Representation of the People Act of 1951 do not mean that election is held by reference to two seats in double-member constituency. **A 1959 SC 1318 (1326).**

(8) A member of the Scheduled Tribe is entitled to contest for the reserved seat and for that purpose he can and must make the prescribed declaration but it does not follow that, he is precluded from contesting the election, if necessary, for the general seat. **A 1959 SC 1318 (1325, 1326).**

(9) The reservation of a seat in a double-member constituency for members of the Scheduled Tribes cannot affect the main basic position that the constituency is one and for returning representatives to the House of the People it is the same joint electorate that goes to the poll. **A 1959 SC 1318 (1323).**

(10) Candidate for election by birth belonging to Scheduled Caste (Samgar) among Hindus — Candidate accepting and following tenets of Arya Samaj — **Held** on evidence that he still retained his caste. A 1960 Mys 27 (31, 33) (DB).

(11) The Samgar Caste is a Scheduled Caste under Article 330. A 1960 Mys 27 (29) (DB).

(12) Article 330 only means that the Constitution has made provision for the scheduled caste or scheduled tribe by fixing the number of seats according to their population. A 1958 Andh Pra 724 (731, 732) (DB).

[d][Explanation.— In this article and in article 332, the expression "population" means the population as ascertained at the last preceding census of which the relevant figures have been published:

Provided that the reference in this Explanation to the last preceding census of which the relevant figures have been published shall, until the relevant figures for the first census taken after the year 2000 have been published, be construed as a reference to the 1971 census.]

(a) Inserted after the word 'State', wherever it occurs in clause (2), by the Constitution (Seventh Amendment) Act, 1956, S. 29 and Schedule (1-11-1956).

(b) Substituted for words "except the Scheduled Tribes in the Tribal areas of Assam and in Nagaland, and" by Constitution (Thirty-first Amendment) Act, 1973, S. 3 (17-10-73).

(c) Inserted, ibid.

(d) Inserted by Constitution (Forty-second Amendment) Act, 1976, S. 47 (3-1-77).

JAMMU AND KASHMIR

Part XVI of the Constitution applies to the State of Jammu and Kashmir, subject to certain exceptions and modifications, which are indicated under the respective articles.

In article 330, references to the "Scheduled Tribes' shall be omitted — See Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (11) (a).

331. Representation of the Anglo-Indian community in the House of the People.— Notwithstanding anything in article 81, the President may, if he is of opinion that the Anglo-Indian community is not adequately represented in the House of the People, nominate not more than two members of that community to the House of the People.

JAMMU AND KASHMIR

Article 331 shall be omitted—See Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (11) (b).

332. Reservation of seats for Scheduled Castes and Scheduled Tribes in the Legislative Assemblies of the States.— (1) Seats shall be reserved for the

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Article 330 (contd.)

(13) Reservation of one seat when the reservation worked out to 1.7 is not invalid. The term 'reservation' itself implies departure from the general rule and it has undoubtedly to be strictly construed. With a guarantee of the Scheduled Castes, it is wholly open for the Scheduled Caste candidate to contest from other general seats. Therefore the reservation has to be construed in a manner as would be conducive to the principle embodied in the Art. 330, or 332 of the Constitution and would not widen the scope of reservation. 1979 Jab LJ 606 (608, 609) (DB) (Madh Pra).

(14) For the purpose of fixing the proportion of the reserved seats for the Scheduled Castes, the total number of seats to be taken into consideration would be of the elected councillors only thus for the purpose of fixing the number of reserved seats for Scheduled Castes, the basis would be the total number of seats of the elected councillors. 1978 Jab LJ 174 (178) (DB).

(15) S. 54 of the Representation of the People Act 1951 is not opposed to Art. 330. A 1958 Andh Pra 724 (731, 732) (DB).

Article 332

(1) Election from Constituency reserved for members of scheduled castes — Member of scheduled caste who has become convert to Buddhism is ineligible to be a candidate for such election. **A 1965 SC 1179 (1184).**

(2) Reservation of seats for Scheduled Castes — Members of Scheduled Castes converted to Buddhism, — They cease to be members of Scheduled Castes — However, in absence of proof of conversion they continue to be members of Scheduled Castes and their election to reserved seats cannot be questioned. **A 1975 SC 420 (425).**

(3) Reservation of seats for members of Scheduled Castes — Questioning of election on ground that the elected candidate was not a member of a Scheduled Caste — Failure to object at time of scrutiny of nomination papers— No bar to raise objection in election petition — But such failure would considerably weaken the objection. **A 1975 SC 420 (421, 422).**

(4) In India where customs and habits of centuries along with some new ideas co-exist it is difficult to say from a man's attitude in respect of certain questions whether he is a Hindu or a Budhist. Religion is essentially a highly personal matter and therefore the open assertion by a person especially an educated member of the Society that he was a Hindu and his marriage was according to Hindu form should be given considerable weight over the interested testimony of others based on stray instances. **A 1975 SC 420 (425).**

(5) A person born of English father and Khasi mother, who identifies and lives with his monther's community was held to be a Khasi. A 1958 Assam 128 (138) (DB).

(6) "Kshetriya Bidwaik Mana" Community is not a Scheduled Tribe mentioned in the Schedule to the Constitution (Scheduled Tribes) Order (1950) Part IX Entry 18

Scheduled Castes and the Scheduled Tribes, [a][except the Scheduled Tribes in the tribal areas of Assam, in Nagaland and in Meghalaya] in the Legislative Assembly of every State [b][* * *].

(2) Seats shall be reserved also for the autonomous districts in the Legislative Assembly of the State of Assam.

(3) The number of seats reserved for the Scheduled Castes or the Scheduled Tribes in the Legislative Assembly of any State under clause (1) shall bear, as nearly as may be, the same proportion to the total number of seats in the Assembly as the population of the Scheduled Castes in the State or of the Scheduled Tribes in the State or part of the State, as the case may be, in respect of which seats are so reserved, bears to the total population of the State.

(4) The number of seats reserved for an autonomous district in the Legislative Assembly of the State of Assam shall bear to the total number of seats in that Assembly a proportion not less than the population of the district bears to the total population of the State.

(5) The constituencies for the seats reserved for any autonomous district of Assam shall not comprise any area outside that district [c][* * * *]

(6) No person who is not a member of a Scheduled Tribe of any autonomous district of the State of Assam shall be eligible for election to the Legislative Assembly of the State from any constituency of that district. [c][* * * * * *].

(a) Substituted for words "except the Scheduled Tribes in the tribal areas of Assam and in Nagaland" by Constitution (Thirty-first Amendment) Act, 1973, S. 4 (17-10-73).

(b) The words "specified in Part A or Part B of the First Schedule" were omitted by the Constitution (Seventh Amendment) Act, 1956. Section 29 and Schedule (1-11-1956).

(c) Words "except in the case of the constituency comprising the cantonment and Municipality of Shillong" in cl. (6) and "except from the constituency comprising the cantonment and Municipality of Shillong", omitted by Act 81 of 1971, S. 71 (21-1-72).

JAMMU AND KASHMIR

Article 332 shall be omitted—See Constitution (Application to Jammu and Kashmir) Order, 1954, Para. 2, sub-para. (11) (b).

333. Representation of the Anglo-Indian community in the Legislative Assemblies of the States.— Notwithstanding anything in Art. 170, the Governor [a][* *] of a State may, if he is of opinion that the Anglo-Indian community needs representation in the Legislative Assembly of the State and is not adequately represented therein [b][nominate one member of that community to the Assembly].

(a) The words "or Rajpramukh" were omitted by the Constitution (Seventh Amendment) Act, 1956, Section 29 and Schedule (1-11-1956).

Article 332 (contd.)

(amended by Act 108 of 1976). Mana Community referred to in Entry No. 18 of Part IX of the Schedule to the order is a Sub-tribe of "Gond." that which has affinity with 'gonds' and any other Community which also bears the name 'Mana' but does not have any such affinity cannot be deemed to fall within the scope of 'Mana' in Entry No. 18. **A 1980 SC 150 (156, 157).**

(7) The term 'reservation' itself implies departure from the general rule and it has undoubtedly to be strictly construed. With a guarantee of the Scheduled Castes, it is wholly open for the Scheduled Castes candidates to contest from other general seats. Therefore the reservation has to be construed in a manner as would be conducive to the principle embodied in the Art. 330 or Art. 332 of the Constitution and would not widen the scope of reservation. Now by fixing only seat as reserved out of 15, the proportion of reservation is less than what actually should be, 1.7 reservation involves fraction and as such the only reservation that was possible on the smaller side of 1.7 was one seat. The phrase 'as nearly as may be' with a reference to the proportion has not to be worked out by measuring its nearness with 1.7 but the practicability of adhering to the proportion at the same time not exceeding the reservation more than what was necessary. 1979 Jab LJ 606 (608, 609) (DB).

(8) The reservation of seats for the Scheduled Castes has to be on the basis only of the seats from which members are to be elected. 1979 MPLJ 679 (682) (DB).

(b) Substituted for the words 'nominate such number of members of the Community to the Assembly as he considers appropriate, by the Constitution (Twenty-third Amendment) Act, 1969 S. 4 (23-1-1970).

JAMMU AND KASHMIR

Article 333 shall be omitted—See Constitution (Application to Jammu and Kashmir) Order, 1956, Para. 2, sub-para. (11) (b).

334. Reservation of seats and special representation to cease after [a]**[forty years].**— Notwithstanding anything in the foregoing provisions of this Part, the provisions of this Constitution relating to—

(a) the reservation of seats for the Scheduled Castes and the Scheduled Tribes in the House of the People and in the Legislative Assemblies of the States; and

(b) the representation of the Anglo-Indian community in the House of the People and in the Legislative Assemblies of the States by nomination.

shall cease to have effect on the expiration of a period of [a][forty years] from the commencement of this Constitution.

Provided that nothing in this article shall affect any representation in the House of the People or in the Legislative Assembly of a State until the dissolution of the then existing House or Assembly, as the case may be.

(a) Words "forty years" substituted for "thirty years" by the Constitution (Forty-fifth Amendment) Act, 1980, S. 2 (25-1-80).

JAMMU AND KASHMIR

In its application to the State of Jammu and Kashmir, in article 334, references to the State or the States shall be construed as not including references to the State of Jammu and Kashmir — See Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (11) (c).

335. Claims of Scheduled Castes and Scheduled Tribes to services and posts.— The claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the main-

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Article 334

(1) Reservation of seats and special representation — Amendment extending the period up to 30 years is not ultra vires the Constitution. A 1973 Orissa 136 (138) (DB).

(2) Article 334 (as amended by Constitution (Twenty Third Amendment) Act, (1969) — Reservation of seats and special representation — 23rd Amendment is not ultra vires Article 15 (1) in view of Article 15 (4). A 1973 Orissa 136 (139) (DB).

Article 335

(1) Provisions of Article 16 (4) are to be strictly construed — They are to be interpreted in context and background of Article 335. **A 1968 SC 507 (512)** ** ILR (1972) Cut 1372 (1378) (DB).

(2) In making a provision for reservation of appointments or posts the Government has to take into consideration claims of members of backward classes as also the maintenance of efficiency of administration. **A 1968 SC 507 (512)** ** A 1969 Cal 576 (577) ** A 1967 Andh Pra 353 (362) (DB).

(3) Constitutional guarantee given to members of Scheduled Castes and Scheduled Tribes that a certain proportion of posts in the Public Services should be reserved for them is subject to the paramount consideration that they must be declared fit by the Public Service Commission having regard to the maintenance of administrative efficiency; if the members of the Scheduled Castes and Scheduled Tribes, are unfit, they cannot claim to be appointed to the service despite reservation. A 1970 Orissa 224 (227) : 1970 Lab IC 1510 (DB).

(4) Promotion to higher post — Reservation in favour of S. Cs. and S. Ts — Must stand justification only under Article 335. (1973) 2 Cut WR (1835) (1842) (DB).

(5) Carry Forward Rule — Constitutionality — Rule is non est by substitution thereof by new carry forward rule of 1955. **A 1965 SC 1430 (1432, 1433).**

(6) Reservation to vacancies by Government Resolution for Scheduled Castes and Scheduled Tribes — Provision adopting principle of "carry forward" in second and third years permitting reservation of more than 50 per cent vacancies in the third year — Carry forward rule held unconstitutional and invalid. **A 1964 SC 179 (187, 189).**

(7) This article speaks only about 'scheduled castes' and scheduled tribes', but what is provided therein must with equal force apply to the other backward classes. **A 1968 Ker 42 (48) (FB).**

(8) Determination of backward classes — Caste cannot be exclusive consideration. A 1967 Andh Pra 353 (360, 361) (DB).

(9) It is not clear whether Article 335 was intended to confer any right on mem-

tenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State.

JAMMU AND KASHMIR

In its application to the State of Jammu and Kashmir, in article 335, reference to the State shall be construed as not including a reference to the State of Jammu and Kashmir, — See Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (11) (c).

336. Special provision for Anglo-Indian community in certain services.— (1) During the first two years after the commencement of this Constitution, appointments of members of the Anglo-Indian community to posts in the railway, customs, postal and telegraph services of the Union shall be made on the same basis as immediately before the fifteenth day of August, 1947.

During every succeeding period of two years, the number of posts reserved for the members of the said community in the said services shall, as nearly as possible, be less by ten per cent. than the numbers so reserved during the immediately preceding period of two years:

Provided that at the end of ten years from the commencement of this Constitution all such reservations shall cease.

Article 335 (contd.)

bers of the scheduled castes. 1967 Ker LJ 500.

(10) Article does not create any right — Case of Scheduled Tribes candidate considered for promotion along with others — Others found better qualified on merit and selected — Non-selection of petitioner was no denial of right. ILR (1975) Him Pra 401 (408).

(11) A Court of law cannot enforce at the instance of a scheduled caste member, the directions issued by the Central Government for preferential treatment for scheduled castes in appointments and promotions, unless it is shown that he is entitled to be appointed or promoted if these instructions are applied. 1967 Ker LJ 500.

(12) Reservation for Scheduled Castes — Article 335 is enabling provision — Decision to be taken by Government alone — Court cannot compel Government to take decision and such decision would not be justiciable. (1974) Serv LWR 919 (920) (Punj).

(13) The justiciability of failure to appoint or promote by not following the instructions of the Central Government for preferential treatment for scheduled castes is doubtful since the claiming member will necessarily fail to establish a specific right in him. 1967 Ker LJ 500.

(14) R. 13-AA of the Kerala State and Subordinate Services Rules (1958) (introduced on 13-1-1972) and orders of Government dated 13-1-1972 and 11-1-1974 according special treatment to the Scheduled Castes and Scheduled Tribes in Government service, are valid. **A 1976 SC 490 (501).** (1974 Ker LT 525 **Reversed.**)

(15) The 40 points roster prepared by the Government keeping in mind Article 335 of the Constitution and reservation of posts for Scheduled Castes to the extent of 15% and for Scheduled Tribes to the extent of 7½% cannot be said to be unreasonable, excessive or extravagant. (1978) 2 Serv LR 608 (616) (Pat) (DB).

(16) The Karnataka State Civil Services (Direct Recruitment of Scheduled Castes, Scheduled Tribes and Backward Tribes to Class III Posts) (Special) Rules, 1977 providing for appointment of local candidates belonging to Scheduled Castes, Scheduled Tribes and Backward Tribes are violative of Article 16 (1) of the Constitution. 1979 Lab IC 537 (548) (DB) (Kant).

(17) Seven candidates selected by the Government stood at the bottom of the reserved list. These candidates were selected by the Public Service Commission and found fit but were put at the bottom of the reserved list. **Held**, that giving them preference would be perfectly permissible by virtue of Article 16 (4) of the Constitution and Article 335 cannot be said to be violated. 1975 MPLJ 624 (627, 630) (DB).

(18) Unless and until the State Government forms an opinion as to whether there is any job or employment under the State which is of scientific or technical nature provisions of Section 5 cannot be given effect to. Without forming an opinion under Section 3 (c) of the W. B. Scheduled Castes and Scheduled Tribes (Reservation of Vacancies in Services & Posts) Act 1976 or relevant materials Section 5 would be bad, and unconstitutional. Therefore unless such an opinion is formed, notification dated 28th Oct. 1978 issued under Section 10 of the Act ibid in so far as purports to state that Sections 4 and 5 of the Act would apply to all posts under the State cannot be given effect to. 1980 Lab IC (NOC) 60 (Cal).

(19) Section 3 (c) of the W. B. Scheduled Castes and Scheduled Tribes (Reservation of Vacancies in Services and Posts) Act (1976), does not suffer from the vice of excessive delegation of essential legislative functions. 1980 Lab IC (NOC) 60 (Cal).

Article 336

(1) Merely, because Constitution in Article 336 has reserved certain posts for a particular community in addition to what it may get under Article 29 (2), it does not follow that the same is true of reservation under Article 15 (4). A 1967 Mys 21 (23, 24) : (1966) 1 Mys LJ 119 (DB).

(2) Nothing in clause (1) shall bar the appointment of members of the Anglo-Indian community to posts other than, or in addition to, those reserved for the community under that clause if such members are found qualified for appointment on merit as compared with the members of other communities.

JAMMU AND KASHMIR

Article 336 shall be omitted — See Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (11) (b).

337. Special provision with respect to educational grants for the benefit of Anglo-Indian community.— During the first three financial years after the commencement of this Constitution, the same grants, if any, shall be made by the Union and by each State [a][* * * *] for the benefit of the Anglo-Indian community in respect of education as were made in the financial year ending on the thirty-first day of March, 1948.

During every succeeding period of three years the grants may be less by ten per cent. than those for the immediately preceding period of three years:

Provided that at the end of ten years from the commencement of this Constitution such grants, to the extent to which they are a special concession to the Anglo-Indian community, shall cease:

Provided further that no educational institution shall be entitled to receive any grant under this article unless at least forty per cent. of the annual admissions therein are made available to members of communities other than the Anglo-Indian community.

(a) The words 'specified in Part A or Part B of the First Schedule' were omitted by the Constitution (Seventh Amendment) Act, 1956, S. 29 and Sch. (1-11-1956).

JAMMU AND KASHMIR

Article 337 shall be omitted—See Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (11) (b).

338. Special Officer for Scheduled Castes, Scheduled Tribes, etc.— (1) There shall be a Special Officer for the Scheduled Castes and Scheduled Tribes to be appointed by the President.

(2) It shall be the duty of the Special Officer to investigate all matters relating to the safeguards provided for the Scheduled Castes and Scheduled Tribes under this Constitution and report to the President upon the working of those safeguards at such intervals as the President may direct, and the President shall cause all such reports to be laid before each House of Parliament.

(3) In this article, references to the Scheduled Castes and Scheduled Tribes shall be construed as including references to such other backward classes as the President may, on receipt of the report of a Commisison appointed under clause (1) of article 340, by order specify and also to the Anglo-Indian community.

339. Control of the Union over the administration of Scheduled Areas and the welfare of Scheduled Tribes.— (1) The President may at any time and shall, at the expiration of ten years from the commencement of this Constitution by order appoint a Commission to report on the administration of the Scheduled Areas and the welfare of the Scheduled Tribes in the States [a][* * *].

The order may define the composition, powers and procedure of the Commission and may contain such incidental or ancillary provisions as the President may consider necessary or desirable.

Article 337

(1) In so far as a certain Order issued by a State Government enjoins that no primary, or secondary school shall from the date of the Order, admit to a class, where English is used as the medium of instruction any pupil other than the children of Anglo-Indians or of citizens of non-Asiatic descent, it quite clearly prevents the Anglo-Indian schools from performing their constitutional obligations and exposes them to the liability of losing the special grant. In this view, the Order would be unconstitutional. **A 1954 SC 561 (569).** (A 1954 Bom 468, Affirmed on appeal.)

(2) The executive power of the Union shall extend to the giving of directions to [b][a State] as to the drawing up and execution of schemes specified in the direction to be essential for the welfare of the Scheduled Tribes in the State.

(a) The words 'specified in Part A and Part B of the First Schedule', were omitted by the Constitution (Seventh Amendment) Act, 1956, S. 29 and Schedule (1-11-1956).

(b) Substituted for the words 'any such State', ibid.

JAMMU AND KASHMIR

Article 339 shall be omitted — See Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. 11 (b).

340. Appointment of a Commission to investigate the conditions of backward classes.— (1) The President may by order appoint a Commission consisting of such persons as he thinks fit to investigate the conditions of socially and educationally backward classes within the territory of India and the difficulties under which they labour and to make recommendations as to the steps that should be taken by the Union or any State to remove such difficulties and to improve their condition and as to the grants that should be made for the purpose by the Union or any State and the conditions subject to which such grants should be made, and the order appointing such Commission shall define the procedure to be followed by the Commission.

(2) A Commission so appointed shall investigate the matters referred to them and present to the President a report setting out the facts as found by them and making such recommendations as they think proper.

(3) The President shall cause a copy of the report so presented together with a memorandum explaining the action taken thereon to be laid before each House of Parliament.

341. Scheduled Caste.— (1) The President [a][may with respect to any State [b][or Union territory], and where it is a State [c][* * *], after consultation with the Governor [d][* *] thereof,] by public notification specify the

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Article 340

(1) Appointment of Commission and subsequent steps to follow under Article 340 do not constitute condition precedent to action being taken under Article 15 (4). **A 1963 SC 649 (657, 658)** ** A 1964 Mys 132 (135) (DB).

(2) It is the Union or the State that has to take action in pursuance of the recommendations made by the Commission — Not correct to say that only the President can act in the matter. **A 1963 SC 649 (653).**

(3) Article 340 nowhere provides that President can issue any instructions to States which will have a binding force — Memorandum on report of Backward Classes Commission is not binding on States. A 1967 Andh Pra 353 (362) (DB).

(4) When Supreme Court has found Scheduled class list based on caste as bad request in memorandum on report of Backward Classes Commission under Article 340 cannot have greater validity than those Supreme Courts decisions in the absence of any constitutional provision in that behalf. A 1967 Andh Pra 353 (362) (DB) ** **A 1968 Ker 42 (56) (FB).**

(5) This article envisages the necessity of an investigation about the conditions of socially and economically backward classes within the territory of India. **A 1968 Ker 42 (48) (FB).**

(6) State can determine who socially and educationally backward classes are. A 1960 Mys 338 (344, 345) (DB).

(7) Appointment of commission — Absence of any report of a commission set up for investigating conditions of life of residents of hill areas, rural areas etc. would not necessarily lead to inference that they are not socially and educationally backward. **A 1975 All 1 (6) : 1974 All LJ 779 (FB). (Reversed on another point in A 1975 SC 563).**

ARTICLE 341 — SYNOPSIS

1. Scheduled Castes — Conversion to other religion.
2. Various Scheduled Castes.
3. Scheduled Castes — Unit whether State or smaller area.

1. Scheduled Castes — Conversion to other religion.— (1) The Constitution (Scheduled Castes) Order, 1950, is not ultra vires on the ground that certain enumerated castes, people though belonging to such castes but professing the Sikh religion are excluded. **A 1952 Punj 143 (144) (FB).**

(2) The Constitution (Scheduled Castes) Order, 1950, is not ultra vires on the ground that it excludes from the definition persons professing a religion other than Hinduism, for example, Pariah converts to Christianity. A 1952 Mad 474 (476) (DB).

(3) Conversion to Christianity takes the convert out of the category of Scheduled Castes in terms of the Constitution (Scheduled Castes) Order (1950). ILR (1963) Andh Pra 500 (DB).

castes, races or tribes or parts of or groups within castes, races or tribes which shall for the purposes of this Constitution be deemed to be Scheduled Castes in relation to that State [e][or Union territory, as the case may be.]

(2) Parliament may by law include in or exclude from the list of Scheduled Castes specified in a notification issued under clause (1) any caste, race or tribe or part of or group within any caste, race or tribe, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification.

[Government of India Act (1935), Sch. I, Para. 26.]

(a) Substituted for the words 'may after consultation with the Governor or Rajpramukh of a State' by the Constitution (First Amendment) Act, 1951, S. 10 (18-6-1951).

(b) Inserted by the Constitution (Seventh Amendment) Act, 1956, S. 29 and Sch. (1-11-1956).

(c) The words 'specified in Part A or Part B of the First Schedule', omitted, ibid.

Article 341 — Note 1 (contd.)

(4) Constitution (Scheduled Castes) Order (1950), Para 3, Sch. I Part IV, Cl. (3), Item 13 — Meaning of 'professes a religion is to enter publicly into a religious state' — For attracting the provisions of this para it has to be established that the person concerned has publicly entered a religion different from the Hindu or Sikh religion. A 1958 Bom 296 (297) (DB).

(5) In order to prove that a member of the Muka Dora tribe had ceased to be a member of that tribe, there should be first of all, evidence of intention, the reactions of the old body and that of the new body. A 1958 Andh Pra 724 (735) (DB).

(6) Whether 'Patoli' community of Multan is a Scheduled Caste — Concerned authorities and not court are competent to decide. A 1979 Delhi 87 (90).

(7) Buddhist cannot be treated as member of Scheduled Caste within the meaning of Protection of Civil Rights Act (22 of 1955). A 1979 Bom 282 (284) : 1979 Bom CR 309.

(8) Constitution (Scheduled Castes) Order (1950). Clause 3 — It is not necessary that a person belonging to the castes mentioned in the Schedule, should be a Hindu by birth. It is enough if he professes Hindu religion. A 1975 Andh Pra 82 (83).

(9) Person publicly professing that he belonged to Buddha religion — Not eligible or qualified to stand as a candidate for a seat which was reserved for the persons belonging to Scheduled Castes. 1978 Mah LJ 371 (377) (DB).

2. Various Scheduled Castes.— (1) Scheduled Castes — Candidate of Dobar subcaste held not of chamar caste. **A 1965 SC 1557 (1560).**

(2) 'Bhovi' caste mentioned in Order includes 'Voddars' of Mysore State before reorganisation — Evidence to show that caste not mentioned in order is included in a caste mentioned by the order is ordinarily not admissible. **A 1965 SC 1269 (1272).**

(3) Scheduled Caste — The terms Rohtia, Ramdasi, Ravidasi are not precise, exact and distinctive — Rohtia and Ramdasi do not necessarily exclude each other — Constitution (Scheduled Castes) Order, 1950. A 1966 Punj 282 (288) (DB).

(4) A person properly described as mochi in Punjab does not fall within the caste of Chamars as included in Constitution (Scheduled Castes) Order 1950 and Constitution (Scheduled Castes) (Union Territories) Order 1951 (as amended in 1966). **A 1969 SC 597 (598)** ** A 1966 Punj 334 (335, 336) (DB).

(5) Constitution (Scheduled Castes) Order, 1950, Sch., Part 13, Item 40 — "Sunri excluding Saha" — The word 'Saha' refers to a caste group within the Sunri caste **A 1967 SC 115 (117, 118).** (A 1966 Cal 141, Reversed.)

(6) Question whether particular caste is a Scheduled caste — Notification issued under Article 341 has to be looked at — Enquiry whether particular sub-caste is included in caste mentioned therein not permissible. **A 1965 SC 1557 (1559) ** A 1969 SC 597 (599, 600).**

(7) Order No. 6132 (15) K. M. 1160/58, dated 2nd April, 1960 of Board of Revenue, Government of West Bengal, giving preference to bid by a patni a scheduled castes member in public auction of ferries, overbid by highest bidder — Reservation made for scheduled castes member is saved by Article 16 (4) and by Article 341 read with Constitutional Order, 1950. (1967) 71 Cal WN 107.

(8) Article 342 is in pari materia with Article 341. A 1967 Mys 182 (184).

(9) Chamar Community notified as Scheduled Caste under President's Order both in Punjab and Madhya Pradesh — Therefore even if a Chamar from Punjab went and became bona fide resident of Madhya Pradesh, he would be at par with the Chamars of M. P. ILR (1977) MP 423 (433) (DB).

(10) The Constitution (Scheduled Castes) Order (1950) — A member of the caste declared to be a Scheduled Caste for U. P. and residing in that territory would not be considered a Scheduled Caste for Punjab

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(d) Words 'or Rajpramukh', omitted, ibid.

(e) Inserted by the Constitution (Seventh Amendment) Act, 1956, S. 29 and Schedule (1-11-1956).

NOTE.— For specification of castes, races or tribes etc. see, the Constitution (Scheduled Castes) Order, 1950, published as C. O. 19, dated 10-8-1950, in Gaz. Ind., 1950, Part II, S. 3, Ext., p. 163 and the Constitution (Scheduled Castes) (Union Territories) Order, 1951, published, as C. O. 32, dated 20-9-1951, in Gaz. Ind., 1951, Pt. II, S. 3, p. 1198; Constitution (Jammu and Kashmir) Scheduled Castes Order, 1956, C. O. 52, dated 22-12-1956, published in Gaz. Ind., 1956, Pt. II, S. 3, Ext., p. 2686A; Constitution (Dadra and Nagar Havell) Scheduled Castes Order, 1962, C. O. 64, dated 30-6-1962, Gaz. Ind., 1962, Pt. II, S. 3 (i), Ext., p. 389; Constitution (Pondicherry) Scheduled Castes Order, 1964, C. O. 68, Gaz. Ind., 5-3-1964, Pt. II, S. 3 (i), Ext., p. 327; Constitution (Goa, Daman and Diu) Scheduled Castes Order, 1968, C. O. 81, Gaz. Ind., 12-1-1968, Pt. II, S. 3 (i), Ext.. p. 7, Constitution (Nagaland) Scheduled Tribes Order, 1970, published as C. O. 88 in Gaz. Ind., 23-7-70, Pt. II, S. 3 (i), Ext., p. 641; Constitution (Andaman and Nicobar Islands) (Scheduled Tribes) Order, 1959, published as C. O. 58 in Gaz. Ind., 31-3-59; Scheduled Areas (Himachal Pradesh) Order, 1975, C. O. 102, Gaz. Ind. 1975, Pt. II, S. 3 (i), Ext., p. 2295, Scheduled Castes and Scheduled Tribes (Amendment) Act, 1976 (108 of 1976); Constitution (Sikkim) Scheduled Castes Order, 1978, C. O. 110, Sikkim Gaz., Ext., No. 93, 12-7-78; Constitution (Sikkim) Scheduled Tribes Order, ibid; Scheduled Areas (States of Bihar, Gujarat, M. P. and Orissa) Order, 1977, Gaz. Ind., 31-12-77, Pt. II, S. 3 (i), Ext., No. 423. See also the Scheduled Castes and Scheduled Tribes (Amendment) Act, 1956 (63 of 1956).

342. Scheduled Tribes.— (1) The President [a][may with respect to any State [b][or Union territory]], and where it is a State [c][* * *], after consulta-

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Article 341 — Note 2 (contd.)

or any other State. ILR (1976) 1 Punj 769 (773) (DB).

(11) Person belonging to Dusadh Caste in Bihar shifting to Madhya Pradesh — Nomination of such person as candidate from scheduled caste from constituency in M. P. is invalid. 1974 MPLJ 565 (572).

(12) Constitution (Scheduled Castes) Order (1950) Part IX Orissa Entry 24 — 'Dewar' caste notified as Scheduled caste in relation to State of Orissa — Should be read as 'Dhibara' which refers to persons engaged in catching of fish — 'Kaibartas' and 'keutas' should be taken as included in the term "Dhibara". 1979 Lab IC 1438 (1439, 1440) (DB) (Orissa).

(13) Orissa Schedule Areas Transfer of Property (by Scheduled Tribes) Regulation 1956 (2 of 1956), Section 2 (e) — "Scheduled Tribes" under, includes "Bhotrada" or "Dhotada" as indicated in Constitution (Scheduled Tribes) Order, 1950 and refers to the same community as "Bhotras" — Does not relate to any sub-caste of the named caste. A 1975 Orissa 216 (217, 218).

3. Scheduled Castes — Unit whether State or smaller area.— (1) Specification of castes with reference to different districts or sub-areas of the State — Permitted by the Article. A 1965 SC 1557 (1560).

(2) The Scheduled Castes notified must be "with respect to any state" and "in relation to that state" — Article does not authorise President to declare any caste as Scheduled Caste "with respect to any district." (1959) 37 Mys LJ 775 (DB).

(3) To get benefit of being a member of a Scheduled Caste or Scheduled Tribe in the matter of public employment, the person claiming should be a member of such caste or tribe in relation to the particular area or State where he is residing and where he seeks employment. A 1969 Orissa 220 (221, 222) (DB).

(4) The power under Section 41 of the States Reorganisation Act did not authorise the President to exclude any person from the category of a Scheduled Caste, who enjoyed that status under the original Scheduled Castes Order. A 1961 Madh Pra 84 (87) (DB).

(5) Under Article 341 (2) without any law made by Parliament, the original Scheduled Castes Order, 1950, specifying Chamar as a Scheduled Caste in the entire area of Madhya Pradesh, could not be varied by any subsequent notification. A 1961 Madh Pra 84 (86, 87) (DB).

(6) Constitution (Scheduled Castes) Order 1950, Sch. I — States Reorganisation Act (1956), Section 41 — Scheduled Castes and Tribes List (Modification) Order (1956), Sch. I, Part VI — Chamars of Narsimhapur District in M. P. held members of Scheduled Castes. A 1961 Madh Pra 84 (87) (DB).

(7) Presidential Order declaring Suryabanshis in Jabalpur District as belonging to Scheduled Caste — Certificate granted by Tahasildar — Collector while countersigning can make enquiries to satisfy himself about its correctness — Not all Suryabanshis but only those residing in Jabalpur belong to Scheduled Caste. A 1976 MP 44 (44); 1975 MP LJ 715 (DB).

Article 342

1. Scheduled Tribes.— (1) 'Naikda or Navaka' does not include 'Bedar'. A 1967 Mys 182 (190).

tion with the Governor [d][* * *] thereof], by public notification, specify the tribes or tribal communities or parts of or groups within tribes or tribal communities which shall for the purposes of this Constitution be deemed to be Scheduled Tribes in relation to that State [e]or Union territory, as the case may be.]

(2) Parliament may by law include in or exclude from the list of Scheduled Tribes specified in a notification issued under clause (1) any tribe or tribal community or part of or group within any tribe or tribal community, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification.

(a) Substituted for the words "may, after consultation with the Governor or the Rajpramukh of a State" by the Constitution (First Amendment) Act, 1951, S. 11 (18-6-1951).

(b) Inserted by the Constitution (Seventh Amendment) Act, 1956, S. 29 and Schedule (1-11-1956).

(c) The words 'specified in Part A or Part B of the First Schedule', omitted, ibid.

(d) The words 'or Rajpramukh', omitted, ibid.

(e) Inserted by Constitution (Seventh Amendment) Act, 1956, S. 29 and Schedule (1-11-1956).

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Article 342 shall be omitted—See Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (11) (b).

NOTE.— For specification of castes, races or tribes etc. See the Constitution (Scheduled Tribes) Order, 1950, C. O. 22, dated 6-9-1950, Gaz. Ind., 1950,

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Article 342 — Note 1 (contd.)

(2) Constitution (Scheduled Tribes) Order 1950, Schedule I, Part I; Assam Autonomous District — Khasi tribe has been notified as the tribe entitled to reservation of seats under Article 342. A 1958 Assam 128 (131) (DB).

(3) The inhabitants of Laccadive, Minicoy and Amindivi islands who and both of whose parents were born in these islands are classified as Scheduled Tribes. A 1957 Mad 433 (435) (DB).

(4) Constitution (Scheduled Tribes) Order, 1950, Part III, Item 25 — Members embracing Christianity do not cease to be Oraons and are entitled to rights and privileges of tribals — They can contest election to Parliamentary seat meant for Scheduled Tribes. A 1964 Pat 201 (206) (DB).

(5) Gond community is not declared to be a Scheduled Tribe in Gazipur district of U. P. — As per Scheduled Tribes Order it is a Scheduled Tribe only in the Gazipur district of U. P. 1969 Lab IC 1016 (1016) (Cal).

(6) Benefit could not be claimed by a person who is not a member of Scheduled Tribe in relation to the State in which he is residing. A 1969 Orissa 220 (221, 222) (DB).

(7) The expression 'aboriginal communities' can be generally used to comprise of aboriginal communities whether or not they are formally included in an Order under Article 342. 1969 Lab IC 1016 (1017) (Cal).

(8) The provisions of Article 16 (4) include reservations for the members of Scheduled Castes and Tribes. 1969 Lab IC 1016 (1017) (Cal).

(9) Constitution (Scheduled Tribes) Order (1950) — Article 342 is in pari materia with Article 341 as regards principles governing scope of enquiry under Article 342. A 1967 Mys 182 (184).

(10) Constitution (Scheduled Tribes) Order (1950) — 'Girijana' is group of persons belonging to Scheduled Tribes — 'Hasalaru' tribe is not different from 'Hasalar' tribe and difference in spelling has no materiality. (1969) 17 Law Rep 691 (692) (DB).

(11) After the President has specified the Scheduled Tribes, it is only the Parliament that is competent to include in or exclude from the list of Scheduled Tribes specified in a notification issued under Cl. (1) of Article 342. A 1967 Mys 182 (184, 185).

(12) A Muka Dora tribesman following manners and customs of the twice born for 20 to 30 years is not sufficient to hold that he had ceased to belong to Muka Dora tribe. A 1958 Andh Pra 724 (736) (DB).

(13) "Scheduled Tribes" definition in Article 342 Constitution of India adopted in Section 26 Mah. Land Revenue Code with changes necessary for purposes of Code — Definition in Code as amended adopted in Section 2 (1) (j) of Mah. Restoration of Lands to Scheduled Tribes Act — Adoption is not invalid — If words "Scheduled Tribe" used in Art. 342 get extra meaning in Act it is not against Constitution. 1977 Mah LJ 564 (571) (DB).

(14) Constitution (Scheduled Tribes) Order (1950), Part III — Scheduled Tribes of Bihar — Non-mention of 'Patars' as sub-tribe of Mundas in Schedule — Inference that they are not Mundas cannot be drawn — Patars of Tamar District in Bihar held are a sub-tribe of Mundas. A 1971 SC 2533 (2538, 2540).

(15) Constitution (Scheduled Tribes) Order 1950 — Express or implied admission by a person that he is not member of Scheduled Tribe is not conclusive. A 1971 SC 2533 (2535).

Pt. II, S. 3, Ext., p. 597, as amended from time to time; Constitution (Scheduled Tribes) (Union Territories) Order, 1951, C. O. 33, dated 20-9-1951, Gaz. Ind., 1951, Pt. II, S. 3, Ext., p. 1198G; Constitution (Andaman and Nicobar Islands) Scheduled Tribes Order, 1959, C. O. 58, dated 31-3-1959, Gaz. Ind., 1959, Pt. II, S. 3 (i), Ext., p. 151; Constitution (Dadra and Nagar Haveli) (Scheduled Tribes) Order, 1962, C. O. 65, dated 30-6-1962, Gaz. Ind., 1962, Pt. II, S. 3 (i), Ext., p. 389; Constitution (Scheduled Tribes) (Uttar Pradesh) Order, 1967, C. O. 78, Gaz. Ind., 24-6-1967, Pt. II, S. 3 (i), Ext. p. 311; Constitution (Goa, Daman and Diu) (Scheduled Tribes) Order, 1968, C. O. 82. Gaz. Ind., 12-1-1968, Pt. II, S. 3 (i), Ext., p. 8—See also the Scheduled Castes and Scheduled Tribes (Amendment) Act, 1956 (63 of 1956). See also note under Art. 341.

PART XVII

OFFICIAL LANGUAGE

CHAPTER I

LANGUAGE OF THE UNION

343. Official language of the Union.— (1) The official language of the Union shall be Hindi in Devanagari script.

The form of numerals to be used for the official purposes of the Union shall be the international form of Indian numerals.

(2) Notwithstanding anything in clause (1), for a period of fifteen years from the commencement of this Constitution, the English language shall continue to be used for all the official purposes of the Union for which it was being used immediately before such commencement:

Provided that the President may, during the said period, by order authorise the use of the Hindi language in addition to the English language and of the Devanagari form of numerals in addition to the international form of Indian numerals for any of the official purposes of the Union.

(3) Notwithstanding anything in this article, Parliament may by law provide for the use, after the said period of fifteen years, of—

(a) the English language, or

(b) the Devanagari form of numerals,

for such purposes as may be specified in the law.

NOTE.— For language to be used in Parliament notwithstanding anything in this Part, see article 120: For language to be used in the Legislature of a State notwithstanding anything in this Part, see article 210; For power of

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Article 342 — Note 1 (contd.)

(16) Munda Scheduled Tribe — Wife becomes member of Munda Tribe by marriage with a Munda though she is not member of Munda Tribe by birth. (1971) 46 ELR 221 (243) (Pat).

(17) Even if a female is not a member of a tribe by virtue of birth she having been married to a tribal after due observance of all formalities and after obtaining the approval of the elders of the tribe would belong to the tribal community to which her husband belongs. **A 1972 SC 1840 (1849, 1850).**

(18) Extension of concessions in Presidential Order of 1950 by State Government — Members of Scheduled Tribes in other States or in Union services cannot claim benefit. 1974 Lab IC 141 (145, 146): ILR (1975) Bom 512 (DB).

(19) M. P. (Anusuchit Jati Tatha Anusuchit Jan Jati) Rini Sahayata Adhiniyam (1967), Sec. 2 (6) — Member of Mogia Tribe residing in district of Guna cannot be deemed to be member of Scheduled Tribe. A 1977 Madh Pra 186 (187).

(20) Constitution (Scheduled Tribes) Order (1950), Schedule, Part IX Entry 18 (as amended by Act 108 of 1976) — Kshetriya Bidwaik Mana Community is not a Scheduled Tribe. It is not covered by Entry 18. **A 1980 SC 150 (156).**

(21) Scheduled Tribe — Pangawala of Chamba State — Tests to see whether person is a "Pangawala" indicated, (1968) 39 Elec LR 99 (116 to 119) (Delhi).

(22) On the evidence on record held that Appellant to election petition belonged to 'Koya' Scheduled Tribe. **1979 UJ (SC) 865 (968).**

Article 343

(1) Article 343 provides that the official language of the Union shall be Hindi in Devanagari script. In the Eight Schedule Hindi and Urdu are mentioned as separate languages. A 1962 All 83 (87, 88) (DB).

(2) Article 343 contemplates use of both forms of numerals viz., International form of Indian numerals and Devnagari form of numerals for any office purposes. A 1967 Andh Pra 111 (116) (DB).

(3) The object of the Official Languages Act 1963 is to provide, with reference to Article 343 (3), for the languages which may be used for official purposes of the Union of India, for transaction of business of Parlia-

the President to issue directions in accordance with the report of Committee of Parliament notwithstanding this article, see article 344 (6).
See the Official Languages Act, 1963 (19 of 1963), S. 3.

JAMMU AND KASHMIR

The provisions of this part shall apply to Jammu and Kashmir only in so far as they relate to—

(i) the official language of the Union;
(ii) the official language for communication between one State and another, or between a State and the Union; and
(iii) the language of the proceedings in the Supreme Court.
—See Constitution (Application to J. and K.) Order, 1954, Para 2, sub-para. (12).

344. Commission and Committee of Parliament on official language.— (1) The President shall, at the expiration of five years from the commencement of this Constitution and thereafter at the expiration of ten years from such commencement, by order constitute a Commission which shall consist of a Chairman and such other members representing the different languages specified in the Eighth Schedule as the President may appoint, and the order shall define the procedure to be followed by the Commission.

(2) It shall be the duty of the Commission to make recommendations to the President as to—

(a) the progressive use of the Hindi language for the official purposes of the Union;
(b) restrictions on the use of the English language for all or any of the official purposes of the Union;
(c) the language to be used for all or any of the purposes mentioned in article 348;
(d) the form of numerals to be used for any one or more specified purposes of the Union;
(e) any other matter referred to the Commission by the President as regards the official language of the Union and the language for communication between the Union and a State or between one State and another and their use.

(3) In making their recommendations under clause (2), the Commission shall have due regard to the industrial, cultural and scientific advancement of India, and the just claims and the interests of persons belonging to the non-Hindi speaking areas in regard to the public services.

(4) There shall be constituted a Committee consisting of thirty members, of whom twenty shall be members of the House of the People and ten shall

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Article 343 (contd.)
ment for Central and State Acts and for certain purposes in High Courts. A 1965 Mad 11 (11): 1965 (1) Cri LJ 49 (DB).

(4) Official language of Pondicherry was to be French till decided otherwise by the Legislative Assembly of Pondicherry. Under the Official Languages Act 1965. Tamil and English have been elevated to status of official languages. Till that Act came into force French text of the judgments of the Superior Court of Appeal were prepared as the official text. A 1968 Mad 298 (307) (DB).

Article 344

(1) Presidential directions could be issued only when the Commission, and following it, the committee have made their reports and that too only in respect of matters stated in clause (2) and in respect of which the said bodies have made reports. A 1972 Mad 40 (45). **(Reversed on another point in A 1977 SC 225.)**

(2) Presidential directions though only administrative in nature are authorised by the Constitution — They are therefore valid and are bound to be obeyed. A 1972 Mad 40 (45) **(Reversed** on another point in A 1977 SC 225).

(3) Presidential directions issued after consideration of the reports by the first Commission and committee will not cease to have force merely because second commission and committee were not appointed at the expiry of ten years from the commencement of Constitution. A 1972 Mad 40 (45) **(Reversed** on another point in A 1977 SC 225).

(4) Official Languages Act (1963), Sec. 3 (4) — Posts and Telegraphs memorandum making "in service training in Hindi" compulsory for all Central Government Employees below 45 years are valid. **A 1977 SC 225 (231): 1977 Lab IC 26. (A 1972 Mad 40 Reversed.)**

be members of the Council of States to be elected respectively by the members of the House of the People and the members of the Council of States in accordance with the system of proportional representation by means of the single transferable vote.

(5) It shall be the duty of the Committee to examine the recommendations of the Commission constituted under clause (1) and to report to the President their opinion thereon.

(6) Notwithstanding anything in article 343, the President may, after consideration of the report referred to in clause (5), issue directions in accordance with the whole or any part of that report.

CHAPTER II
REGIONAL LANGUAGES

345. Official language or languages of a State.— Subject to the provisions of articles 346 and 347, the Legislature of a State may by law adopt any one or more of the languages in use in the State or Hindi as the language or languages to be used for all or any of the official purposes of that State:

Provided that, until the Legislature of the State otherwise provides by law, the English language shall continue to be used for those official purposes within the State for which it was being used immediately before the commencement of this Constitution.

NOTE

The following Acts have been passed by the State Legislatures:

(1) A. P. Official Language Act, 1966 (A. P. Act 9 of 1966) (w.e.f. 29-3-1968.)
(2) Assam Official Language Act, 1960 (Assam Act 33 of 1960) (31-7-1964.)
(3) Bihar Language of Laws Act, 1955 (Bihar Act 23 of 1955.)
(4) Gujarat Official Languages Act, 1960 (Guj. Act 1 of 1961) (16-2-1961).
(5) Haryana Official Language Act, 1969 (Haryana Act 17 of 1969).
(6) Kerala State Legislature (Continuance of Use of English Language) Act, 1965. (Presi. Act 1 of 1965) (as re-enacted by Presi. Act 1 of 1966 and Kerala Act 8 of 1968).

Article 345

(1) Notwithstanding a State Law adopting Hindi or a regional language for the official purposes of the State, English can be used for the official purposes of the State until there is an express legislative prohibition against such use. A 1957 Madh Pra 1 (3) (DB) ** 1969 MPLJ 99.

(2) The State Legislature of Madhya Pradesh was entitled to adopt both Hindi and Marathi as the official languages. A 1959 Madh Pra 208 (210) (DB) ** 1969 MPLJ 99.

(3) Hindi language finds a place among the regional languages specified in the Eighth Schedule and cannot be deemed to be taken out of the category of regional languages contemplated by Article 345. A 1959 Madh Pra 208 (210) (DB).

(4) Pleadings and applications in English are permissible subject to a translation being supplied to the other side when necessary. A 1967 Andh Pra 42 (43) (DB).

(5) Allahabad General Rules (Civil) R. 15 — Plaint written not in Hindi but in English — Plaint is valid in spite of Rule 15 — Proviso to Article 345 also emphasises that unless the legislature of a State expressly provides by law, English is to continue as the language to be used for official purposes within the State. A 1963 All 546 (547): 1963 All LJ 243 (DB).

(6) Article 345 does not declare that after enactment of a law by a State Legislature adopting Hindi as the language for any of the official purposes of the State any order made by the State and expressed in the English language shall be void. A 1961 All 365 (368).

(7) Official Language of Courts in Tamil Nadu — Constitution permits use of Tamil as State language in Tamil Nadu — Section 137 (2) C. P. C. provides for powers to State to have local language in Courts — Under these powers State Legislature passed T. N. Official Languages Act (1956) and issued Notification to use Tamil for recording evidence only — By amending that Statute, Sec. 4-B was introduced making Tamil as language in which judgments were to be written — However as required by Sec. 137 (2) C. P. C. the Government not having issued notification bringing into force Section 4B, a judgment written in Tamil, held was no judgment at all. (1978) II MLJ 442 (443, 444).

(8) Ordinance No. 104 of 1975 published in Hindi Language translated in English — Bihar Legislature prescribed Hindi as official languge — Omission of clause in English version about power of Board to suspend a teacher or headmaster of a School — In such case Hindi version should prevail — Held. Board had jurisdiction to pass an order of suspension of a Headmaster. (1979) 3 Serv LR 369 (378) (Pat).

(7) Kerala Official Language (Legislation) Act, 1969 (Ker. Act 8 of 1969).
(8) Maharashtra Official Languages Act, 1964 (Maha. Act 5 of 1965) (26-1-1965).
(9) Mysore Official Language Act 1963 (Mys. Act 26 of 1963) (w.e.f. 1-4-1968).
(10) Orissa Official Language Act, 1954 (Orissa Act 14 of 1954) (w.e.f. 16-5-1966).
(11) Pondicherry Official Languages Act, 1963 (Pondi. Act 3 of 1965) (w.e.f. 1-7-1966).
(12) Punjab Official Languages Act, 1967 (Punj. Act 25 of 1967) (w.e.f. 1-1-1968).
(13) Rajasthan Official Language Act, 1956 (Raj. Act 47 of 1956).
(14) Tamil Nadu State Legislature (Continuance of Use of English Language) Act, 1964 (Mad. Act 38 of 1964) (26-1-1965).
(15) Tamil Nadu Official Language Act, 1956 (Madras Act 39 of 1956) (w.e.f. 1-1-1967).
(16) U. P. Official Language Act, 1951 (U. P. Act 20 of 1951) (w.e.f. 26-1-1968).
(17) W. B. Official Language Act, 1961 (W. B. Act 24 of 1961) (w.e.f. 26-1-1965).

346. Official language for communication between one State and another or between a State and the Union.— The language for the time being authorised for use in the Union for official purposes shall be the official language for communication between one State and another State and between a State and the Union:

Provided that if two or more States agree that the Hindi language should be the official language for communication between such States, that language may be used for such communication.

347. Special provision relating to language spoken by a section of the population of a State.— On a demand being made in that behalf the President may, if he is satisfied that a substantial proportion of the population of a State desire the use of any language spoken by them to be recognised by that State, direct that such language shall also be officially recognised throughout that State or any part thereof for such purpose as he may specify.

CHAPTER III

LANGUAGE OF THE SUPREME COURT, HIGH COURTS, ETC.

348. Language to be used in the Supreme Court and in the High Courts and for Acts, Bills, etc.— (1) Notwithstanding anything in the foregoing provisions of this Part, until Parliament by law otherwise provides—

(a) all proceedings in the Supreme Court and in every High Court,

(b) the authoritative texts—

(i) of all Bills to be introduced or amendments thereto to be moved in either House of Parliament or in the House or either House of the Legislature of a State,

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Article 346

(1) Ordinance No. 104 of 1975 published in Hindi language translated in English — Bihar Legislature prescribed Hindi as official language — Omission of clause in English version about power of Board to suspend a teacher or Headmaster of a School — In such case Hindi version should prevail — Held, Board had jurisdiction to pass an order of suspension of a Headmaster. (1979) 3 Serv LR 369 (378) (Pat).

[But see (1979) 3 Serv LR 369 (378) (Pat). (Ordinance No. 104 of 1975 published in Hindi language, translated in English — Bihar legislature prescribed Hindi as official language — Omission of clause in English version about power of Board to suspend a teacher or Headmaster of a School — In such case Hindi version should prevail.) ** A 1959 All 792 (793): 1959 All LJ 685 ** A 1959 All 208 (210) (DB).]

Article 348

(1) Under the English version of an Act or rule, regulation, etc., that is to be treated as the authoritative text in case of conflict between the English version and that in Hindi or other language. A 1954 All 257 (278) (DB) ** A 1974 All 106 (110) (FB) ** 1980 Jab LJ 494 ** A 1962 All 240 (244) (FB) ** A 1966 Raj 142 (149) (DB) ** A 1965 All 170 (172): 1965 (1) Cri LJ 418.

(2) The doctrine that if there be two versions of a statute in two different languages, one version can be used to interpret the other does not apply in India, as Clause (3) of this article clearly provides that where laws are passed in an Indian language and translated into English, the authoritative version shall be the English one. A 1958 Madh Pra 16 (19).

[See however 1974 UPTC 570 (574) (FB) (All). (Where there is some doubt or

(ii) of all Acts passed by Parliament or the Legislature of a State and of all Ordinances promulgated by the President or the Governor [a][* * *] of a State, and

(iii) of all orders, rules, regulations and bye-laws issued under this Constitution or under any law made by Parliament or the Legislature of a State,

shall be in the English language.

(2) Notwithstanding anything in sub-clause (a) of clause (1), the Governor [a][* *] of a State may, with the previous consent of the President, authorise the use of the Hindi language, or any other language used for any official purposes of the State, in proceedings in the High Court having its principal seat in that State:

Provided that nothing in this clause shall apply to any judgment, decree or order passed or made by such High Court.

(3) Notwithstanding anything in sub-clause (b) of clause (1), where the Legislature of a State has prescribed any language other than the English language for use in Bills introduced in, or Acts passed by, the Legislature of the State or in Ordinances promulgated by the Governor [a][* *] of the State or in any order, rule, regulation or bye-law referred to in paragraph (iii) of that sub-clause, a translation of the same in the English language published under the authority of the Governor [a][* *] of the State in the Official Gazette of that State shall be deemed to be the the authoritative text thereof in the English language under this article.

[Government of India Act (1935), S. 214 (5); S. 227.]

(a) The words 'or Rajpramukh' were omitted by the Constitution (Seventh Amendment) Act, 1956, S. 29 and Schedule (1-11-1956).

349. Special procedure for enactment of certain laws relating to language.— During the period of fifteen years from the commencement of this Constitution, no Bill or amendment making provision[a] for the language to be used for any of the purposes mentioned in clause (1) of article 348 shall be introduced or moved in either House of Parliament without the previous sanction of the President, and the President shall not give his sanction to the introduction of any such Bill or the moving of any such amendment except after he has taken into consideration the recommendations of the Commission

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Article 348 (contd.)

ambiguity in any provision in the authoritative English text, it is permissible to look into the Hindi text to remove the doubt or ambiguity.)]

(3) Where the English translation of a statute or rule, etc., has not been published as contemplated by this clause, this will not render the Act or Rule null and void. A 1957 Madh B 26 (28) (DB).

(4) The Bihar Legislature in pursuance of clause (3) of Article 348 has prescribed Hindi as the language for use in Bills, Acts Ordinances of the State of Bihar. That being the position, the Ordinance cannot be said to be non est simply because a translation of the same in English language has not been published under the authority of the Governor. A 1975 Pat 295 (298, 299) (DB).

(5) Under the Official Language Act of the Pondicherry Legislature both Tamil and English have been elevated to the status of the official languages to come into effect upon a date to be notified. Even if the date be not actually notified, yet, until that is done, the procedure that seems to prevail, with regard to the language of the Court, is that there is prepared a French Text of the judgments of the Superior Court of Appeal which will be the official text of the judgment. A 1968 Mad 298 (307).

(6) The validity of the U. P. Government Servants' Conduct Rules (1946) is not affected because they were published only in English version and not in Hindi version — Both versions are equally authoritative. A 1962 All 507 (509): 1962 (2) Cri LJ 459.

(7) Hindi version of Ordinance (210 of 1975) published on 5-12-1975 — Proceedings in question instituted on 8-12-1975 — Appeal against order passed under Sec. 6 of Bihar Public Land Encroachment Act (1956), filed before High Court — Not maintainable. A 1976 Pat 392 (393 to 395) (DB).

(8) In view of Notification dated 5-9-1969 issued by Governor of U. P. — Petition presented in Hindi in Devnagri Script is competent. A 1977 All 164 (173) (DB).

(9) Intervenor arguing case in Hindi — Refusal by him to present arguments in Court language as suggested by Court because Hindi was not understood by Counsel for State and some of the Judges — Court ordered cancellation of his intervention. A 1971 SC 2608 (2608).

constituted under clause (1) of article 344 and the report of the Committee constituted under clause (4) of that article.

CHAPTER IV
SPECIAL DIRECTIVES

350. Language to be used in representations for redress of grievances.— Every person shall be entitled to submit a representation for the redress of any grievance to any officer or authority of the Union or a State in any of the languages used in the Union or in the State, as the case may be.

[a][**350A. Facilities for instruction in mother-tongue at primary stage.—** It shall be the endeavour of every State and of every local authority within the State to provide adequate facilities for instruction in the mother-tongue at the primary stage of education to children belonging to linguistic minority groups; and the President may issue such directions to any State as he considers necessary or proper for securing the provision of such facilities.]

(a) Inserted by the Constitution (Seventh Amendment) Act, 1956, S. 21 (1-11-1956).

OBJECTS AND REASONS

"The new article 350A proposed in this clause is designed to implement one of the States Reorganisation Commission's important recommendations regarding safeguards for linguistic minorities in the States after reorganisation."—Gaz. of Ind., 1956, Pt. II, S. 2, Ext., p. 218.

[a][**350B. Special Officer for linguistic minorities.—** (1) There shall be a Special Officer for linguistic minorities to be appointed by the President.

(2) It shall be the duty of the Special Officer to investigate all matters relating to the safeguards provided for linguistic minorities under this Constitution and report to the President upon those matters at such intervals as the President may direct, and the President shall cause all such reports to be laid before each House of Parliament, and sent to the Governments of the States concerned.]

(a) Inserted by the Constitution (Seventh Amendment) Act, 1956, S. 29 and Sch. (1-11-1956).

351. Directive for development of the Hindi language.— It shall be the duty of the Union to promote the spread of the Hindi language, to develop it so that it may serve as a medium of expression for all the elements of the composite culture of India and to secure its enrichment by assimilating without interfering with its genus, the forms, style and expression, used in Hindustani and in the other languages of India specified in the Eighth Schedule, and by drawing, wherever necessary or desirable, for its vocabulary, primarily on Sanskrit and secondarily on other languages.

Article 350

(1) The languages contemplated by Article 350 have reference to those in the Eighth Schedule which does not contain English language. No person can claim to make a representation in English by virtue of Article 350. A 1959 Madh Pra 208 (210) (DB).

(2) The expression "any officer or authority" does not cover Courts of law. Sec. 3, M. P. Languages Act (1950) is not repugnant to Article 350. A 1959 Madh Pra 208 (211) (DB).

(3) In considering the applicability of this article to plaints presented before a Court of law, two points have to be considered. Firstly, whether a plaint presented before a Court of law can be said to be a representation for redress of a grievance, Secondly, can a Court of law be properly described as an officer or authority of a State, A 1963 All 546 (547) (DB).

Article 351

(1) Pension Scheme by Tamil Nadu Government granting pension to Anti-Hindi agitators — Payment under Scheme authorised not by legislative sanction but by executive act — Art. 351 is violated. A 1976 SC 1559 (1559) (W. P. No. 3962 of 1972, D/-21-1-1975) (Mad) Reversed.)

(2) Departmental examination — Optional use of Hindi as medium to answer General English paper — Option withdrawn subsequently as not yielding satisfactory result — Action of withdrawal not violative of Arts. 351, 14 or 16. 1980 Lab IC (NOC) 84 (All).

PART XVIII
EMERGENCY PROVISIONS

352. Proclamation of Emergency.— (1) If the President is satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or [b][armed rebellion], he may, by proclamation, make a declaration to that effect [a][in respect of the whole of India or of such part of the territory thereof as may be specified in the Proclamation].

[c][**Explanation.**— A Proclamation of Emergency declaring that the security of India or any part of the territory thereof is threatened by war or by external aggression or by armed rebellion may be made before the actual occurrence of war or of any such aggression or rebellion, if the President is satisfied that there is imminent danger thereof].

[d][(2) A Proclamation issued under clause (1) may be varied or revoked by a subsequent Proclamation.

(3) The President shall not issue a Proclamation under clause (1) or a Proclamation varying such Proclamation unless the decision of the Union Cabinet (that is to say, the Council consisting of the Prime Minister and other Ministers of Cabinet rank appointed under article 75) that such a Proclamation may be issued has been communicated to him in writing.

ARTICLE 352 — SYNOPSIS

1. "Satisfied".
2. Scope.
3. Construction of war-time measures.
4. "Internal disturbance".
5. Revocation of a proclamation.
6. Right to move Court under Art. 226.
7. Constitution (38th Amendment Act), 1975.

1. "Satisfied".— (1) Where a Proclamation of Emergency is made under this article, it is not open to the Courts to question the grounds on which the President is satisfied that a grave emergency exists whereby the security of India is threatened by war or external aggression or internal disturbances. A 1945 PC 48 (50) •• A 1931 PC 111 (111, 112) •• A 1943 FC 75 (83).

(2) A proclamation does not cease to be in compliance with Art. 362 (1) because it does not contain the words "the President is satisfied". (1967) 8 Guj LR 265 (275) •• A 1967 SC 243 (245) : 1967 Cri LJ 282 •• ILR (1967) 1 Punj 517 (522).

(3) Neither the subjective satisfaction of the President postulated by Cl. (1) and Cl. (3) nor the declaration made by a proclamation following the satisfaction is open to judicial review. A 1977 Delhi 167 (171, 172) : 1977 Cri LJ 1130 (DB).

(4) Resolutions of Parliament approving proclamation under Article 352 only result in satisfying the proclamation made by he President. The approbation granted to the President's action does not mean that the President's action has ceased to exist or is merged into the resolution of the Houses of Parliament. A 1977 Delhi 167 (175, 176) : 1977 Cri LJ 1130 (DB).

(5) Declaration of Emergency by Presidential Order dated 25-6-1975 and continuance of emergency declared in 1971 — Declaration is political and non-justiciable matter — Satisfaction of President about existence of grave emergency is alone necessary. 1975 WLN 750 (775, 776) (Raj). (Reversed on another point in 1976 Cri LJ 947 (SC).)

(6) Proclamation of emergency and suspension of fundamental right under Art. 14 — Articles 15 and 16 remain unaffected. 1977 Lab IC (NOC) 31 : (1976) 2 All LR 378.

(7) The security of the State can be threatened by activity as postulated by the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. Therefore there is nexus between the proclamation under Article 352 and the Presidential Order dated 23-12-1974 under Article 359. ILR (1975) 2 Delhi 820 (837) (DB).

(8) Emergency declared by the President — Validity and its continuance — Not open to judicial scrutiny or review. ILR (1975) 2 Delhi 820 (834, 837) (DB) •• A 1976 Andh Pra 1 (8, 9) (FB).

2. Scope.— (1) The only conditions necessary for the applicability of Art. 359 are that there ought to be a proclamation under Article 352 and a declaration by the President suspending the enforcement of any of the rights contained in Part III of the Constitution. ILR (1976) 1 Punj 879 (940) (FB).

(2) The period of grave emergency envisaged by Art. 352 (1) is indefinite in duration in terms of months and years. A 1970 Goa 80 (85).

(3) Grave emergency — Meaning is sufficiently explained in Article 352 — Emergency should be such that thereby security of India or any part thereof is threatened by war or external aggression or internal disturbance. 1970 Cri LJ 282 (285) : 73 Cal WN 496 (DB).

(4) It is not contemplated either by Article 352 (1) or S. 16-A (3) of MISA that while making a declaration under S. 16-A (3), it is necessary for the detaining authority to specify which declaration of emergency he had in view. Because it is ultimately an emergency whereby the security of India is threatened. (1977) 79 Bom LR 189 (206) (DB).

(5) Emergency (Essential Powers) Ordinance, 1969 promulgated under provisions of Federal Constitution. Therefore Essential (Security Cases) Regulations, 1975 under the Ordinance are constitutional and valid. (1978) 1 Malayan LJ 30 (34).

(6) Emergency Risks (Factories) Insurance Act (1962), S. 1 (3) — Provision does not vio-

(4) Every Proclamation issued under this article shall be laid before each House of Parliament and shall, except where it is a Proclamation revoking a previous Proclamation cease to operate at the expiration of one month unless before the expiration of that period it has been approved by resolutions of both Houses of Parliament:

Provided that if any such Proclamation (not being a Proclamation revoking a previous Proclamation) is issued at a time when the House of the People has been dissolved, or the dissolution of the House of the People takes place during the period of one month referred to in this clause, and if a resolution approving the Proclamation has been passed by the Council of States, but no resolution with respect to such Proclamation has been passed by the House of the People before the expiration of that period, the Proclamation shall cease to operate at the expiration of thirty days from the date on which the House of the People first sits after its reconstitution, unless before the expiration of the said period of thirty days a resolution approving the Proclamation has been also passed by the House of the People.

Article 352 — Note 2 (contd.)

late Arts. 352 and 358 of the Constitution. (1972) 76 Cal WN 952 (959).

(7) In India Martial Law cannot be effectively imposed so long as right to Life and Liberty guaranteed by Article 21 of the Constitution is not taken away — The only devices for taking away Art. 21 is to be found in Articles 352 and 359 under which the President can make a declaration of emergency and suspend the right guaranteed under Art. 21 — After the 44th Amendment denying the President the power to suspend Article 21 — The position is that no effective Martial Law can be imposed under our Constitution. A 1980 Andh Pra 172 (175) : (1979) 2 APLJ (HC) 338 (DB).

3. Construction of war-time measures.— (1) War-time measures, which often have to be enacted hastily, should be construed more liberally in favour of the State than peace-time legislation. A 1952 SC 335 (338) : 1952 Cri LJ 1406 •• A 1943 Nag 36 (53, 64) •• A 1965 Punj 74 (79) (DB).

(2) Person charged with offence under R. 126 (p) (2) of Defence of India (Part XII-A Gold Control) Rules (1962) — Cannot take recourse to Court during period of emergency, even if his rights under Article 21 are infringed. A 1970 Andh Pra 47 (53) : 1970 Cri LJ 199 (DB).

4. "Internal disturbance".— (1) "Internal disturbance" means a rebellion or insurrection and not an ordinary breach of public peace. A 1959 All 101 (111) : 1959 Cri LJ 128 : 1958 All LJ 793 (FB). (Reversed in A 1962 SC 955 on another point.)

5. Revocation of a proclamation.— (1) A proclamation issued can be revoked only by an event mentioned in Cl. (2) and not otherwise. A 1967 SC 243 (245) : 1967 Cri LJ 282.

(2) The question whether the proclamation should continue to be in force is left exclusively to the President and the Parliament. A 1966 Raj 247 (250) : 1966 Cri LJ 1338 (DB).

6. Right to move Court under Art. 226.— (1) Declaration of emergency and suspension of fundamental rights — Detention under COFEPOSA — Writ of habeas corpus cannot be issued. 1977 Cri LJ 1684 (1690) (J & K).

(2) Proclamation of emergency — Detenu under MISA has no locus standi to approach the Court by way of petition for Habeas Corpus. 1976 MPLJ 183 (187) : 1976 Jab LJ 189 (DB).

(3) During the continuance of the proclamation of emergency under Art. 352 (1) of the Constitution the validity of an order made under Article 359 of the Constitution suspending the right to move any court for enforcement of any of the fundamental rights cannot be challenged as it is a power vested in the President by Article 359 of the Constitution. A 1976 Cal 26 (29).

(4) Petition for the purpose of doing away with or getting rid of penalties of proscription and forfeiture of eleven issues of a journal, 'Sadhana' and closure of the press imposed by Government — Presidential orders under Articles 352 and 359 of declaration of emergency and suspension of fundamental rights — Held, petitions are not for enforcement of fundamental rights under Art. 19 (1) (a) and are therefore outside the purview of Presidential orders. (1977) 79 Bom LR 289 (301) (DB).

(5) If the object of a proceeding is to enforce the fundamental right to personal freedom a High Court's jurisdiction under Art. 226 is barred during an emergency even if it involves adjudication on the question of vires of a rule made under enactments authorising preventive detention. A 1977 SC 1027 (1053) : 1977 Cri LJ 785.

(6) Maharashtra Debt Relief Act (8 of 1976) cannot be challenged on the ground that during subsistence of emergency it violated provisions of Article 19, in view of Article 358. (1977) 79 Bom LR 449 (463) (DB).

(7) If even after the proclamation of emergency and the issuance of Presidential Order under Article 359 a citizen is prejudiced by an executive action, he can challenge it on the ground that it lacked the authority of law, and if the authority taking such action were unable to support it in law, the Court would strike down that action. (1976) 78 Bom LR 125 (148).

(8) Petition challenging Order of State Censor — Not maintainable during subsistence of order under Art. 359. 1977 Cri LJ (NOC) 230 : (1977) 90 Mad LW 145 (DB).

(9) Proclamation of emergency — Writ petition challenging orders issued by Commissioner of Police under Bombay Police Act and under Defence and Internal Security of India Rules (1971) on the ground that they are ultra vires being outside the parent Act or parent Rules

(5) A Proclamation so approved shall, unless revoked, cease to operate on the expiration of a period of six months from the date of the passing of the second of the resolutions approving the Proclamation under clause (4):

Provided that if and so often as a resolution approving the continuance in force of such a Proclamation is passed by both Houses of Parliament the Proclamation shall, unless revoked, continue in force for a further period of six months from the date on which it would otherwise have ceased to operate under this clause:

Provided further that if the dissolution of the House of the People takes place during any such period of six months and a resolution approving the continuance in force of such Proclamation has been passed by the Council of States but no resolution with respect to the continuance in force of such Proclamation has been passed by the House of the People during the said period, the Proclamation shall cease to operate at the expiration of thirty days from the date on which the House of the People first sits after its reconstitution unless before the expiration of the said period of thirty days, a resolution approving the continuance in force of the Proclamation has been also passed by the House of the People.

(6) For the purposes of clauses (4) and (5), a resolution may be passed by either House of Parliament only by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting.

(7) Notwithstanding anything contained in the foregoing clauses, the President shall revoke a Proclamation issued under clause (1) or a Proclamation varying such Proclamation if the House of the People passes a resolution disapproving or, as the case may be, disapproving the continuance in force of such Proclamation.

(8) Where a notice in writing signed by not less than one-tenth of the total number of members of the House of the People has been given, of their intention to move a resolution for disapproving, or, as the case may be, for

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Article 352 — Note 6 (contd.)

and not on the ground that they are violative of Art. 19 — Petition maintainable. (1976) 78 Bom LR 1 (41, 42) (DB).

(10) Proclamation issued by President under Art. 359 on 23-12-1974 — Right of detenu to move Court for enforcement of certain fundamental rights suspended — Exercise of power by President cannot be said to be colourable. 1975 Cri LJ 1974 (1978, 1980) (Punj).

(11) Writ petition challenging certain orders of State Government — Presidential order under Art. 359 in operation — Interim stay order or injunction could be granted only where a prima facie case for an injunction or stay could be made out, quite apart from a right covered by Article 14 or by any other fundamental right whose enforcement might have been suspended. **A 1977 SC 1496 (1504).**

(12) Declaration of Emergency — Statutory order under Pre-emergency Law — Promulgation during emergency — Absence of legislative authority in executive action in promulgating the order — Order can be challenged as violating Art. 19 of the Constitution. A 1976 Orissa 138 (143) (DB).

(13) If a writ petition (to which the order of suspension applies) is suspended, an order of stay which has been passed before the order of suspension will cease to be in force. A 1977 Pat 65 (70) (DB).

(14) Liability created by act or omission under an Act which was in operation during the currency of the proclamation of emergency cannot be challenged even after the revocation of the proclamation on the ground that the provisions of the impugned Act violated Art. 19 of the Constitution. **A 1976 SC 958.**

(15) Federal Court of Malaysia is not precluded from questioning the validity of the proclamation issued under their constitution by Section 12 of the Emergency (Essential Powers) Act, 1979. (1979) 2 Malayan LJ 264 (266) •• (1979) 2 Malayan LJ 291 (293).

(16) Proclamation of emergency by the king-King also issued Emergency (Essential Powers) Ordinance — Under Sec. 2 of the Ordinance the King issued Essential (Security Cases) Regulations 1975 — Appellant convicted under the Regulations — Regulations held ultra vires and conviction set aside — Validation of Regulation retrospectively — Appellants ordered to be tried afresh. (1979) 2 Malayan LJ 238.

(17) Action of dismissal of a police officer taken under General Order 30 (2) made during the period of emergency was upheld though the law deprived the officer concerned the guarantee embodied in Art. 135 (2) of the Constitution of Malaysia as the dismissal order was made by a proper authority. (1979) 2 Malayan LJ 191 (195).

disapproving the continuance in force of, a Proclamation issued under cl. (1) or a Proclamation varying such Proclamation,—

(a) to the Speaker, if the House is in session; or

(b) to the President, if the House is not in session,

a special sitting of the House shall be held within fourteen days from the date on which such notice is received by the Speaker, or, as the case may be, by the President for the purpose of considering such resolution.]

[e][(9)] The power conferred on the President by this article shall include the power to issue different Proclamations on different grounds, being war or external aggression or [f][armed rebellion] whether or not there is a Proclamation already issued by the President under clause (1) and such Proclamation is in operation.

(5) [e] [* *]].

(a) Inserted by Constitution (Forty-second Amendment) Act, 1976, S. 48 (3-1-77).

(b) Substituted for words "internal disturbance" by Constitution (Forty-fourth Amendment) Act, 1978, S. 37 (a) (1) (20-6-79).

(c) Inserted, ibid.

(d) Substituted for clauses (2), (2A) and (3), ibid.

(e) Original clause (4) inserted by Const. (Thirty-eighth Amendment) Act, 1975 and renumbered as clause (9), and clause (5) omitted, ibid, S. 37 (c) and (d).

(f) Substituted for words "internal disturbance", ibid.

OBJECTS AND REASONS

Clause 38.— This clause seeks to amend article 352 relating to Proclamation of Emergency to provide for various safeguards against abuse of powers under the article. In the first place, the ground of "internal disturbance" is being substituted by the ground of "armed rebellion" to exclude scope for Proclamation of Emergency in cases of internal disturbance not involving armed rebellion. In the second place, it is being provided that the President shall not issue a Proclamation of Emergency unless the decision of the Cabinet that such a Proclamation may be issued has been communicated to him in writing. In the third place, it is being provided that a Proclamation of Emergency would require to be approved within a period of one month (instead of two months as provided at present) by resolution of both the Houses of Parliament and that such resolution should be by a majority of the total membership of each House and not less than two-thirds of the majority of the members present and voting in each House instead of a simple majority provided at present. In the fourth place, it is being provided that for the continuance of the Emergency approval by resolution of both Houses would be required every six months. In the fifth place, provision is being made that a Proclamation of Emergency would cease to be operative whenever a resolution to that effect is adopted by the Lok Sabha by a simple majority of the members of the House present and voting. It is also being provided that not less than one-tenth of the total membership of the Lok Sabha may, by notice, requisition a meeting of the Lok Sabha for the purpose of considering the continuance of a Proclamation of Emergency.

Provision has also been made for the omission of clause (5) of article 352, which was inserted by the Constitution (Thirty-eighth Amendment) Act, 1975 and which makes the satisfaction of the President as to the existence of a grave Emergency necessitating the issue of a Proclamation of Emergency final. S. O. R.—See Gaz. of Ind., 15-5-78, Pt. II, S. 2, Ext., p. 618.

JAMMU AND KASHMIR

Part XVIII of the Constitution applies to the State of Jammu and Kashmir, subject to certain exceptions and modifications. These exceptions and modications are indicated in the respective Articles.

Article 352 (contd.)

7. Constitution (38th Amendment Act), 1975. — (1) The 38th Amendment does not affect federal structure of the Constitution. A 1977 Delhi 167 (175) : 1977 Cri LJ 1130 (DB).

(2) Declaration of emergency or continuance thereof — Not justiciable — Amendment does not change basic structure of Constitution. 1977 Cri LJ (NOC) 89 (DB) (All) ** 1975 WLN 750 (771) (DB) (Raj). (Reversed on another point in 1976 Cri LJ 945 : A 1976 SC 1207.)

In its application to the State of Jammu and Kashmir, to article 352, the following new clause shall be added, namely :—

"(6) No Proclamation of Emergency made on grounds only of internal disturbance or imminent danger thereof shall have effect in relation to the State of Jammu and Kashmir (except as respects article 354) unless—

(a) it is made at the request or with the concurrence of the Government of that State, or

(b) where it has not been so made, it is applied subsequently by the President to that State at the request or with the concurrence of the Government of that State."

——See Constitution (Application to J. and K.) Order, 1954, Para. 2 (13) (a) (as amended by C. O. 100 and 104).

353. Effect of Proclamation of Emergency.— While a Proclamation of Emergency is in operation, then—

(a) notwithstanding anything in this Constitution, the executive power of the Union shall extend to the giving of directions to any State as to the manner in which the executive power thereof is to be exercised;

(b) the power of Parliament to make laws with respect to any matter shall include power to make laws conferring powers and imposing duties, or authorising the conferring of powers and the imposition of duties, upon the Union or officers and authorities of the Union as respects that matter, notwithstanding that it is one which is not enumerated in the Union List :

[a][Provided that where a Proclamation of Emergency is in operation only in any part of the territory of India,—

(i) the executive power of the Union to give directions under clause (a), and

(ii) the power of Parliament to make laws under clause (b),

shall also extend to any State other than a State in which or in any part of which the Proclamation of Emergency is in operation if and in so far as the security of India or any part of the territory thereof is threatened by activities in or in relation to the part of the territory of India in which the Proclamation of Emergency is in operation.]

(a) Inserted by Constitution (Forty-second Amendment) Act, 1976, S. 49 (3-1-77).

354. Application of provisions relating to distribution of revenues while a Proclamation of Emergency is in operation.— (1) The President may, while a Proclamation of Emergency is in operation, by order direct that all or any of the provisions of articles 268 to 279 shall for such period, not extending in any case beyond the expiration of the financial year in which such Proclamation ceases to operate, as may be specified in the order, have effect subject to such exceptions or modifications as he thinks fit.

Article 353

(1) Where emergency by external aggression has been proclaimed, it cannot be argued that detention, during such emergency, could be made in respect of only those activities which relate to the external aggression and not in respect of internal disturbances. A 1968 Mad 54 (57) : 1968 Cri LJ 177 (DB).

(2) By the combined operation of Arts. 352, 353 and 250 (1), Parliament has the right to make laws with respect to all the three lists in the Seventh Schedule to the Constitution during a period of emergency. This power of Parliament is not confined to the making of laws alone but includes the power to confer jurisdiction and impose duties both upon the Union of India and its authorities as respects any law made during the operation of proclamation of emergency. A 1964 Cal 279 (280, 281) : 1964 (1) Cri LJ 662 (DB).

(3) Central Government competent to issue directions to State Government calling upon them to withdraw or cancel orders of detention passed under the Defence of India Rules by the various authorities under their (State Governments') Control. A 1967 Bom 109 (122) (DB).

(4) Preventive detention under Section 3 of COFEPOSA — Restraints imposed on detenus under orders passed under Section 5 and Maharashtra Conditions of Detention Order (1974) — Writ petitions filed during emergency — Presidential order under Art. 359 — Bar to jurisdiction of High Court to entertain and grant relief. A 1977 SC 1027 (1044 to 1047) : 1977 Cri LJ 785. (1976 Cri LJ 534 (Bom) and (1975) 77 Bom LR 506, Reversed.)

(2) Every order made under clause (1) shall, as soon as may be after it is made, be laid before each House of Parliament.

355. Duty of the Union to protect States against external aggression and internal disturbance.— It shall be the duty of the Union to protect every State against external aggression and internal disturbance and to ensure that the Government of every State is carried on in accordance with the provisions of this Constitution.

356. Provisions in case of failure of constitutional machinery in States.— (1) If the President on receipt of a report from the Governor [a][* * *] of a State or otherwise, is satisfied that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of this Constitution, the President may by Proclamation—

(a) assume to himself all or any of the functions of the Government of the State and all or any of the powers vested in or exercisable by the Governor, [b][* * *] or any body or authority in the State other than the Legislature of the State;

(b) declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament;

(c) make such incidental and consequential provisions as appear to the President to be necessary or desirable for giving effect to the objects of the Proclamation, including provisions for suspending in whole or in part the operation of any provisions of this Constitution relating to any body or authority in the State:

Provided that nothing in this clause shall authorise the President to assume to himself any of the powers vested in or exercisable by a

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Article 355

(1) Duty placed on the Union Government under Article 355 is not justiciable — It is only a political duty — Duty cannot be enforced by issue of a writ of mandamus. 1969 Ker LT 693 (696).

(2) The provision dealing with the proclamation of emergency under Article 352 is covered by the first part of the duty of the Union towards a State mentioned in Art. 355, but the second part of that duty is somewhat of different and broader character and covers all steps which are enough to ensure that the Govt. of every State is carried on in accordance with the provisions of Constitution. It is this part of duty which is sought to be covered by a proclamation under Art. 356. A 1977 SC 1361 (1380).

ARTICLE 356 — SYNOPSIS

1. Scope.
2. Justiciability of proclamation.
3. Delegation of powers to Governor.

1. Scope.— (1) When "the Government of the State cannot be carried on in accordance with the provisions of the Constitution" this Article empowers the President to assume to himself the executive powers of the State Government, and to declare that the powers of the State Legislature shall be exercisable by the Parliament. A 1954 Pepsu 136 (148) (DB).

(2) Proclamation of emergency in a State — Internal disturbance can be a ground notwithstanding that it is provided for by Article 355. A 1974 Andh Pra 106 (110).

(3) It is not correct to think that a proclamation under Article 356 can never be made if a party has an undisputed majority in the legislature to enable its leader to form a ministry. There can be many diverse and varied considerations e. g. outbreak of unprecedented violence, a great natural calamity like an earthquake, a flood or an epidemic. A 1974 Andh Pra 106 (110).

(4) The word "Proclamation" means a public announcement. 1946 Rang LR 64 (68).

(5) The President will not be disqualified from issuing a Proclamation by the fact that at the time he is out of India. 1946 Rang LR 64 (69, 70).

(6) Where a Proclamation has been issued under this Article declaring that the powers of the State Legislature shall be exercisable by Parliament, a provision in a State enactment that the State Government cannot make a certain rule unless it has published a draft of the rule at least thirty days before the State Legislative Assembly meets cannot be complied with and therefore such a rule made during the operation of the Proclamation is invalid. (1955) 57 Pun LR 69 (72) (DB).

(7) A provision delegating the President's power to the State Governor would come under this Cl. (c). See A 1954 Pepsu 136 (148) (DB).

(8) The power to issue a proclamation is a constitutional power of the President and not the executive power of the Union. A 1968 Punj 441 (447) (DB).

(9) Proclamation under Article 356 can be issued, even though there is no sitting Legislative Assembly. A 1965 Ker 229 (230, 231).

(10) No resort need be had by the President to the provisions of Art. 356 (1) (a) read with Article 172 or Article 174 to dissolve the State Legislative Assembly. The power is implicit in Clause (1) (b) of Article 356 itself. A 1965 Ker 229 (230, 231).

(11) Where the President's rule has been imposed on a State and the President's powers

High Court, or to suspend in whole or in part the operation of any provision of this Constitution relating to High Courts.

(2) Any such Proclamation may be revoked or varied by a subsequent Proclamation.

(3) Every Proclamation under this article shall be laid before each House of Parliament and shall, except where it is a Proclamation revoking a previous Proclamation, cease to operate at the expiration of two months unless before the expiration of that period it has been approved by resolutions of both Houses of Parliament:

Provided that if any such Proclamation (not being a Proclamation revoking a previous Proclamation) is issued at a time when the House of the People is dissolved or the dissolution of the House of the People takes place during the period of two months referred to in this clause, and if a resolution approving the Proclamation has been passed by the Council of States, but no resolution with respect to such Proclamation has been passed by the House of the People before the expiration of that period, the Proclamation shall cease to operate at the expiration of thirty days from the date on which the House of the People first sits after its reconstitution unless before the expiration of the said period of thirty days a resolution approving the Proclamation has been also passed by the House of the People.

(4) A Proclamation so approved shall, unless revoked, cease to operate on the expiration of a period of [c][six months from the date of issue of the Proclamation]:

Provided that if and so often as a resolution approving the continuance in force of such a Proclamation is passed by both Houses of Parliament, the Proclamation shall, unless revoked, continue in force for a further period of [d][six months] from the date on which under this clause it would otherwise

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Article 356 — Note 1 (contd.)

have been delegated, an order passed in the name of the President is an order of the State Government in exercise of its functions as a delegate and is valid. A 1968 Punj 363 (366).

(12) Where there is an order by the President, who has assumed the administration of the State, making his powers exercisable by the Government, a sanction for prosecution by the Governor is valid. The sanction of the President is not necessary. 1962 Ker LT 690 (696) (DB).

(13) Where during the President's Rule, the Governor passes an order, the President can cancel it. A 1966 SC 816 (819) : 1966 Cri LJ 602.

(14) After the assumption of the Governor's powers by the President, there is no impediment to the Governor attempting to ascertain the possibility of constitutional Government in the State before sending his report under this Article. His deliberation with party leaders is not illegal. A 1965 Ker 229 (231).

(15) On the assumption of the administration by the President, there being no Ministers, Article 166, Cl. (3) is necessarily suspended and rules made under it are not in force. 1962 Ker LT 690 (697) (DB).

(16) President assuming all powers of State Government by a proclamation — Article 166 (3) and 154 not suspended — Rules for allocation of business can be validly made by Governor during proclamation. 1975 An LT 159 (168) (DB).

(17) Article 356 is governed by Art. 74. — The President in exercise of his powers under Article 356 has to act on the advice of the Council of Ministers. (1972) 76 Cal WN 67 (89) (DB) ** A 1974 Andh Pra 106 (109) ** A 1971 Cal 122 (124).

(18) During the proclamation of President's Rule in State the Governor acts as if the President himself acts, subject of course to the Superintendence, direction and control of the President. A 1978 Mad 173 (176) (DB).

(19) Proclamation of the President G. S. R. 490 of 19-3-1970 assuming powers of West Bengal Government — Valid. A 1971 Cal 122 (124).

(20) A proclamation was issued by President under Article 356 (1) of the Constitution in respect of State of Punjab. Among other provisions of the Constitution, the power of the Governor under Article 147 (1) to summon the House or each House of Legislature was suspended by Proclamation. Held, that in order to give effect to the proclamation, the President could suspend also the power of State Legislature to express its view contemplated by proviso to Art. 3. A 1970 Delhi 178 (180).

(21) W. B. (Prevention of Violent Activities) Act (1970), ((President's Act 19 of 1970) — Revocation of proclamation, D/- 19-3-1970 — Act would cease to operate on the expiry of one year after the proclamation has ceased to operate except as respects things done or omitted to be done before the expiration of the said period unless the Act is repealed, re-enacted with or without modification. A 1972 SC 1497 (1500).

(22) W. B. (Prevention of Violent Activities) Act (President's Act 19 of 1970) would remain in force for one year after President's rule came to an end. A 1972 SC 1670 (1673) : 1972 Cri LJ 1020.

(23) A member of the Legislative Council designated as "Government Chief whip" in the

have ceased to operate, but no such Proclamation shall in any case remain in force for more than three years:

Provided further that if the dissolution of the House of the People takes place during any such period of [d][six months] and a resolution approving the continuance in force of such Proclamation has been passed by the Council of States, but no resolution with respect to the continuance in force of such Proclamation has been passed by the House of the People during the said period, the Proclamation shall cease to operate at the expiration of thirty days from the date on which the House of the People first sits after its reconstitution unless before the expiration of the said period of thirty days a resolution approving the continuance in force of the Proclamation has been also passed by the House of the People.

[e][(5) Notwithstanding anything contained in clause (4), a resolution with respect to the continuance in force of a Proclamation approved under cl. (3) for any period beyond the expiration of one year from the date of issue of such Proclamation shall not be passed by either House of Parliament unless—

(a) a Proclamation of Emergency is in operation, in the whole of India or, as the case may be, in the whole or any part of the State, at the time of the passing of such resolution, and

(b) the Election Commission certifies that the continuance in force of the Proclamation approved under clause (3) during the period specified in such resolution is necessary on account of difficulties in holding general elections to the Legislative Assembly of the State concerned].

[Government of India Act (1935), S. 45; S. 93].

(a) The words "or Rajpramukh" were omitted by the Constitution (Seventh Amendment) Act, 1956, S. 29 and Schedule (1-11-1956).

(b) The words "or Rajpramukh, as the case may be," were omitted ibid.

(c) Substituted for certain words by Constitution (Forty-fourth Amendment) Act, 1978, S. 38 (20-6-79).

Article 356 — Note 1 (contd.)

Legislative Council by the Chief Minister is not entitled to continue as such after the proclamation issued by the President under Article 356. ILR (1978) 2 Kant 965 (977).

(24) Proviso to Article 213 (1) refers to action of the Governor and proviso to Article 213 (3) refers to Legislature of a State. Both of them are bodies or authorities in the State within the meaning of Article 356 (1) (c). 1970 Pat LJR 59 (75) (DB).

(25) Notwithstanding Article 356 Governor of a State is not an employee of the Government of India. 1977 WLN 414 (418) (Raj).

2. **Justiciability of proclamations.**— (1) The legality or propriety of a proclamation is not open to consideration by the Court. A 1968 Punj 441 (450) (DB).

(2) The validity of a proclamation under this Article cannot be challenged in the Court. A 1965 Ker 229 (232).

(3) Held, on facts Governor's report recommending President's Rule and President's proclamation under Article 356 not justiciable. A 1974 Orissa 52 (70) (DB).

(4) Article 356 of the Constitution pursuant to which the proclamation was issued by the President and the incidental and consequential provisions made by him for giving effect to the object of that proclamation, are not justiciable and as such, not enforceable in a Court of law. The issue involved in Article 356 of the Constitution is a non-justiciable political issue. (1975) 2 Andh WR 277 (300) (DB).

(5) The shackles of judicial review which the Courts have put upon the arbitrary exercise of discretion by administrative agencies cannot be permitted to be put on the expression of satisfaction by the President in a matter specially confided to him by the Constitution. A 1974 Andh Pra 106 (109).

(6) Satisfaction of President under Article 356 can be based on material other than Governor's report — Courts can only determine validity of the action of President on whatever may remain for them to consider on what are admitted on behalf of President, to be grounds of presidential satisfaction. A 1977 SC 1361 (1376, 1377).

(7) Proclamation of emergency — Satisfaction of President is not justiciable. A 1974 Andh Pra 106 (110, 111, 112).

3. **Delegation of powers to Governor.**— (1) Governor acting as President's agent cannot delegate generally the Minister's power to Governor's advisor nor can the latter delegate specific function to another Officer. (1974) 1 Andh WR 333 (339, 340).

(2) President by proclamation assuming to himself all functions of West Bengal Government — Order under proclamation directing that all powers and functions to be exercisable by Governor — Appointment of Advisers by

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(d) Words "six months" were substituted by "one year" by Constitution (Forty-second Amendment) Act, 1976. These words were so restored, ibid.

(e) Cl. (5) as inserted by Constitution (Thirty-eighth Amendment) Act, has been so substituted, ibid,

OBJECTS AND REASONS

Clause 39.— This clause seeks to amend article 356 of the Constitution relating to the President's power to issue a Proclamation in case of failure of constitutional machinery in a State. The article is being amended to specify that such a Proclamation will, upon its being approved first by resolutions by both Houses, continue for six months from the date of issue of Proclamation and that upon its being approved like-wise on a second occasion, it would continue for a further period of six months. The article is also being amended to specify that a resolution with respect to the continuance in force of a Proclamation under the article for any period beyond the expiration of one year from the date of issue of such Proclamation shall not be passed by either House of Parliament unless a Proclamation of Emergency is in operation at the time of the passing of such resolution and the Election Commission certifies that the continuance in force of the Proclamation under the article during the period specified in such resolution is necessary on account of difficulties in holding elections to the Legislative Assembly of the State concerned. S. O. R.—See Gaz. of Ind., 15-5-78, Pt. II, S. 2, Ext., pp. 618, 619.

JAMMU AND KASHMIR

... its application to the State of Jammu and Kashmir, in clause (1) of article 356, references to the provision or provisions of the Constitution shall be construed as including references to provisions or provision of the Constitution of Jammu and Kashmir — See Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (13) (b) (as substituted by C. O. 71 of 1964.)

357. Exercise of legislative powers under Proclamation issued under article 356.— (1) Where by a Proclamation issued under cl. 1 of article 356, it has been declared that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament, it shall be competent—

(a) for Parliament to confer on the President the power of the Legislature of the State to make laws, and to authorise the President to delegate, subject to such conditions as he may think fit to impose, the power so conferred to any other authority to be specified by him in that behalf;

Article 356 — Note 3 (contd.)

Governor to streamline administration — Is not sub-delegation of power, since Advisers' work under supervision, guidance and control of Governor who has discretion to follow or alter decision of Advisers — Appointment of Advisers cannot be challenged on ground of sub-delegation. A 1971 Cal 122 (124).

(3) Power to appoint Commission of Enquiry — Delegation of power by President in favour of Governor after proclamation of emergency — Statutory obligation to form opinion about necessity of such enquiry also stands delegated. A 1973 Cal 233 (237) (DB).

(4) Proclamation of emergency — Powers of Governor and function of State Government delegated in favour of Governor — Power to form opinion about necessity of enquiry under Commissions of Enquiry Act is exercisable by the Governor. A 1973 Cal 233 (238) (DB).

(5) Proclamation under Article 356 of Constitution — Delegation of power by the President in favour of the Governor — Effect would not be that the President completely abdicated and surrendered the powers and responsibilities he had assumed by the proclamation under Article 356. A 1973 Cal 233 (238, 239) (DB).

(6) Proclamation issued by President assuming powers of State in W. B. — Presidential order G. S. R. of same date conferring powers on Governor — Dismissal of employee by Governor after dispensing with enquiry under Article 311 (2), Proviso (c) — Order is valid. 1977 Lab IC 628 (632) (DB) (Cal).

(7) Indian Police Service (Regulation of Pay) Rules (1954), Rule 3 (2-A) — Promotion to selection posts — President under Article 356 assuming to himself all functions of Government of West Bengal and powers exercisable by Governor and delegating same to Governor to be exercised subject to control of himself — Selection of a person for the post of I. G. P. by Governor on the advice of Prime Minister or Home Minister — Consideration of advice by Governor did not vitiate selection. (1972) 76 Cal WN 67 (89) (DB).

Article 357

(1) The expression "except as respects things done" in Article 357 (2) must receive liberal and extensive construction. Provisions of Bank of Patiala Regulation and Management Order (1954), including that of Cl. 4 (1) (iii) and Rules made thereunder relate to matter of day-to-day affairs and administration of Bank and come within purview of saving clause in Art. 357 (2). A 1966 SC 1607 (1611, 1612).

(2) W. B. (Prevention of Violent Activities) Act (President's Act 19 of 1970) — The Act remains in force for one year after President's rule came to an end. A 1972 SC 1670 (1673) : 1972 Cri LJ 1020

(b) for Parliament, or for the President or other authority in whom such power to make laws is vested under sub-clause (a), to make laws conferring powers and imposing duties, or authorising the conferring of powers and the imposition of duties, upon the Union or officers and authorities thereof;

(c) for the President to authorise when the House of the People is not in session expenditure from the Consolidated Fund of the State pending the sanction of such expenditure by Parliament.

[a][(2) Any law made in exercise of the power of the Legislature of the State by Parliament or the President or other authority referred to in sub-clause (a) of clause (1) which Parliament or the President or such other authority would not, but for the issue of a Proclamation under article 356, have been competent to make shall, after the Proclamation has ceased to operate, continue in force until altered or repealed or amended by a competent Legislature or other authority].

(a) Substituted by Constitution (Forty-second Amendment) Act, 1976, Section 51 (3-1-77), and applicable to any law referred to in Cl. (2) which is in force immediately before coming into force of S. 51, i.e. on 3-1-77.

358. Suspension of provisions of article 19 during emergencies.— [a][(1)] [a][While a Proclamation of Emergency declaring that the security of India or any part of the territory thereof is threatened by war or by external aggression is in operation] nothing in article 19 shall restrict the power of the State as defined in Part III to make any law or to take any executive ac-

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Article 357 (contd.)

(3) W. B. (Prevention of Violent Activities) Act (1970) (President's Act 19 of 1970) — Revocation of proclamation, D/- 19-3-1970 — Act would cease to operate on the expiry of one year after the proclamation has ceased to operate except as respects things done or omitted to be done before the expiration of the said period unless the Act is repealed, re-enacted with or without modification. **A 1972 SC 1497 (1500) : 1972 Cri LJ 1020.**

(4) Laws made by President in exercise of powers under Section 3, W. B. State Legislature (Delegation of Powers) Act (1968) are not affected by Article 254 of the Constitution. A 1971 Cal 534 (537) (DB).

(5) Emergency (Essential Powers) Ordinance, 1969 promulgated under provision of Constitution — Essential (Security Cases) Regulations, 1975 under the Ordinance are therefore constitutional and valid. (1978) 1 Malayan LJ 30 (34).

(6) Passing of U. P. Civil Laws Amendment Act (XXXV of 1968) by President alone by virtue of power conferred upon him under Article 357 — Fact that it is not assented by President as required under Article 111 does not make it invalid. **A 1970 All 201** (203) (FB).

(7) Raising of appellate jurisdiction of District Courts up to rupees twenty thousand by President — No violation of Art. 14. **A 1970 All 201** (205) (FB).

ARTICLE 358 — SYNOPSIS

1. Scope.
2. This Article and Art. 359.
3. "To make any law".
4. "To take any executive action".
5. "Except as respects, things done or omitted to be done".
6. Emergency Risks Insurance Acts.
7. Pre-emergency legislation.

1. Scope.— (1) As soon as a Proclamation of Emergency is issued by the President under Article 358 the provisions of Article 19 are automatically suspended. **A 1967 SC 483 (485) : 1967 Cri LJ 520** °° **A 1966 SC 1078 (1080) : 1966 Cri LJ 812** °° **A 1966 SC 657 (660) : 1966 Cri LJ 586** °° A 1968 Ker 143 (146) : 1968 Lab IC 647 °° A 1967 Pat 114 (117) (DB) °° A 1967 Him Pra 21 (24) °° A 1967 Goa 142 (144) °° A 1966 Raj 247 (250) : 1966 Cri LJ 1338 °° A 1965 Punj 74 (76).

(2) The suspension of Article 19 as soon as a proclamation of emergency has been issued removes during the period of the emergency the fetters created on the legislative and executive powers by Article 19. (1966) 68 Pun LR 390 °° A 1967 Madh Pra 268 (275) (DB).

(3) Article 358 permits the State to make a law or take executive action heedless of Article 19 only while a proclamation of emergency is in operation. 1969 Lab IC 30 (33) (Ker) (DB).

(4) Proclamation of emergency enables the State to exercise the power to make any law and to take any executive action which cannot be challenged as infringing Article 19. 1975 Ker LT 845 (DB).

(5) Article 358 not only protects a law violative of Article 19 during period of emergency but it protects any executive action violative of Article 19. A 1968 Guj 124 (149) (DB).

(6) Protection under Article 358 is a blanket protection. State is not bound to prove nexus between legislation and emergency. 1973 Mah LJ 813.

(7) Article 358 does not validate a law which was invalid because of the constitutional inhibition before the proclamation of emergency. A 1967 SC 1170 (1173) °° A 1963 Assam 94 (97) (FB) (Reversed on another point in A 1964 SC 600.) °° (1966) 1 Mad LJ 313 °° A 1964 Madh Pra 175 (182) : 1964 (2) Cri LJ 160 (DB).

(8) Article 358 which suspends the provisions of Article 19 during an emergency declared by

tion which the State would but for the provisions contained in that Part be competent to make or to take, but any law so made shall, to the extent of the incompetency, cease to have effect as soon as the Proclamation ceases to operate, except as respects things done or omitted to be done before the law so ceases to have effect:

[b][Provided that [c][where such Proclamation of Emergency] is in operation only in any part of the territory of India, any such law may be made, or any such executive action may be taken, under this article in relation to or in any State or Union territory in which or in any part of which the Proclamation of Emergency is not in operation, if and in so far as the security of India or any part of the territory thereof is threatened by activities in or in relation to the part of the territory of India in which the Proclamation of Emergency is in operation].

Article 358 — Note 1 (contd.)

the President under Article 352 is in terms prospective. **A 1967 SC 1170 (1173).**

(9) Article 358 is prospective. It applies to new Legislation enacted during emergency. It does not apply to pre-emergency legislation. Such legislation can be challenged under Article 19 during emergency. **A 1975 Punj 324** (331).

(10) In view of the provisions of Article 358 the suspension of Article 19 during the period of emergency is complete and legislative and executive action taken cannot be questioned on the ground that it contravenes Article 19 even after the emergency is over. **A 1964 SC 381** (393) : **(1964) 1 Cri LJ 269.** (1963) All WR (HC) 559, **Overruled** on another point.)

(11) After the declaration of emergency, Article 358 merely removed the fetters on the powers of either the Parliament or a State Legislature to make any law abridging or taking away the rights guaranteed by Article 19. But in the absence of any such law having been made any executive action that may be taken to the prejudice of any person will require sanction of some valid law and if there be no valid law to support the executive action the same can be challenged by the aggrieved person. (1976) 78 Bom LR 1 (39).

(12) Proclamation of emergency — Court can take judicial notice of and disallow complaints of violations of Article 19. **A 1965 All 86** (91) (DB).

(13) It is for the authority in whom the power to declare the emergency is vested to declare by any subsequent declaration that the emergency has ceased. **A 1969 J & K 5** (6) : 1969 Cri LJ 67.

(14) The suspension of Article 19 provided under Article 358 continues so long as the Proclamation of Emergency is in operation. **A 1964 SC 381** (393) : **(1964) 1 Cri LJ 269.** (1963 All WR (HC) 559, **Overruled** on another point.)

(15) Existence of emergency does not extend this Article to laws made other than those made during period of emergency. **1973 BLJR 122** : 1973 Pat LJR 129.

(16) The provisions of Article 358 are applicable to both legislative and executive actions and identical considerations apply to delegated legislation and executive action. **A 1975 Punj** 324 (331).

(17) Article 358 suspends Article 19 but not Article 301. Hence, attack on the basis of Art. 301 is permissible. **A 1976 Raj 151** (153).

(18) Unless there is a declaration under Article 359, legislative and executive actions purporting to be inconsistent with rights guaranteed under Article 19, if made or done prior to the proclamation of emergency, can be challenged in courts of law and can be adjudicated upon. (1974) 2 Serv LR 574 (Delhi).

(19) Writ petition challenging proceedings under Himachal Pradesh Ceiling on Land Holdings Act, 1972 — Application for grant of interim injunction and for modifying or vacating interim injunction already granted — Application is not hit by Article 358 or Article 359 (1). **A 1976 HP 34** (35) **(FB).**

(20) Only because Article 360 appears in the statute book after Article 358, it cannot be said that the provisions of Article 358 are not applicable to a legislation providing for the mode of payment of advance price due to financial stringency or paucity of funds. The protection given by Article 358 to a legislation made during the subsistence of emergency is a blanket protection. It is not open for the writ petitioners during the emergency to challenge a legislation on the ground that it is violative of their fundamental rights guranteed under Article 19. It is not also permissible for them to avail of the same rights obliquely or indirectly. **A 1976 Bom 13** (15 to 17) (DB).

(21) Proclamation of emergency — Suspension of liberties — Courts have to interpret emergency law in favour of security of State. (1975) 2 Andh WR 437 (462) (DB).

(22) If Article 358 expressly provides that such law would continue to have effect during emergency during the subsistence of the Proclamation of Emergency no challenge could be made to such a law on the ground that the provisions of Article 19 have been violated. Indeed in relation to the kind of legislation as contemplated by Article 358, a challenge to the constitutionality of the legislation on the ground that it is violative of Art. 19 cannot even be entertained. In effect, the position under Article 358 is that the provisions of Article 19 stand suspended. (1977) 79 Bom LR 449 (463) (DB).

(23) Because of the issue of proclamation under Article 358, the operation of Article 19 is suspended. Article 19 does exist in the Constitution and can incidentally be relied upon for the purpose of indicating as to what is the jurisdiction of High Court under Article 226 (1-A) of the Constitution. 1976 Cri LJ 889 (891) (DB) (Guj).

2. This Article and Article 359.— (1) An ordinance, Rule or order made under Art. 359 (1) can be challenged on a ground other than those covered by Article 358 and by the Presidential Order issued under Article 359 (1). A

[d][(2) Nothing in clause (1) shall apply—

(a) to any law which does not contain a recital to the effect that such law is in relation to the Proclamation of Emergency in operation when it is made; or

(b) to any executive action taken otherwise than under a law containing such a recital].

(a) Art. 358 renumbered as clause (1) and substituted for words "While a Proclamation of Emergency is in operation" by Constitution (Forty-fourth Amendment) Act, 1978, S. 39 (20-6-79).

(b) Added by Constitution (Forty-second Amendment) Act, 1976, S. 53 (3-1-77).

(c) Substituted for words "where a Proclamation of Emergency" by Constitution (Forty-fourth Amendment) Act, 1978, S. 39 (20-6-79).

(d) Inserted, ibid.

OBJECTS AND REASONS

Clause 40.— This clause seeks to amend article 358 relating to the suspension of provisions of article 19 during Emergencies. By virtue of the amendments, the provisions of article 19 will become suspended only in the case of a Proclamation of Emergency issued on the ground of war or external aggression and not in the case of a Proclamation of Emergency issued on the ground of armed rebellion. Further, the suspension of article 19 under article 358 will not apply in relation to any law which does not contain a recital to the effect that such law is in relation to the Proclamation of Emergency in operation when it is made or to any executive action taken otherwise than under a law containing such a recital. S. O. R.—See Gaz. of Ind., 15-5-78, Pt. II, S. 2, Ext., p. 619.

Article 358 — Note 2 (contd.)
1966 SC 657 (660) : 1966 Cri LJ 586 ** A 1967 SC 483 (485) : 1967 Cri LJ 520 ** A 1966 SC 1078 (1080) : 1966 Cri LJ 812.

(2) Article 358 proprio vigore suspends the fundamental rights guaranteed by Article 19 thus enabling the State during the period, the proclamation of emergency is in operation to make laws in violation of Article 19 and to take executive action under those laws despite the fact that those laws constitute an infringement of the rights conferred by Article 19. Article 359 (1) does not suspend any fundamental right of its own force but authorises the President to deprive an individual of his right to approach any court for enforcement of any or all of the rights conferred by Part III of the Constitution. A 1977 SC 1027 (1041).

(3) While Article 358 suspends the rights guaranteed under Article 19 during the period of emergency Article 359 does not purport expressly to suspend any of the fundamental rights. A 1964 SC 381 (393) : (1964) 1 Cri LJ 269. (1963 All WR (HC) 559, Overruled on another point.)

(4) The suspension of Article 19 under Article 358 applies to the whole of the country, and so, covers all legislatures and also States. But the order issued under Article 359 (1) may extend to the whole of India or may be confined to any part of the territory of India. A 1964 SC 381 (394) : (1964) 1 Cri LJ 269. (1963 All WR (HC) 559, Overruled on another point.)

3. "To make any law".— (1) Act passed after enforcement of emergency — Challenge to under Article 19 (1) (f) and (g) cannot be made as the article has no application. A 1969 All 317 (325, 326) (FB) ** A 1967 SC 483 (485) : 1967 Cri LJ 520 ** A 1966 SC 1078 (1080) : 1966 Cri LJ 812 ** A 1968 Bom 75 (84) (DB) ** A 1968 Guj 124 (149) (DB) ** A 1967 Madh Pra 268 (275) (DB) ** A 1967 Goa 142 (144) ** A 1965 Bom 224 (238) (DB). (Overruled on another point in A 1968 SC 870.) ** A 1965 Punj 74 (76) (DB) ** A 1964 Punj 307 (309) (DB).

(2) No Court could pronounce a legislation, subsequent to the emergency as in violation of Article 19 and therefore void. A 1965 Mad 225 (229) : 1965 (1) Cri LJ 714 (DB) ** A 1967 Him Pra 21 (26).

(3) Wide definition of "Law" in Article 13 will include order made under Defence of India Rules, Rule 125. A 1967 Pat 114 (117) (DB).

(4) "Law" means effective law. Bill reserved for consideration of the President cannot be treated as 'law'. 1973 Mah LJ 813.

(5) Scheme or modification of scheme under Chapter 4-A of Motor Vehicles Act is 'law' within Articles 19 and 358. A 1967 Him Pra 21 (23).

(6) The Ordinance promulgated by the Governor under Article 213 has the same force as an Act of a Legislature assented to by the Governor. If an Act of a Legislature can be free from the fetters of Article 19 so long the emergency continues, it is idle to contend that the Governor's Ordinance will not be so. Therefore, so long as the emergency continues, it cannot be contended that Bihar Co-operative Societies (Second Amendment) Ordinance is violative of Article 19. A 1975 Pat 295 (303).

(7) Karnataka Cinemas (Regulation) Rules 1971 (as amended in 1974), Rule 27 (2) (b) — Constitutionality — Cannot be challenged during proclamation of emergency. (1975) 2 Kant LJ 288.

(8) Though the Original Rr. 98 and 107 of Karnataka Cinemas (Regulation) Rules of 1971 made after the cessation of the first proclamation of emergency do not have the protection of Article 358, the Amendment Rules of 1974 made after the second proclamation of emergency will have such protection. But as Article 358 affords protection to valid laws only, if any of the Rules made after the Proclamation

Article 358 — Note 3 (contd.)
of Emergency are ultra vires of the Act or are violative of Article 14 of the Constitution, then those rules are not immune from attack even during the continuance of emergency. A 1975 Kant 37 (41).

(9) U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), Section 21 (1), Explanation (iv) — Explanation which repealed Act (3 of 1947) held could not be assailed for infraction of Article 19 while the proclamation of emergency was in operation as fundamental right guaranteed under Art. 19 stood suspended. (1975) 1 All LR 222 (223). (Overruled on another point in A 1976 All 328 (FB).]

(10) U. P. Vritti, Vyapar, Ajivika Aur Sevayojan Kar Adhiniyam — Act passed after enforcement of emergency — Challenge to under Art. 19 — Provisions of Art. 19 stand suspended under Article 358. **A 1969 All 317 (326) (FB).**

(11) Section 47-A of Electricity (Supply) Act (1948) as introduced by Electricity (Supply) (U. P. Amendment) Act (1972) cannot be challenged on ground of violation of Article 19 during operation of emergency. A 1975 All 29 (33).

(12) The validity of the Tamil Nadu Debt Relief Act (President's Act, 31 of 1976) could not be questioned on the ground that the Act was not an "emergency oriented law". The Articles 358 and 359 conferred unfettered power on the State to pass any legislation, whether emergency oriented or not. (1978) 91 Mad LW 438 (439, 440). (86 Mad LW (Suppl) 1, held, not good law.)

4. "To take any executive action."— (1) Article 358 does not invest the State with arbitrary authority to take action to the prejudice of citizens and others. **A 1967 SC 1170 (1173).**

(2) Executive action by State which is invalid otherwise than on ground of infringement of Article 19 is not protected. **A 1970 SC 1275** (1278). (G. O. M. No. 2976, dated 30th December, 1964 which was an executive order issued by the Andhra State during proclamation of emergency was plainly contrary to the statutory provisions of Andhra Pradesh Sugar Dealers Licensing Order (1963) and the Sugar Control Order (1963) issued by the Central Government and was not protected under Art. 358.)

(3) Executive action during proclamation of emergency taken under an invalid pre-emergency legislative provision — Article 358 does not apply. A 1973 All 200 (201). (Bye-law framed by Municipal Board imposing a total ban in regard to slaughter of animals — Bye-law framed in 1955 when no proclamation of emergency was in existence — Bye-law being in violation of Article 19 (1) (g) was void at its inception — Executive action taken by Board under the bye-law while proclamation of emergency was in existence is without authority of law and illegal.)

(4) Article 358 would not authorise the taking of detrimental executive action during the emergency affecting the fundamental rights in Article 19 without any legislative authority or in purported exercise of power conferred by any pre-emergency law which was invalid when enacted. **A 1973 SC 106 (116).** (The restrictions on newsprint policy were imposed before the proclamation of emergency. Hence these restrictions could be challenged as violating Article 19 (1) (a).)

(5) During the proclamation of emergency Article 358 does not apply to executive action taken during the emergency if the same is a continuance of a prior executive action or an emanation of the previous law which is otherwise violative of Article 19 or is otherwise unconstitutional. But if it can be shown that the executive action taken during the emergency has no authority as a valid law its constitutionality can be challenged. A 1974 SC 366 (387). (Notifications Nos. CER/3/73 dt. 13-3-1973 and CER/16/73 dt 13-3-1973 issued by Textile Commissioner under Cls. 22 and 30 (1) (b) of Cotton Textiles (Control) Order (1948) having been made under pre-emergency executive order the writ petitions challenging its constitutionality were competent.)

(6) Where the President's Order under Article 359 provided that no action in a Court of law could be taken for the enforcement of the rights conferred under Arts. 14, 21 and 22, the President's Order although did not suspend the rights under Arts. 14, 21 and 22 but it suspended the right of the petitioner to move a Court of law for enforcement of these rights. Accordingly, the orders of detention passed under Maintenance of Internal Security Act could not be challenged on the ground that it is in contravention of Art. 19. 1976 MPLJ 183 (DB) (MP).

(7) Clauses (1) and (2) of R. 3 of the Grant-in-aid Code (Maharashtra) read with various instructions issued by State are perfectly valid and State Government was competent to issue those executive instructions for guidance of the educational authorities dealing with applications for grant of permission to start schools. Held Article 358 did save Clauses (1) and (2) of R. 3 and Article 19 could not have been invoked by the writ petitioners during the period when the Proclamation of Emergency was in operation. A 1968 Bom 91, Reversed. A 1973 SC 588 (595).

5. "Except as respects, things done or omitted to be done".— (1) Valid claims cannot be washed off by the emergency per se. They can only be suspended by a law passed during operation of Arts. 358 and 359 (1-A). The expression "things done or omitted to be done" occurring in Article 358 is to be interpreted narrowly. Therefore as soon as the emergency was over, the settlement for payment of bonus arrived at between the L. I. C. and its employees would revive and what could not be demanded during the emergency because of the passing of the Life Insurance Corporation (Modification of Settlement) Act would become payable even for the period of emergency for which payment was suspended. **A 1978 SC 803 (812).**

(2) Foreign Exchange Regulation Act (1947), S. 18-B — Proclamation of Emergency in operation — Person refused 'P' form on 19-8-1965 — No relief can be granted on ground of infringement of Article 19, Constitution of India — Even after emergency has ceased orders passed remain as "the things done". ILR (1969) Delhi 898.

(3) The saving provided in Article 358 has been reproduced in Rule 132-A, framed under the Defence of India Act. The expression "things done or omitted to be done" is wide enough to continue a prosecution not completed under a temporary Act or prosecutions about to be commenced. 1969 Cri LJ 1582 (1591, 1594) (Mad).

359. Suspension of the enforcement of the rights conferred by Part III during emergencies.— (1) Where a Proclamation of Emergency is in operation, the President may by order declare that the right to move any court for the enforcement of such of [a][the rights conferred by Part III (except articles 20 and 21)] as may be mentioned in the order and all proceedings pending in any court for the enforcement of the rights so mentioned shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order.

[b][(1A) While an order made under clause (1) mentioning any of [a][the rights conferred by Part III (except articles 20 and 21)] is in operation, nothing in that Part conferring those rights shall restrict the power of the State as defined in the said Part to make any law or to take any executive action which the State would but for the provisions contained in that Part be competent to make or to take, but any law so made shall, to the extent of the incompetency, cease to have effect as soon as the order aforesaid ceases to operate, except as respects things done or omitted to be done before the law so ceases to have effect]:

Article 358 (contd.)

6. Emergency Risks Insurance Acts.— (1) Liability created by an act or omission when the Emergency Risks (Factories) Insurance Act (63 of 1962) and Emergency Risks (Goods) Insurance Act (62 of 1962) were in operation during the currency of the proclamation of emergency cannot be challenged even after the revocation of the proclamation on the ground that the provisions of the Acts violated Art. 19. **A 1976 SC 958 (964).**

(2) Both under Article 358 of Constitution as well as S. 1 (3) of the Emergency Risks (Factories) Insurance Act (1962), the operation of the Act itself is not affected by its expiry as respects things previously done or omitted to be done. The rights accrued or the liability incurred are preserved and any investigation, legal proceedings or remedy in regard to them may be instituted, continued or any penalty, forfeiture of punishment may be imposed as if the temporary Act was repealed by the Central Act. The law so made as referred to in Article 358 shall continue to operate as respects things done or omitted to be done before the law ceased to have effect. Section 1 (3) of the Act, however, is negatively worded that is why with a view to continue the operation of the law thus expired that it is continued as respects things done or omitted to be done by applying the provisions of Section 6 of the General Clauses Act. A 1971 Andh Pra 145 (152, 153) : 1971 Lab IC 651 (DB).

(3) Emergency Risks (Factories) Insurance Act (1962), Section 1 (3) — Provision does not violate Articles 352 and 358 of the Constitution. (1972) 76 CWN 952.

(4) Liability under Emergency Risks (Goods) Insurance Act (1962) would continue to subsist upon its expiry and proceedings could be commenced to give effect to that liability. This conclusion is supported by Article 358 of the Constitution also. A 1973 Ker 2.

(5) Emergency Risks (Goods) Insurance Act (1962), Section 1 (3). Expiry and Repeal of Act — Effect — Proceedings for recovery of evaded payment can be taken after expiry of Act only if liability was incurred prior to expiry of the Act. 1974 Assam LR 245.

7. Pre-emergency legislation.— (1) Pre-emergency legislation — Can be challenged under Article 19 (1) (f) and (g), during continuation of emergency. A 1976 P & H 365.

(2) Where anything has been done under a pre-emergency statute like the Essential Commodities Act, including any rule or order made thereunder a plea under Article 19 is available, notwithstanding the emergency proclaimed. 1969 Lab IC 30 (32) (Ker) (DB).

(3) The Punjab Wheat (Restriction on Stock by Producers) Order 1974 issued under powers conferred by Section 3 Essential Commodities Act must in the eye of law be deemed as an integral part of that Act and since that Act being pre-emergency legislation is subject to Article 19 even during the emergency, the 1974 Punjab Order emanating from that Act and being in continuation of its policies can be challenged as being violative of Article 19 (1) (f) and (g) during the emergency. A 1975 Punj 324 (331, 332, 333).

(4) The Orissa Paddy Procurement (Levy) Order, 1974, though promulgated during the continuance of emergency, has been made in exercise of powers under Essential Commodities Act, a pre-emergency law. Consequently if the executive action in formulating the Order is without any legislative authority, the Order can be challenged on the ground that it violates Art. 19. The basic provisions of the Order being in excess of the delegation and therefore not being a valid piece of legislation, it can be challenged as being violative of Art. 19. A 1976 Orissa 138 (143) (DB).

ARTICLE 359 — SYNOPSIS

1. Presidential Order — General.
2. Order affecting a class of persons.
3. Right to bring action to enforce specified fundamental rights suspended.
(A) Pending proceedings.
(B) Interim orders.
(C) Effect of sub-sec. (1-A).
(D) Habeas Corpus petition.
4. Legislative or executive acts can be challenged on other grounds.
5. Fundamental rights themselves are not affected by order.

1. Presidential Order — General.— (1) During the period of emergency Article 19 only is suspended temporarily under Article 358 and all other rights except those

[c][Provided that where a Proclamation of emergengy is in operation only in any part of the territory of India, any such law may be made, or any such executive action may be taken, under this article in relation to or in any State or Union territory in which or in any part of which the Proclamation of Emergency is not in operation, if and in so far as the security of India or any part of the territory thereof is threatened by activities in or in relation to the part of the territory of India in which the Proclamation of Emergency in in operation].

[d][(1B) Nothing in clause (1A) shall apply—

(a) to any law which does not contain a recital to the effect that such law is in relation to the Proclamation of Emergency in operation when it is made; or

(b) to any executive action taken otherwise than under a law containing such a recital].

Article 359 — Note 1 (contd.)

specifically suspended by the President under Article 359 remain untouched. **A 1967 SC 1643 (1656).**

(2) The power confided to the President under Article 359 for making a selection of the fundamental rights to suspend their enforcement is absolute. (1965) 1 Mys LJ 176 (DB).

(3) President can suspend enforcement of any of the fundamental rights. **A 1968 SC 765 (768) : 1968 Cri LJ 972.**

(4) When the existence of emergency itself cannot be questioned, the power exercised by the President in making a declaration under Art. 359 (1) cannot also be questioned on the ground that the emergency does not exist. A 1976 AP 1 (10).

(5) How long the proclamation of emergency should continue and what restrictions should be imposed on the fundamental rights of citizens during the pendency of emergency are matters which must be left to the executive. **A 1964 SC 381 (403) : (1964) 1 Cri LJ 269.**

(6) The fact that emergency may last for a long period and as a consequence citizens may be precluded from enforcing fundamental rights under Arts. 14, 21 and 22 during the period of the order has no bearing on the validity of detention under Defence of India Act. **A 1964 SC 381 (403).**

(7) The fact that during the operation of the Presidential order the executive may abuse the powers and the citizens would have no remedy is essentially a political question and its impact on the constitutional question is at best indirect. **A 1964 SC 381 (403).**

(8) President's order under Article 359 providing that enforcement of fundamental rights under Arts. 14, 21 22 would be suspended if any person is deprived of such right under Defence of India Ordinance (later replaced by the Act) or the rules or orders made thereunder — **Held**, it was not necessary to make any express provision in Defence of India Act or the rules for the suspension of the enforcement of fundamental rights under Arts. 14, 21 and 22. **A 1968 SC 765 (770) : 1968 Cri LJ 972.**

(9) Presidential order suspending enforcement of rights under Articles 14, 21 and 22 during period of emergency — By indirectly validating Laws in infringement of Articles 14, 21, and 22 the Order does not become a fraud on powers under Article 359. **A 1964 SC 381.** (Distinguished in A 1976 SC 1207.)

(10) In construing the Presidential Order issued under Article 359 (1) it is necessary to remember the general rule of construction that an order purporting to suspend the fundamental rights must be strictly construed in favour of the citizen's fundamental rights. **A 1966 SC 657 (660) : 1966 Cri LJ 586 ** A 1967 Guj 229 (247) ** ILR (1976) 1 Punj 879 (895).**

(11) Order of President under, D/- 3-11-1962 — Reference to Defence of India Ordinance of 1962 — Must be construed as reference to Defence of India Act, 1962. **A 1966 SC 740 (744).**

(12) An order passed under Article 359 (1) cannot be tested with the aid of Art. 13 (2) under that very fundamental right the enforcement of which it suspends. **A 1968 SC 765 (768, 769) : 1968 Lab IC 872 : 1968 Cri LJ 972. (A 1967 SC 1335. Overruled.)**

(13) The Order of the President under the Article authenticated under Rule 2 (a) of Authentication (of Orders and other Instruments) Rules cannot be called in question on the ground that they are not made or executed by the President. A 1966 Mys 207 (209, 210) : 1966 Cri LJ 929 (DB).

(14) Emergency — Proclamation lifting emergency — Orders which could not be reviewed can be reviewed judicially. **A 1969** Cal 474 (476).

(15) Presidential order under Art. 359 (1) would ordinarily have a wider range and effect throughout the country than the existence of martial-law in any particular part of the country. Martial-law results in taking over by Military Courts of power even to try offences and the ordinary or civil Courts will not interfere with this special jurisdiction under extraordinary conditions such a taking over by Military Courts is certainly outside the provisions of Art. 359 (1) taken by itself. **A 1976 SC 1207 (1318).**

(16) The use of the words "such of the rights" and the word "mentioned" occurring in Art. 359 indicates a specific and express mention as distinguished from an implied reference. Art. 16 is not mentioned in the Presidential order and hence the Presidential order cannot be construed to have impliedly taken away the right of the petitioner to claim equality under Art. 16 in the mat-

(2) An order made as aforesaid may extend to the whole or any part of the territory of India:

[e][Provided that where a Proclamation of Emergency is in operation only in a part of the territory of India, any such order shall not extend to any other part of the territory of India unless the President, being satisfied that the security of India or any part of the territory thereof is threatened by activities in or in relation to the part of the territory of India in which the Proclamation of Emergency is in operation, considers such extension to be necessary].

(3) Every order made under clause (1) shall, as soon as may be after it is made, be laid before each House of Parliament.

(a) Substituted for words "the rights conferred by Part III" by Constitution (Forty-fourth Amendment) Act, 1978, S. 40 (20-6-79).

(b) Inserted and deemed always to have been so by Constitution (Thirty-eighth Amendment) Act, 1975, S. 7 (1-8-75).

Article 359 — Note 1 (contd.)

ter of public employment. 1978 Lab IC 235 (241) (Guj) ** 1977 Lab IC (NOC) 59: ILR (1976) HP 147 (DB) ** (1976) 2 Serv LR 156 (171) (Delhi) ** A 1975 Raj 217 (224, 225).

(17) The only device for taking away Art. 21 is to be found in Arts. 352 and 359. By the 44th Constitution Amendment Act the President has been denied the power to suspend the right to life and liberty guaranteed under Article 21 with the result that this right of the citizen remains within the care and protection of the Constitutional Courts and can never be given away to the control of Military authorities or tribunals Therefore no effective Martial Law can be imposed under the Constitution. A 1980 Andh Pra 172 (175): (1979) 2 AP LJ (HC) 338 (DB).

2. Order affecting a class of persons.— (1) Although the scope of the Order made by the President under Article 359 (1) of the Constitution will be confined to whole or a part of the territory of India and during certain periods, there is nothing in the Article which prevents the President from restricting the scope of the Order to a class of persons, provided the operation of the Order is confined to an area and to a period. **A 1967 SC 1335 (1339): 1967 Cri LJ 1204.** (Order in respect of persons such as foreigners and persons governed by the Defence of India Rules. **Overruled** on another point in **A 1968 SC 765.**) ** **A 1964 SC 381 (399, 415): 1964 (1) Cri LJ 269.** (Order confined to persons deprived of any of the specified rights under the Defence of India Ordinance, 1962, or any Rule or Order made thereunder.) ** 1973 Cri LJ 1344 (1351) (All).

(2) Where the Presidential order applies to a specified class of persons mentioned therein it does not affect the right of a person to whom it does not apply to move the High Court for his release. 1972 All Cri R 323 (332).

3. Right to bring action to enforce specified fundamental rights suspended.— (1) Orders made by the President under the Article — Effect of Right of a person to move the Court for enforcement of his fundamental rights under Articles 14, 21 and 22 is suspended. A 1966 Mys 207 (209, 210): 1966 Cri LJ 929 (DB) ** **A 1968 SC 765 (770): 1968 Cri LJ 972.** (A 1967 SC 1335, **Overruled.** High Court decision taking the view adopted in **A 1967 SC 1335** also must be **held no longer good law.**) ** **A 1964 SC 173 (176, 177): 1964 (1) Cri LJ 132** ** A 1966 Andh Pra 229 (231): 1966 Cri LJ 871 (DB) ** (1965) 69 Cal WN 913: 1966 Cri LJ 826 (828). ** **A 1977 SC 1027 (1044): 1977 Cri LJ 785** ** **A 1977 SC 854 (856): 1977 Lab IC** 537 ** A 1976 P & H 238 (243) ** A 1975 All 29 (33) ** A 1970 All 383 (388).

(2) If the impugned order challenged as infringing Article 14 of the Constitution was passed before declaration of emergency it cannot be challenged after declaration of emergency. A 1976 Pat 345 (348). (Question of reasonableness also cannot be raised.)

(3) The Presidential Declaration dated 25-6-1975 effectively debars the petitioner from raising any contention based on Article 14 even as respects executive discrimination against him. A 1976 Mad 376 (381).

(4) Bye-laws framed under the Orissa Municipal Act were sought to be challenged as discriminatory violating Article 14 of the Constitution. In view of the Presidential order the petitioner was not allowed to press the point as it was based on Article 14. 1977 Tax LR 2177 (2182) (Orissa).

(5) During emergency the State was empowered to make laws or to take executive action in derogation to the provisions of Article 19 as soon as emergency was proclaimed on 25-6-1975. The President by notification dated 8-1-1976 has issued an order also under Article 359 (1) to the effect that the right of any person to move any court for the enforcement of the right conferred by Article 19 and all proceedings pending in any Court for enforcement of the above mentioned rights shall remain suspended for the period during emergency. (1979) 3 Serv LR 635 (647) (Pat).

(6) The imposition of pre-censorship on the journal is undoubtedly a restriction on the liberty of the press which is an essential part of the right to freedom of speech and expression declared by Art. 19 (1) (a), and when that stands suspended by virtue of the Presidents' order under Article 359 (1) there can be no question of the subject being left free to invoke Part XIII of the

(c) Inserted by Constitution (Forty-second Amendment) Act, 1976, S. 53 (3-1-77).
(d) Inserted by Constitution (Forty-fourth Amendment) Act, 1978, S. 40 (20-6-79).
(e) Inserted by Constitution (Forty-second Amendment) Act, 1976, S. 53 (3-1-77).

OBJECTS AND REASONS

Clause 41.— This clause seeks to make two amendments to article 359 of the Constitution relating to suspension of the enforcement of the rights conferred by Part III during Emergencies. The first amendment is for providing that the enforcement of the right to life and personal liberty under article 21 cannot be suspended. The second amendment is for providing that the suspension of the enforcement of any right under the article will not apply in relation to any law which does not contain a recital to the effect that such law is in relation to the Proclamation of Emergency in operation when it is made or to any executive action taken otherwise than under a law containing such a recital. S.O.R.—Gaz. of Ind., 15-5-78, Pt. II, S. 2, Ext., p. 619.

Article 359 — Note 3 (contd.)

Constitution that it was a restriction on his right of trade, commerce and commercial intercourse throughout India. 1977 Cri LJ (NOC) 230 : ILR (1977) 3 Mad 109 (127) (DB).

(7) Where an order of State censor passed under Rule 48 of the Defence and Internal Security of India Rules 1971 was challenged it was held on facts that there could be no gainsaying that the grounds of challenge could lead only to one grievance that the petitioner's rights are affected and they must be traced ultimately to the rights conferred under Part III of the Constitution and no one would have locus standi to move the Courts for enforcement of his rights whatever be the particular ground on which those rights might happen to be asserted. 1977 Cri LJ (NOC) 230 : (1977) 90 Mad LW 145 (DB).

(8) President's order suspending the right to move any Court during the operation of emergency comprehends not merely the right to move the Courts for enforcing the fundamental right under Part III of the Constitution but also any right of the same variety whether they were in existance prior to the Constitution or afterwards, whether they are to be found in the Constitution or quite apart from it. ILR (1977) 3 Mad 109 (138) : 1977 Cri LJ (NOC) 230.

(9) Detentions — Immunity from challenge under President's order — Not confined to cases of effective deprivations of the rights by a constitutionally good and valid law. (1965) 1 Mys 176 (DB).

(10) It is not open to anyone either to challenge the validity of any law or any executive action on the ground of violation of a fundamental right suspended in the Presidential order promulgated under Article 359 (1).

Even the right of any person to challenge any executive action during emergency on the ground that it was arbitrary or unlawful has been negatived. **A 1977 SC 1027 (1042) : 1977 Cri LJ 785.**

(11) Writ Petition filed during pendency of emergency — Validity of Rule 149 of Indian Railways Establishment Code, Vol. I challenged — In view of Order made by President petitioner not wishing to challenge under Article 14 but under Art. 16 — He cannot do so. **A 1963 Assam 94 (97, 98) (FB). (Reversed** on different point in A 1964 SC 600.)

(12) Detention under Defence of India Act not open to challenge by virtue of Presidential order under Article 359 (1) - Defence cannot get mere declaration that Defence of India Act is invalid. **A 1964 SC 381 (403).** (Distinguished on another point in A 1976 SC 1207.)

(13) A fundamental right may be enforced in many ways. This article authorises the suspension of the right to move "any Court" to obtain the compulsory observance of a claim or the adherence to a fundamental right through a direction, order or decree. (1965) 1 Mys LJ 176 (DB) ** **A 1964 SC 381 (394, 397) : (1964) 1 Cri LJ 269** ** A 1968 Mad 54 (56) : 1968 Cri LJ 177.

(14) Repeal of Defence of India Ordinance — Effect of repeal — Section 8 of General Clauses Act, 1897 applies to President's order under Article 359 (1) — Person detained has no right to challenge vires of D. I. Act or Rules. **A 1964 SC 173 (179) : 1964 (1) Cri LJ 132.**

(15) Person charged with offence under Rule 126 (p) (2) of Defence of India (Part XII-A Gold Control) Rules (1962) — Cannot take recourse to Court during period of emergency, even if his rights under Article 21 are infringed. A 1970 Andh Pra 47 (53) : 1970 Cri LJ 199 (DB) ** **A 1970** Andh Pra 47 (53) : 1970 Cri LJ 199.

(16) It cannot be said that the scope of Article 359 (1) is only to restrict the application of the Article to the Legislative field and not to the acts of the executive. **A 1976 SC 1207 (1224).**

(17) Any contention based on a failure to furnish to the detenu the grounds of detention or even defects in the grounds furnished will not be available to the detenu since the obligation to furnish grounds stems from Article 22 (5). 1975 Cri LJ 1164 (1174) (Ker).

(18) The right to make representation is conferred by Article 22 (5) which has been suspended by the Presidential order made under the provisions of the emergency. Challenge to detention cannot be sustained. 1976 Cri LJ 783 (793) (Cal).

(19) It is no doubt true that by reason of Presidential order issued under Article 359 (1) the detenu cannot complain that the omission to mention the names of the persons in the grounds of detention deprived them of an opportunity of making effective representation. But the suspension of Article 22 (5) of the Constitution does not ab-

Article 359 — Note 3 (contd.)

solve the State from the duty of complying with the mandatory provisions of the M. I. S. Act (1971). ILR (1975) 2 Delhi 791 (816) (DB).

(20) When a person seeks to challenge an infraction of a positive statutory provision he is not asking for the enforcement of a fundamental right even though the content of the two may be the same. Where the petitioner prayed that the action of the respondent in demanding security under a rule which ran counter to Section 22 of the Tamil Nadu Prohibition Act it was held that the continuance of proclamation and of the Presidential order did not stand in the way of entertainment of the petition. (1978) 1 Mad LJ 109 (114).

(21) Suit pending by Pakistani national — Plaintiff declared an enemy on declaration of emergency — Disqualified from proceeding with the suit during emergency — Dismissal of suit due to emergency is illegal — Suit should be suspended for a period so long as plff. is unable to proceed with his suit. A 1976 Cal 267 (271).

A. Pending proceedings

(22) Article 359 only purports to take away the right to enforce the right claimed on the basis of Articles 14 and 19 of the Constitution. It does not take away the jurisdiction of a Court to decide a case when the Court does not accept the argument relating to the enforcement of such a right in a pending case. 1977 All Cri R 311 (313).

(23) It is only such proceedings which are suspended where the petitioner in fact at the time of enquiry proves that there is an infringment of a fundamental right and that he cannot hope to get the rule made absolute except on that ground alone which are intended to be attracted by the Presidential order suspending the pending proceedings. A 1977 Bom 367 (375).

(24) In determining the question as to whether a particular proceeding falls within the mischief of Presidential order or not, what is to be examined is not so much the form which the proceedings have taken or the words in which the relief is claimed as the substance of the matter. **A 1977 Mad 386 (392) (FB).**

(25) Presidential order under — Bar created by Article 359 (1) applies not only to writ proceedings under Article 32 or Article 226 but also to all proceedings including those under Criminal P. C. **A 1977 Mad 386 (391) (FB).**

(26) It cannot be said that merely because averments alleging a breach of Article 14 are made in the petition, the Court suspends the proceeding during the subsistence of emergency without even ascertaining as to whether the petitioner is able to make out a case of the violation of provisions of Art. 14. A 1977 Bom 355 (362).

(27) It is difficult to interpret the language of Presidential order dated 8-1-1976 so as to mean that the proceedings which already stand initiated for the enforcement of the rights conferred by Article 19, which have been directed to be suspended should be dismissed. **(1976) 78 Pun LR 775 (778) (FB).**

(28) Where a President issued a proclamation on 23-12-74 under Article 359 suspending right of detenu under C. F. E. and P. of S. A. Act to move Court for the enforcement of his fundamental right under Articles 14, 21 and 22 — President cannot be said to have exercised his powers in a colourable manner and the proclamation as also its application to pending proceedings are unexceptionable. 1975 Cri LJ 1974 (1979) (Punj).

(29) Presidential Order — Pending proceedings — Suspension of right to move court for enforcing rights under Arts. 14, 21 and 22 — Writ petitioner expressly giving up that right — **Held,** court could proceed to hear that part of petition not affected by the Order. 1976 Cri LJ 534 (536) (Bom). **(Reversed** on another point in A 1977 SC 1027 : 1977 Cri LJ 785.)

B. Interim Orders

(30) Even interim orders passed in pending proceedings cannot be kept alive when the main petitions adjourned sine die since to do so would be to defeat the purpose of Article 359 (1). 1976 Ker LT 87 (90). **(Overruled** on another point in 1979 Cri LJ (NOC) 113 (FB) (Ker).) ** 1976 Cri LJ 1586 (1591) (Cal) ** A 1976 Cal 393 (403).

(31) No order validly passed with jurisdiction by a Court before the Presidential order under Article 359 whether it be an interim order of stay or confirmed order of stay pending disposal of the original petition after hearing the other side get automatically vacated by the mere fact that an order under Article 359 has been passed by the President after such order had been passed by the Courts. **A 1977 Ker 96 (102) (FB).** (1976 Ker LT 87, **Overruled;** A 1976 Pat 247, **Diss from.)**

(32) The grant, modification or revocation of stay order is a discretionary relief which flows from the inherent powers of the Court. The Courts therefore will always have a jurisdiction to modify or revoke the stay order in the suspended pending proceedings. By vacating or modifying the stay order the Court is neither enforcing the right as conferred by Article 19 nor the Court is in any way touching any part of the pending proceedings for the enforcement of the right conferred by Article 14 of the Constitution. It is a different matter that the Court in the facts and circumstances of a case may not in exercise of discretion modify the order. **(1976) 78 Pun LR 775 (781) (FB).**

(33) If the proceedings pending before a Court when a fundamental right is enforced is to remain suspended due to the Presidential order then even the order of stay which is only ad interim in nature and is to continue during the pendency of the proceedings will also be deemed to have been suspended. A 1976 Pat 248 (251) ** A 1977 Pat 65 (70) ** A 1976 Cal 17 (18).

(34) Where in a writ petition certain orders of the State Government were challenged on the ground of violation of Art. 14 and the Presidential order under Art. 359 was in force, the interim stay order or injunction could not be justified at all. Where prima facie case for injunction or stay could be made out apart from a right

Article 359 — Note 3 (contd.)
under Article 19 or by any fundamental right where enforcement might have been suspended an injunction or stay can be granted on suitable terms. **A 1977 SC 1496 (1504).**

(35) An application for interim injunction or an application for vacating or modifying it not being a proceeding for the enforcement of the rights claimed in the petition (writs under Articles 14 and 19 in this case) is not included within that directive. A 1976 H. P. 34 (35).

(36) An order passed under Article 359 suspending a fundamental right cannot be tested under that very fundamental right which it suspends. If that were permissible no order under Article 359 could really be passed. 1973 Cri LJ 1344 (1350). **(A 1967 SC 1335 Held overruled by A 1968 SC 765.)**

C. Effect of sub-section (1-A)

(37) Original Article 359 (1) permitted suspension of the remedy itself with regard to certain rights to be mentioned in the Presidential order, the selection being left to the discretion of the President itself. Now what would have been the indirect effect is classified by permitting the President to make an order expressly suspending the rights mentioned in Part III of the Constitution by specification.

The provisions of Article 359 (1-A) are really meant and intended to further fortify the conditions so as to maintain security of India during the period of grave emergency. A 1977 Bom 99 (127).

(38) On the basic frame work or basic feature any challenge to the legality of the order made by the President of India under Article 359 (1-A) of the Constitution suspending the fundamental right guaranteed by Article 14 along with other rights is not tenable. A 1977 Bom 99 (129) ** A 1975 Bom 324 (337) : 1975 Cri LJ 1828.

(39) The effect of insertion of sub-Article (1-A) in Article 359 is that in addition to rights under Article 19 already provided for as per Article 358 the other rights also enshrined in Part III cannot during the subsistence of the emergency invalidate Legislative or Executive action; but this does not dispense with the need to justify executive action in an emergency by valid law. ILR 1977 (2) Delhi 23 (48) (DB).

[See also (1976) 2 Malayan LJ 166 (173).]

(40) The effect of insertion of sub-Article 359 (1-A) by 38th Constitution Amendment Act (1975) is that the State can make any law which it might not have been competent to make it. Articles 358 and 359 (1-A) do not restrict at all the power of the legislature to confine itself to laws which have nexus to the grounds which enable the declaration of emergency by the President. It therefore cannot be contended that legislature was not competent to enact Tamil Nadu Debt Relief Act (1976) during the course of emergency. (1978) 91 Mad LW 438 (440) (DB). ((1973) 2 MLJ 212 **Held no longer good law** as it was decided before the introduction of Art. 359 (1-A).)

(41) Rule 58 of the Defence and Internal Security of India Rules 1971 has full force and effect enabling the appropriate censor authority to apply pre-censorship of newspapers and other publications effectively after the introduction of the Prevention of Publication of Objectionable Matters Act 1976 and the challenge to orders passed by the Central Government and State Censor under Rule 48 on the basis that they are inconsistent with the provisions of Prevention of Publication of Objectionable Matters Act 1976 cannot be entertained during the period of emergency. ILR (1977) 3 Mad 109 (143).

(42) Where the Maharashtra Debt Relief Act (III of 1976) was challenged on the ground that it violated the fundamental right under Article 19 and proceedings under the Act were pending into Court, it was held that it was difficult to entertain an argument that since the petitioner had raised a question relating to violation of the fundamental rights under Article 19 proceedings should be suspended as the Act was challenged as ultra vires the State Legislature and not violative of Art. 19. (1977) 79 Bom LR 449 (464).

(43) The constitutional remedies given by Articles 32 and 226 cannot be barred by any legislation short of amendment of the Constitution itself. The power to issue a writ of habeas corpus is not a statutory right. Nor it is based on common law or natural law. 1975 Cri LJ 1809 (1819) (MP). **(Reversed** on another point in A 1976 SC 1207 : 1976 Cri LJ 945.)

D. Habeas Corpus petition

(44) In view of the Presidential order dated 27-6-1975 which is unconditional unlike an order dated 3-11-1962 no person can file a writ petition before a High Court for habeas corpus or any other writ or order or direction to challenge the legality of an order of detention on the ground that the order is not under or in compliance with the Act or is illegal or is vitiated by mala fides factual or legal or is based on extraneous considerations. **A 1976 SC 1207 (1392).**

The following cases decided before **A 1976 SC 1207** cannot be good law in view of the Supreme Court decision.
ILR (1977) 3 Mad 109 (143) ** 1977 Cri LJ (NOC) 89 (DB) (All) ** 1976 MP LJ 183 (190) (DB) ** 1977 Cri LJ 493 (501) (Cal) ** A 1975 Bom 324 (329): 1975 Cri LJ 1818 ** (1977) 79 Bom LR 189 (203, 204) ** 1975 Cri LJ 1438 (DB) (Madh Pra) ** (1975) 16 Guj LR 642 (DB) ** ILR (1976) 1 Punj 879 (918) ** 1975 Cri LJ 1974 (1976) (Punj) ** 1975 WLN 400 (Raj) ** 1976 Cri LJ 468 (471) (All) ** ILR (1977) 2 Delhi 23 (30) ** (1976) 78 Bom LR 125 (148) ** 1972 All Cri R 323 (332) ** 1975 Cri LJ 1376 (1382) (Delhi) ** (1976) 1 AP LJ (HC) 161 (167, 172) ** A 1976 AP 1 (37).

(45) In petitions under Art. 226 against illegal detention every High Court is entitled to consider that the principle of legality is not abrogated and if an aggrieved person can show that he is detained or arrested otherwise than under the provisions of law which should govern the trial he has got the locus standi to approach this Court for a proper relief. Art. 21 is not the sole repository of all rights to liberty. ILR (1976) Him Pra 715 (724, 733).

Article 359 — Note 3 (contd.)

[Majority view in **A 1976 SC 1207** Explained. Proposition is based on observations of Beg J. in that case).]

(46) In a petition for Habeas Corpus it is not open to the High Court to go behind the order of detention (order D/- 9-7-1975) and make an enquiry about the alleged non-satisfaction or non-application of the mind by the District Magistrate. (1977) 79 Bom LR 189 (200).

(47) A detenu detained under Defence of India Act cannot question the validity of the Act nor can he challenge the detention on the ground of infringement of rights conferred by Part III of the Constitution but he can challenge it on the ground that the detention is in violation of the mandatory provisions of the Defence of India Act or is mala fide or that the operative provisions of law under which he is detained is invalid. **A 1964 SC 381 (400).**

[Distinguished in **A 1976 SC 1207** on the ground that the decision is one under conditional Presidential order dated 3-11-1962 which was limited to deprivation of rights under the Defence of India Act. The decision cannot apply to cases after Presidential order D/- 25-6-75.]

(48) It is not contemplated by Art. 352 (1) of the Constitution or Sec. 16-A (3) of the M. I. S. Act that while making a declaration under Sec. 16-A (3) of the M. I. S. A. it is necessary for detaining authority to specify which declaration of emergency he had in view. The cases of the threat may be either war or external aggression or internal disturbances. But when the emergency is referred in Section 16-A of M. I. S. Act that is ultimately an emergency whereby the security of India is threatened. (1977) 79 Bom LR 189 (206).

(49) The result of the amendments effected in the Maintenance of Internal Security Act 1971 by adding Sec. 16-A and 18 to the main Act is that when an order of detention under S. 3 of the Act by the Central or the State Government is made the officer concerned makes a declaration in terms of Sec. 16-A (2) or (3) and there is no longer any necessity to furnish the detenu the grounds of detention by reason of sub-sections (6) and (7) thereof. Nor are in such a case the provisions of Secs. 8 to 12 of the Act attracted; the new Section 18 applies and the person detained has no right to personal liberty by virtue of natural or common law. 1975 Cri LJ 1809 (1813) (Madh Pra). **(Reversed** on another point in A 1976 SC 1207 : 1976 Cri LJ 945.)

(50) The right of personal liberty has been incorporated in Art. 21 and has been elevated to the status of Fundamental right. Hence any natural or common law right of personal liberty does not exist in India apart from the fundamental right enshrined in Art. 21. Sec. 18 of M. I. S. Act has been enacted as an abundant caution and is intended to meet the challenge to the detention under the Act based on natural or common law right of personal liberty. The validity of Section 18 M. I. S. Act cannot be challenged on the ground that natural or common law right was inviolable. 1975 WLN 750 (785) (DB) (Raj). **(Reversed** on another point in A 1976 SC 1 207 : 1976 Cri LJ 945.)

(51) A petition praying for a writ of habeas corpus cannot challenge the declaration under Section 16-A (3) of the M. I. S. Act. (1977) 79 Bom LR 189 (201).

(52) The effect of a declaration under Section 12-A of Conservation of Foreign Exchange and Prevention of Smuggling Activities Act is to take away from the detenue the right to know about the grounds on which the order of detention has been passed. ILR 1976 (1) Punj 879 (930.)

4. Legislative or executive acts can be challenged on other grounds.— (1) Validity of Ordinance or rule or order made under — Order can be challenged on grounds other than violation of Articles 14, 19, 21, 22. **A 1967 SC 483 (485): 1967 Cri LJ 520 ** A 1966 SC 1078 (1080): 1966 Cri LJ 812 ** A 1966 SC 657 (661): 1966 Cri LJ 586 ** A 1964 SC 381 (399, 400, 401): 1964 (1) Cri LJ 269** ** A 1977 Pat 65 (70) ** A 1976 Cal 26 (30) ** 1975 Cri LJ 1174 (1177) (Madh Pra).

(2) Since Articles 15 and 16 can stand independently of Art. 14, suspension of Article 14 on proclamation of emergency held did not render Arts. 15 and 16 inoperative. Therefore challenge to an order relating to promotion to posts of section officers under R. 9 of the Allahabad H. C. Staff Rules on the ground that it violated Art. 16 held maintainable. 1977 Lab IC (NOC) 31 : (1976) 2 All LR 378.

(3) Order of President under Article 359 (1) — Suspension of right to move Court — Misuse of statutory power by authority — Court has jurisdiction to entertain applications under Arts. 32 and 226 on these grounds. **A 1966 SC 740 (752): 1966 Cri LJ 608** ** A 1968 Mad 54 (59): 1968 Cri LJ 177 (DB) ** A 1967 Mad 21 (24): 1967 Cri LJ 85 (DB) ** A 1965 Mad 225 (229): 1965 (1) Cri LJ 714 ** A 1965 Punj 74 (76, 77) (DB).

(4) If any legal right conferred on a person by legislation other than the fundamental right referred to in the Presidential order is sought to be enforced in a Court of law it would not to be within, the inhibition of Presidential order issued under Art. 359 (1). **A 1977 Mad 386 (393): 1977 Cri LJ 1708 (FB).** (Detention under C. F. E. P. S. Act — Petitioner was held seeking to enforce his right to property.)

(5) Where the authority seeks to impose on a person detained under the Defence of India Act a restriction not prescribed by Rule 30 (4) of the Defence of India Rules the defence would not be barred by the Presidential order issued under this Article from moving the Court for a direction to the authority to act in accordance with law. **A 1966 SC 424 (426, 427): 1966 Cri LJ 311.**

(6) Assuming that the citizen has a common law right or natural law right apart from the right guaranteed by the Constitution, a detenue under M. I. S. Act could not fall back upon those rights to claim better amenities in view of Sec. 18 of the M. I. S. Act. A 1976 Ker 94 (97).

(7) The Presidential order cannot have application in respect of matters which are not so directly connected with the order of

Article 359 — Note 4 (contd.)

detention like the manner in which a detenue is to be treated in jail. 1976 Cri LJ 320 (324) (Ker).

(8) Where during proclamation of emergency under Article 359 and suspension of Article 21 the writ petition is filed by security prisoner for enforcement of an obligation cast by Rule 51 of U. P. Security Prisoners' Rules 1972 on the State Government to pay maintenance allowance to his dependants, the suspension of Art. 21 cannot bar the maintainability of the petition. A 1976 All 414 (415).

(9) Suit for eviction — One of pleas raised by defendant was that Section 1 (3) (iii) of J & K Houses and Shops Rent Control Act (34 of 1966) violated Art. 14 — **Held** that the defendant while resisting the suit of the plaintiff by raising a plea of unconstitutionality of an Act cannot be said to be seeking the enforcement of any of his specified Fundamental rights. A 1976 J & K 51 (64).

(10) Where in a suit for possession based on the plaintiff's right to pre-empt the challenge to the right is not by the State but by vendors and the vendees. The filing of the suit by the plaintiff does not tantamount to the enforcement of fundamental right within the meaning of Art. 19 (1) and consequently the Presidential order No. G. S. R. 16 (c) dated 8-1-1976 can have no application to the suit. A 1977 J & K 58 (65).

(11) Detention order — Effect of President's order under Article 359 is that during emergency the detenue is barred from asking detaining authority to supply grounds of detention order — But if allegations of bad faith can be substantiated by detenu without enforcement of right like the ones in Article 22 and if it is possible for the Court to hold that the order was not passed in genuine exercise of powers but out of ulterior considerations in bad faith it will strike down the order. A 1966 Pat 391 (395): 1966 Cri LJ 1306 (DB).

(12) Article 16 of the Constitution has not been suspended by Presidential proclamation dated 25-6-75. A petitioner is therefore entitled to claim enforcement of his rights conferred by Art. 16 of the Constitution during the period of emergency. (1979) 3 Serv LR 635 (648) (DB) (Pat).

(13) Where the court is not, in substance, called upon to extend its assistance for the enforcement of a fundamental right mentioned in the order, the proceedings does not require to be suspended. (1977) 39 STC 399 (402) (Ker): 1976 Ker LT 847.

(14) Under the Presidential order dated 3rd November 1962 issued under Article 359, the jurisdiction of the Court to entertain a petition for impairment of the guarantee under Article 14 can be excluded only if the impugned order is shown to be made under the authority reserved by the Defence of India Ordinance or Rules made thereunder. Since G. O. M. No. 2976 (Andhra) dated 30th December, 1964 was not issued under any of the above provisions it was not protected under the Presidential Order. A 1966 Andh Pra 310. Affirmed. **A 1970 SC 1275 (1278).**

(15) Proclamation of emergency and suspension of pending proceeding for enforcement of fundamental right — Service rule struck down by High Court as being violative of Articles 14 and 16 prior to proclamation — Appeal under Article 136 by State pending when emergency was declared — Proceeding is not for enforcement of rights under Articles 14 and 16 but for deletion of that enforcement and therefore not suspended. **A 1975 SC 1906 (1908).**

(16) If an authority acts in excess of the powers conferred upon him by law, or if he acts in mala fide manner such an action of the executive can always be called in question before a court of law. 1976 Cri LJ 1813 (1818) (All).

(17) Where a writ petition challenging the validity of certain conditions of the Conservation of Foreign Exchange and Prevention of Smuggling Activities (Maharashtra Conditions of Detention) Order 1974, on the ground that the said conditions violated Articles 14, 19, 21 and 22 of the Constitution and on certain other grounds was before a Court what was suspended by the Proclamation of Emergency suspending Article 19 and the Presidential Order under Art. 359 (1) was only the Petitioner's right to enforce that part of the petition which related to the enforcement of the petitioner's rights under the aforesaid Articles of the Constitution. The rest of the petition could be heard by Court. 1976 Cri LJ 534: (1975) 77 Bom LR 599 (602) (DB).

(18) The term 'all proceedings in the order' must necessarily mean different proceedings but all those limited to the enforcement of the rights specified in the order and as such the Presidential order does not stand in the way of entertaining an application for vacating an interim order in a case where the applicants make out a clear case that there is no question of infringement of any right including the rights suspended by the Presidential order which prima facie call for sustaining an interim order. 1977 Lab IC 490 (494) (DB) (Cal).

[Civil Rule No. 1088 (W) of 1973. D/- 19-8-1975 (Cal). **Reversed.**]

(19) Where the petitions were filed to quash the penalties of forfeiture of some issues of 'sadhana' paper and closure of "sadhana press" under Rule 47 of the Defence and Internal Security of India Rules it was held on facts that the petitions were in substance and in form for the purpose of getting rid of the penalties imposed upon them by the State Government under Rule 47 and not for the purpose of enforcement of their fundamental right of freedom of speech under Art. 19 (1) (a) of the Constitution and hence the petitions are maintainable. (1977) 79 Bom LR 289 (302).

5. **Fundamental rights themselves are not affected by order.**— (1) The suspension of a remedy cannot abrogate the right itself. Hence the rights conferred by Part III, in respect of which the remedy is suspended by the Presidential order under Art. 359 (1), does not fall with the remedy. **A 1964 SC 381 (407, 414, 415): (1964) 1 Cri LJ 269 **** (1965) 1 Mys LJ 176 (DB). **** A 1978 SC 803** (811): 1978 Lab IC 612 **** A 1977 SC 1027 (1041): 1977 Cri LJ 785 **** ILR (1975) 2 Delhi 820 (836) (DB).

360. Provisions as to financial emergency.— (1) If the President is satisfied that a situation has arisen whereby the financial stability or credit of India or of any part of the territory thereof is threatened, he may by a Proclamation make a declaration to that effect.

[a][(2) A Proclamation issued under clause (1)—

(a) may be revoked or varied by a subsequent Proclamation;

(b) shall be laid before each House of Parliament;

(c) shall cease to operate at the expiration of two months, unless before the expiration of that period it has been approved by resolutions of both Houses of Parliament:

Provided that if any such Proclamation is issued at a time when the House of the People has been dissolved or the dissolution of the House of the People takes place during the period of two months referred to in sub-cl. (c), and if a resolution approving the Proclamation has been passed by the Council of States, but no resolution with respect to such Proclamation has been passed by the House of the People before the expiration of that period, the Proclamation shall cease to operate at the expiration of thirty days from the date on which the House of the People first sits after its reconstitution, unless before the expiration of the said period of thirty days a resolution approving the Proclamation has been also passed by the House of the People].

(3) During the period any such Proclamation as is mentioned in clause (1) is in operation, the executive authority of the Union shall extend to the giving of directions to any State to observe such canons of financial propriety as may be specified in the directions, and to the giving of such other directions as the President may deem necessary and adequate for the purpose.

(4) Notwithstanding anything in this Constitution—

(a) any such direction may include—

(i) a provision requiring the reduction of salaries and allowances of all or any class of persons serving in connection with the affairs of a State;

(ii) a provision requiring all Money Bills or other Bills to which the provisions of article 207 apply to be reserved for the consideration of the President after they are passed by the Legislature of the State;

(b) it shall be competent for the President during the period any Proclamation issued under this article is in operation to issue directions for the reduction of salaries and allowances of all or any class of persons serving in connection with the affairs of the Union including the Judges of the Supreme Court and the High Courts .

Article 359 — Note 5 (contd.)

(2) The Presidential order under Art. 359 cannot widen the authority of the legislative or the executive. **A 1964 SC 381 (393): (1964) 1 Cri LJ 269 **** 1963 All WR (HC) 559. **(Overruled** on another point in A 1964 SC 381.)

(3) The fact that even after insertion of new Article 359 (1-A) Article 359 (1) is retained shows that there is no suspension of the rights guaranteed by Art. 19 under Article 358 or of any of the other rights specified in the Presidential order during the Emergency under Art. 359 (1-A) in the sense that those rights are completely abrogated or repealed or removed from the statute book. (1976) 78 Bom LR 1 (39).

(4) What is suspended is the right to move any court for the enforcement of the specified rights conferred by Part III and not the rights themselves. Hence even during the proclamation of emergency if an enactment were found to be violative of any of the rights conferred by Part III of the Constitution as are specified in the declaration that law would be void under Art. 13 (2) of the Constitution. **A 1976 AP 1 (24) (FB).**

Article 360

(1) Where the President issued a Proclamation under Art. 359 suspending right of detenu under Conservation of Foreign Exchange and Prevention of Smuggling Activities Act to move Courts for enforcing his fundamental rights under Articles 14 21 and Cls. (4) to (7) of Art. 22, the President could not be said to have exercised his powers in a colourable manner. It could not be urged that the President should have acted under Art. 360 and not under Art. 352. Art. 360 has a limited scope and its provisions may perhaps be found wholly inadequate if the activities of the Smugglers have reached alarming proportions are to be combated on a war scale. 1975 Cri LJ 1974 (1978, 1980): 77 Punj LR 343.

[b][(5) * *]

(a) Substituted by Constitution (Forty-fourth Amendment) Act, 1978, S. 41 (20-6-79).

(b) Cl. (5) as inserted by Constitution (Thirty-eighth Amendment) Act, 1975, omitted, ibid.

JAMMU AND KASHMIR

Article 360 shall be omitted—See Constitution (Application to Jammu and Kashmir) Order, 1954, Para. 2, sub-para. 13 (c) (as substituted by C. O. 71 of 1964).

PART XIX

MISCELLANEOUS

361. Protection of President and Governors and Rajpramukhs.— (1) The President, or the Governor or Rajpramukh of a State, shall not be answerable to any court for the exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him in the exercise and performance of those powers and duties:

Provided that the conduct of the President may be brought under review by any court, tribunal or body appointed or designated by either House of Parliament for the investigation of a charge under article 61:

Provided further that nothing in this clause shall be construed as restricting the right of any person to bring appropriate proceedings against the Government of India or the Government of a State.

(2) No criminal proceedings whatsoever shall be instituted or continued against the President, or the Governor [a][* * *] of a State, in any Court during his term of office.

ARTICLE 361 — SYNOPSIS

1. Object.
2. Clause (1).
3. "Powers and duties of his office."
4. Suit against Government.
5. Writ proceedings.
6. Proceedings against Legislature.
7. Clause (2).
8. Clause (3).
9. Clause (4).

1. Object.— (1) The object of the article is to protect from harassment the persons holding the high office of the executive head of State, in regard to their official acts which in democracy are done on the advice of Ministers A 1955 Hyd 241 (246): 1955 Cri LJ 1488 (DB).

2. Clause (1).— (1) This clause confers on the President and the Governors of States an absolute immunity from any legal proceedings in regard to their official acts. A 1952 Cal 799 (801).

(2) While act of Governor is justiciable his personal immunity is not taken away even when his bona fides are questioned. **A 1973 Mad 198 (218, 219) (FB).**

(3) The exercise of power by the President under clause (c) to the proviso to Article 311 (2) is fully covered by Clause (1) of Art. 361 and the President is not answerable to any court for the exercise and performance of his powers and duties under the clause of the proviso to Art. 311 (2) and no court has jurisdiction to examine the facts and circumstances that led to the satisfaction of the President envisaged in Clause (c) except probably on the ground of mala fides. ILR (1974) 1 Delhi 592 (598, 600) (DB).

(4) So far as criminal proceedings are concerned, clause (2) confers an absolute immunity, whether the act or omission is in official or personal capacity. But this immunity is applicable only during the term of office of the President or the Governor. A 1955 Hyd 241 (246): 1955 Cri LJ 1488 (DB).

(5) By virtue of the exemption under this clause no writ or direction can be issued against the Governor of a State to compel him to exercise or abstain from exercising any power. ILR (1967) Andh Pra 715 (727) (DB) ** A 1952 Cal 799 (801).

(6) The expression "for any act done or purporting to be done in the exercise of those powers" shows that the exemption under the clause extends also to acts incidental to the exercise of powers by the President or Governor. A 1952 Cal 799 (801, 802).

(7) The words "purporting to be done" in this clause are very wide and the exemption will apply if the act professes to be done under the Constitution and there is no improper motive or bad faith. A 1958 Andh Pra 240 (251) (DB) ** A 1953 Madh Bha 54 (55) (DB) ** A 1952 Cal 799 (802) ** A 1952 Nag 330 (332) (DB).

(8) The nomination of members to the State Legislative Council by the Governor under Article 171 would be an act purporting to be done in the exercise of power conferred by the Constitution. A 1952 Cal 799 (802).

(9) The President or the Governor not being answerable to any Court, he will not be under any obligation to make any affidavit in answer to a rule issued on an application challenging any act of his purporting to be done in the exercise of his constitutional powers. A 1952 Cal 799 (802).

(3) No process for the arrest or imprisonment of the President, or the Governor [a][* *] of a State, shall issue from any Court during his term of office.

(4) No civil proceedings in which relief is claimed against the President, or the Governor [a][* *] of a State, shall be instituted during his term of office in any Court in respect of any act done or purporting to be done by him in his personal capacity, whether before or after he entered upon his office as President, or as Governor [a][* *] of such State, until the expiration of two months next after notice in writing has been delivered to the President or the Governor [b][* * *], as the case may be, or left at his office stating the nature of the proceedings, the cause of action therefor, the name, description and place of residence of the party by whom such proceedings are to be instituted and the relief which he claims.

[Government of India Act (1935), Section 306.]

(a) The words 'or Rajpramukh' omitted by the Constitution (Seventh Amendment) Act, 1956, Section 29 and Schedule (1-11-1956).

(b) The words 'or the Rajpramukh' omitted, ibid.

Article 361 — Note 2 (contd.)

(10) Writ petition by a duly elected member to the Legislative Council of the State — Petitioner challenging that the Secretary to the Government prevented him to comply strictly with the provisions of Art. 188 — Petition not barred by Art. 361. A 1979 NOC 149 : (1979) 1 Mad LJ 94 (DB) ** A 1978 Mad 342 (354, 355, 356).

(11) This clause does not apply not only to acts not done in a personal capacity but also to acts not done in official capacity as President or Governor. A 1954 Andhra 9 (11).

[**See however** A 1962 Madh Pra 73 (75 to 79) : 1961 MPLJ 1316.]

(12) A decision of the Rajpramukh, after the Constitution, in the matter of recognition of a successor to a jagir, would be beyond his power and clause (1) of Article 361, would not bar a civil suit amongst the claimants themselves, for in such a suit the Rajpramukh shall not be required to answer to the Court. **A 1955 Raj 135 (139) (FB).**

(13) A proclamation of emergency by the President pursuant to his constitutional power under Article 356 is not justiciable. The President not being amenable to the jurisdiction of Court in view of Article 361 (1), the Court cannot go into the validity or legality or propriety of his proclamation. A 1968 Punj 441 (450) (DB).

(14) Governor's report recommending President's Rule and President's proclamation under Article 356 is not justiciable even where the decision was not of the State Government but of the Governor without the aid and advice of the Council of Ministers. A 1974 Orissa 52 (70) (DB).

(15) The High Court cannot issue a process to the Governor to dispose of the appeal in the exercise of his discretion after complying with requirements of law. (1957) 2 Andh WR 425 (432) (DB).

3. "Powers and duties of his office."— (1) The powers of the Governor may be conferred by the Constitution or by any law or rules made under any law. But whatever may be the source of the power the exemption under clause (1) will apply. A 1954 Andh 9 (10, 11).

4. Suit against Government.— (1) The personal immunity of the President and the Governor under this Article is no bar to the institution of the suit against the Government. **A 1943 Lah 41 (47) (FB) ** A 1954 Pat 513 (524) : 1954 Cri LJ 1593 (DB).**

5. Writ proceedings.— (1) Writ proceedings cannot be brought against the President or Governor of a State with reference to any act or omission in his official capacity. A 1956 Pat 384 (392) (DB) ** A 1954 Andh 9 (11) ** A 1953 Madh Bha 54 (55) (DB).

(2) Petitioner, an Advocate filed a writ petition under Article 226 of the Constitution that the "Supreme Commander of the Defence Forces of the Union of India, Rashtrapati Bhavan, New Delhi, who was the first respondent and the Cabinet Secretary to the Union Government of India, New Delhi, the second respondent to show cause why they should not be ordained to invoke Martial Law as a panacea to the then Constitutional impasse for the rest of the term of the Lok Sabha to be replaced by general poll." **Held** that the writ petition was totally misconceived. Art. 361 clause 1 of the Constitution operates as a complete bar to the maintainability of the writ petition against the President of India and hence the petition was not maintainable. A 1980 Andh Pra 172 : (1979) 2 APLJ 338 (341) (DB).

(3) There is no bar to the institution of writ proceedings against Government as such, whether of the Union or of a State. **A 1950 SC 163 (165) ** A 1950 SC 129 (134) ** A 1954 Andh 9 (11) ** A 1952 Nag 330 (333) (DB) ** A 1951 Nag 181 (183).**

[**See also A 1950 SC 222 (236).**]

(4) The fact that the President or the Governor is personally immune from legal proceedings in a Court in respect of his official acts does not mean that his acts cannot be questioned in a Court of law in proceedings against the Government. A 1952 Nag 330 (333) (DB).

NOTE:— Since the reorganisation of States, there are no Rajpramukhs in existence. While the Constitution (Seventh Amendment) Act, 1956, directs under Section 29 to carry out certain consequential and minor amendments in many Articles, including Clauses (2), (3) and (4) of this Article, it does not contain such direction in regard to clause (1) and the marginal note to this Article.

[a][361A. Protection of publication of proceedings of Parliament and State Legislatures.— (1) No person shall be liable to any proceedings, civil or criminal, in any court in respect of the publication in a newspaper of a substantially true report of any proceedings of either House of Parliament or the Legislative Assembly, or, as the case may be, either House of the Legislature of a State, unless the publication is proved to have been made with malice:

Provided that nothing in this clause shall apply to the publication of any report of the proceedings of a secret sitting of either House of Parliament or the Legislative Assembly, or, as the case may be, either House of the Legislature, of a State.

Article 361 — Note 5 (contd.)

(5) Article 361 only gives personal protection to the Governor. Where a writ issued by the High Court directing arrest of the accused is returned unexecuted on account of an order issued by the Governor under Article 161 suspending the sentence of the accused. Article 361 is no bar to the examination by the Court of the legality of the Governor's order in order to determine whether there was a valid return to the writ issued by the High Court. **A 1960 Bom 502 (505) : 1960 Cri LJ 1558 (FB).**

(6) The issue of a directive by the President to the Indian Oil Corporation under Article 144 of its Articles of Association to hold a disciplinary inquiry against its employee being in his official capacity he is not answerable for it to any court of law under Article 361 (1) and hence he cannot be made a party to the writ petition filed against his directive the Union of India being the proper party. ILR (1971) 2 Delhi 129 (144) (DB).

(7) Under Article 361 (1) the Governor cannot be made a party to any proceedings in Court, where his decision could have been questioned on grounds available to a citizen against other authorities justifying the quashing of an impugned order. The second proviso to Article 361 (1) however shows that the party can file a writ petition against the State Government without making the Governor a party. A 1964 Cal 184 (189, 190) (DB).

6. Proceedings against Legislature.— (1) The Court has no jurisdiction to interfere with the proceedings of a Legislature and hence a Court cannot issue a mandamus against a Legislature to prevent it from passing an enactment which is in contravention of Fundamental Rights. A 1951 All 228 (233) (DB).

7. Clause (2).— (1) If a criminal prosecution is pending at the time when the President's or Governor's term of office begins, such prosecution shall be suspended during the term of office. A 1955 Hyd 241 (247) : 1955 Cri LJ 1488 (DB).

(2) The clause only prohibits the institution of criminal proceedings in a Court, and hence investigation by the police on their own initiative or information reaching them is not prohibited. A 1955 Hyd 241 (252, 253) : 1955 Cri LJ 1488 (DB).

(3) The clause embraces every kind of criminal proceeding in a Court against the President or Governor, as is made clear by the words "no criminal proceedings whatsoever". A 1955 Hyd 241 (254) : 1955 Cri LJ 1488 (DB) ** A 1966 All 305 (311) : 1966 Cri LJ 632 ** A 1958 Andh Pra 478 (479) : 1958 Cri LJ 857 ** A 1955 Hyd 264 (267, 268) : 1955 Cri LJ 1590.

(4) Every action taken by a judicial Magistrate under the Criminal Procedure Code is a criminal proceeding and when, on information laid before a Magistrate of offences alleged to have been committed by the Governor of a State, he orders investigation by the Police, there is institution of criminal proceeding. A 1955 Hyd 241 (253) (DB).

(5) The exemption under this clause is confined strictly to the President or the Governor, as the case may be, and does not extend to any other person alleged to have committed the offence at the Raj Bhavan. A 1955 Hyd 241 (254) : 1955 Cri LJ 1488 (DB).

8. Clause (3).— (1) There is no constitutional bar against the issue of a summons to the President or a Governor as witness. A 1955 Hyd 241 (245) : 1955 Cri LJ 1488 (DB).

9. Clause (4).— (1) Contract between contractor and Union of India but entered into in name of President of India — Arbitrator by mistake passing award against President — Mistake held could be corrected by Court under Section 15, Arbitration Act — Article 361 (4) protects the President from personal liability. A 1964 Cal 91 (93).

(2) Article 361 (4) which requires a notice to be delivered to the Governor before he is sued applies to all cases in which a Governor is sued in that way irrespective of the fact whether he was or was not the Ruler of the former Indian State. The protection under Article 361 (4) is in addition to that afforded under Section 87-B C. P. C. A 1963 Mys 171 (172).

(2) Clause (1) shall apply in relation to reports or matters broadcast by means of wireless telegraphy as part of any programme or service provided by means of a broadcasting station as it applies in relation to reports or matters published in a newspaper.

Explanation—In this article, "newspaper" includes a news agency report containing material for publication in a newspaper.]

(a) Inserted by Constitution (Forty-fourth Amendment) Act, 1978, S. 42 (20-6-79).

Art. 362. [Omitted by Constitution (Twenty Sixth Amendment) Act, 1971, S. 2 (28-12-71).

363. Bar to interference by courts in disputes arising out of certain treaties, agreements, etc.— (1) Notwithstanding anything in this Constitution but subject to the provisions of article 143, neither the Supreme Court nor any other Court shall have jurisdiction in any dispute arising out of any provision of a treaty, agreement, covenant, engagement, sanad or other similar instrument which was entered into or executed before the commencement of this Constitution by any Ruler of an Indian State and to which the Government of the Dominion of India or any of its predecessor Governments was a party and which has or has been continued in operation after such commencement, or in any dispute in respect of any right accruing under or any liability or obligation arising out of any of the provisions of this Constitution relating to any such treaty, agreement, covenant, engagement, sanad or other similar instrument.

ARTICLE 363 — SYNOPSIS

1. Scope.
2. Disputes arising out of agreements of accession or merger.
3. Disputes arising out of provisions of treaty, agreement, covenant, etc.
4. Rights of subjects of ex-Rulers — Enforcement after merger or accession.
5. Covenants — Interpretation.
6. Jurisdiction.

1. Scope.— (1) There are two conditions for the applicability of this article: (i) The covenant with the Rulers of Indian State must have been entered into before the coming into force of the Constitution, and (ii) the covenant must continue in force after the commencement of the Constitution. ILR (1955) 2 Cal 109 (150) (DB).

(2) The article refers to the numerous agreements and covenants entered into between the then Government of India and the Rulers of Indian States. These agreements and covenants were in the nature of treaties between two States and as such were Acts of State outside the purview of municipal Courts. A 1954 SC 447 (452) •• A 1951 SC 253 (261) •• A 1955 Pepsu 3 (14) (DB) •• A 1952 Sau 49 (54) (FB).

(3) If the question involved is of the nature contemplated by this article, even a suit or other proceeding which was pending in the Federal Court at the commencement of the Constitution aud which stood transferred to the Supreme Court under Article 374 (2) would be beyond the jurisdiction of the Supreme Court. A 1951 SC 253 (258).

(4) This article is applicable not only when there is a direct dispute between the State and the citizen but even when the dispute arises in a case to which the State of India is not a party and a claim is made either on behalf of the State or by any other party to the dispute that the subject-matter of the dispute is covered by Article 363. A 1969 Raj 52 (58) (DB) •• A 1955 Pepsu 3 (10) (DB).

(5) It is not necessary for the application of the article that the dispute must have arisen after the coming into force of the Constitution. A 1951 SC 253 (258) •• A 1955 Pepsu 3 (9) (DB).

(6) If a dispute falls under Article 363, it cannot be decided by any Court in India. The remedy lies in making an appeal to the President to make a reference to the Supreme Court of India under Article 143 of the Constitution. A 1969 Raj 52 (58) (DB).

(7) Article 362 is a provision which shuts out the jurisdiction of a Court of law and like any other provision of similar nature, it is to be construed strictly so that a citizen of India may not be denied the opportunity, except when the case strictly falls under this Article to get his right adjudicated and decided by a civil Court. A 1969 Raj 52 (58) (DB).

(8) In order to know whether any dispute arises out of the merger agreement or not, the Court has first to ascertain prima facie whether the subject-matter of the dispute falls within the scope and ambit of the agreement. If this is not so, it will be difficult to say whether in fact any dispute arises out of such an agreement. (1969) 1 Andh WR 425.

(9) It is only in such cases where the court is satisfied that conflicting rights have to be decided between the parties that it must decline to decide the rights and must stay the action, but it ought not to stay the action before that point is reached. A 1969 Raj 52 (60) (DB).

(10) Where the subject-matter of the dispute in the writ petition relates to the trust created in pursuance of a private property settlement by the ex-Ruler and does not relate to any provision of the covenant or to any constitutional provision relating to the covenant and the dispute raised by State is not a bona fide dispute, Article 363 of the Constitution cannot be invoked to oust the jurisdiction of the High Court to decide the dispute. A 1978 Raj 112 (114, 115).

(2) In this article—

(a) "Indian State" means any territory recognised before the commencement of this Constitution by His Majesty or the Government of the Dominion of India as being such a State; and

(b) "Ruler" includes the Prince, Chief or other person recognised before such commencement by His Majesty or the Government of the Dominion of India as the Ruler of any Indian State.

Article 363 — Note 1 (contd.)

(11) The paramountcy which the British Crown enjoyed vis-a-vis the Indian States is not now enjoyed by Central Government. A 1963 Punj 461 (467).

(12) Acquisition of territories of Goa, Daman and Diu by military action is an Act of State by Government of India and is not justiciable in municipal Courts. A 1969 Goa 76 (82): 1969 Lab IC 942.

(13) To be treated as a Ruler under Article 363 (1) the claimant must be recognised by the President of India as a Ruler under Article 366 (22). A 1966 Cal 570 (572) (DB).

2. Disputes arising out of agreements of accession or merger.— (1) In view of the provisions of Article 363 (1) any dispute arising out of the Merger Agreement or the Instrument of Accession is beyond the competence of the Courts to enquire into. A 1961 SC 775 (777) •• A 1953 Nag 86 (88) (FB) •• (1958) 60 Bom LR 721 •• 1973 Lab IC 1082 (1083, 1084) (Gauhati) (DB).

(2) Tripura Merger Agreement, Article VIII — Rights and Liabilities arising out of such agreement are not justiciable — A writ petition cannot be entertained on its basis. 1973 Lab IC 1082 (1083, 1084) (DB) (Gauhati).

(3) If the Parliament or State Legislature makes laws inconsistent with personal rights, privileges of a Ruler of a State, the exercise of that legislative authority cannot be questioned in any Court by relying on agreement or covenant in spite of any guarantee in that respect. A 1961 SC 196 (199) •• A 1961 All 280 (280, 281) (DB).

(4) Question whether The Rampur Thekedari and Pattedari (Abolition) Act (U. P. Act 10 of 1954) contravenes Para. 8 of States Merger (Governor's Provinces) Order, 1949 — Court has no jurisdiction to decide by virtue of Article 363. A 1955 All 518 (520) : 1955 All LJ 398 (DB).

(5) The decision of a dispute between the Raja of Mandi and the Government, as to whether a certain property was the private property of the Raja would inevitably involve a reference to, and the interpretation of the Merger Agreement and the Note of Acceptance. Article 363 (1) bars the jurisdiction of the Courts to inquire into it. A 1967 Him Pra 6 (8, 9).

(6) Any dispute raised by a third party that he owns a share in a property cleared as private property of the Ruler could not be considered to be a dispute arising out of the merger agreement and as such there would be no bar of Art. 363. ILR (1973) Him Pra 1244 (1284).

(7) Held on facts that Article 7 of the Merger Agreement with Maharaja of Manipur exempts only the civil liability for acts done or omitted to be done by the Maharaja during his administration of the State as a Ruler and not acts done or omitted to be done after he ceased to administer the State. A 1961 Manipur 40 (42).

(8) Merger agreement entered into by late Nizam with Union of India — Jurisdiction of High Court to construe terms of agreement — Not barred under Article 363 — Words 'Personal rights' in Article IV of agreement — Do not cover private property of late Nizam. ILR (1969) Andh Pra 442.

(9) Estates of Rulers of Indian States — Act in so far as it provides for assuming superintendence of such estates does not contravene Articles 291, 362 and 363. A 1961 Madh Pra 197 (198).

(10) Ruler of former Indian State is exempt from appearance in Court as a witness in Criminal case. A 1960 Punj 565 (567) : 1960 Cri LJ 1491.

(11) Bar to interfere by Courts with disputes in certain cases — Suit against successor State — Suit against ex-Shahpura was permissible — Position continued after merger of State with State of Rajasthan — Suit against the successor State held was maintainable. ILR (1970) 20 Raj 187.

3. Disputes arising out of provisions of treaty, agreement, covenant, etc.— (1) The bar of jurisdiction under this article applies only in regard to disputes arising out of any provision of a treaty, covenant, etc. of the kind mentioned in the article. ILR (1955) 2 Cal 109 (150) (DB). (A 1935 Bom 439, Rel. on.)

(2) Matsya Covenant, Art. XI — Rajasthan Covenant, Article XII — Matsya Covenant superseded by Rajasthan Covenant — Allegation that subsequently suit arose out of agreement under Rajasthan Covenant and hence not hit by Article 363 — Not maintainable. Operation of Article 363 not restricted to "parent" covenant — Every agreement whether primary or entered in pursuance of provisions of preceding agreement falls within ambit of Art. 363. A 1979 SC 126 (132).

(3) Covenant between Rulers of Travancore and Cochin States for protecting annual payment sanctioned to former Regent of Travancore by Ruler of Travancore — Dispute relating to interpretation as also enforcement of provision of Covenant — Dispute is outside pale of High Court's jurisdiction. 1976 Ker LT 508 (510).

(4) Ruler of Sirmur dying without leaving any male heir — Decision of President of India refusing to recognise the collateral of deceased Ruler as heir. Held that since the dispute did not relate to a breach of any constitutional or statutory provision but related to the breach of an agreement of merger, it was impossible to escape from the bar contemplated by both the limbs of Article 363 and suit for declaring the decision void could not lie.. ILR (1977) 6 Him Pra 501 (515) : 1977 Sim LC 440.

(5) The article will not apply when the matter in dispute is not covered by the covenant at all. A 1953 Sau 180 (188) (DB) •• A 1950 Sau 7 (8) (DB).

Article 363 — Note 3 (contd.)

(6) When the matter in dispute is covered by treaty, covenant, etc., it cannot be entertained by any Court, whether the person seeking enforcement of the covenant is deemed to be a party to the covenant or not. A 1955 SC 540 (546) ** A 1951 SC 253 (259) ** A 1959 SC 909 (912, 913) ** A 1959 Madh Pra 136 (139) ** A 1953 Nag 86 (88) (FB) ** A 1957 Cal 576 (577) ** A 1957 Trav-Co 236 (237) ** A 1956 Sau 119 (120) (DB).

[But see A 1952 Sau 49 (54) (FB).]

(7) Agreement between Ruler and Government of India — Whether succession to personal or private property was made subject-matter of the guarantee or assurance — Court can look into terms of agreement. A 1969 Andh Pra 423 (431) (DB).

(8) Article 363 takes in only the agreements, covenants or other instruments entered into between the Government of India and the ruler of Indian State as part of the arrangements for the incorporation of the ex-State agreements entered into prior to the enactment of the Constitution. There should be no bar to a litigant agitating the question in a Court of Law whether a particular property belonged to him or it belonged to erstwhile ruler of an Indian State or to the successor Government. A 1972 Raj 279 (283).

(9) The relevant agreements in which the rights of the rulers were recognised were not political agreements and were not liable to be set at naught by the unilateral act of the Union of India. A 1971 SC 530 (565, 568).

(10) Matsya Covenant, Art. XI — Government accepting certain items in inventory submitted by ex-Ruler as his private properties — Subsequently, informing that some of the items were not private properties — Held, action of Government did not amount to reviewing earlier settlement — Earlier arrangement was tentative and liable to change during the process of final settlement. A 1979 SC 126 (132).

(11) Treaties which come within the prohibition of Article 363 are continuing or living treaties. They do not include past or dead treaties. ILR (1955) 2 Cal 109 (DB).

(12) Merger of States to form Union of Pepsu by Covenant by Rulers dated 5-5-1948 — Rulers are completely divested of their sovereign power by the covenant — They are not competent thereafter to enter into supplementary covenant. A 1963 SC 222 (230). (A 1959 Punj 440, Reversed; A 1953 Pepsu 161, Overruled.)

(13) Since the right to the Privy Purse arises under Article 291 the dispute in respect of which does not fall within either clause, the jurisdiction of the Court is not excluded. Again, the jurisdiction of the Court is not excluded in respect of disputes relating to personal rights and privileges which are granted by statutes. A 1971 SC 530 (574, 578, 579). (Observations in A 1965 SC 1798, Held to be obiter and not correct.)

(14) Expenditure-tax on expenditure made out of amount of privy purse — Liability disputed — Dispute falls under Article 363 and is not justiciable. A 1963 Guj 98 (101, 102).

(15) Disputes as to liability of person to pay to State Bank of Patiala amounts determined in accordance with Patiala Recovery of State Dues Act — Reliance on Article 10 of Pepsu Covenant to get rid of liability — Article 363 applies. A 1963 SC 222 (231).

(16) Rights guaranteed by the Covenant of the United States of Rajasthan are merely political rights — Not justiciable — Recognition as Ruler under Article 366 (22) of a person who is not a legal heir to his predecessor — No infringement of Art. 19 (1) (f). A 1963 Punj 461 (467, 468).

(17) Where some dispute had arisen between a Ruler of a State and the Government of India and in pursuance of its settlement the Ruler had agreed to annual deduction from his privy purse, the Ruler cannot challenge the decision in Court as the Court action is definitely excluded under Article 363. (1968) 70 Punj LR 370 (374) (DB).

(18) A covenant called Matsya Covenant was entered into by ex-Rulers of the erstwhile States of Alwar, Bharatpur, Dholpur and Karauli. The ex-Ruler of Alwar sent inventory of his private properties to the Government of India. After discussions between the parties, the Government of India informed the ex-Ruler about its decision as to which items belonged to the ex-Ruler as his private properties. No dispute was referred to any third person as was provided in the Matsya Covenant. Held the decision as to what properties belonged to the ex-Ruler as his private properties was arrived at on mutual agreement of the parties. Therefore, any suit in Civil Court arising out of the agreement was not maintainable. A 1979 SC 126 (132).

(19) Where the dispute is whether the law passed by the State Legislature constitutes a breach of the guarantees contained in the covenant, the jurisdiction of the Courts is barred under this article. A 1952 SC 252 (312).

(20) Article 362 does not prohibit the acquisition of properties which are declared private properties by the covenant of merger. The guarantee contained in that Article is to a limited extent only. That guarantee has been fully respected by Bihar Land Reforms Act, 1950. In any event the question is not justiciable in a Court of law because of the comprehensive language of Art. 363. A 1963 Pat 475 (478) (DB). (A 1952 SC 252, Rel. on.)

(21) Where the covenant merely provides that questions of succession to Jagirdaris must be decided by the Rajpramukh, a dispute as to such succession is not one arising out of the provision in the covenant. A 1955 Raj 135 (139) (FB).

(22) The question whether under the Constitution the Rajpramukh has the power which was given to him by the covenant cannot be said to be a dispute arising out of any provision of the covenant. A 1955 Raj 135 (139) (FB).

(23) Where a covenant grants immunity from being sued in a Court of law to a Ruler of a State, the dispute in a suit for money by private person against the Ruler is not one arising out of the covenant and the jurisdiction of the Court is not barred under this article. A 1955 Bom 449 (450).

[See also A 1957 Bom 155 (160) : ILR (1957) Bom 656 (DB).]

(24) A dispute between the Ruler and his tenant relating to the right of the Ruler to eject the tenant from the land cannot be said

Article 363 — Note 3 (contd.)
to be a dispute arising out of any provisions of the agreement between the Ruler and the Government. A 1958 SC 239 (242, 243). (A 1954 Orissa 101, Reversed.)

(25) Recognition of successor — Certificate recognising person as sole successor to all private properties held by late Nawab — Jurisdiction of Courts not barred under Article 363 to agitate that matter subject to S. 87-B, Civil P. C. A 1969 Andh Pra 423 (435) (DB).

4. Rights of subjects of ex-Rulers — Enforcement after merger or accession.— (1) The covenants or treaties entered into by the Rulers of the former States are acts of State between the high contracting parties thereto and no action in a Court of law can be founded by a citizen of the new State on the strength of anything contained in the covenant. A 1960 Raj 138 (141) (DB).

(2) Where a change of sovereignty is brought about by cession the residents of the territories as subjects of the new sovereign have only such rights as are granted or recognised by the new sovereign. Such recognition may be by legislation or by agreement, expressed or implied. A 1961 Orissa 161 (164) (DB) °° A 1964 SC 1043 (1070) °° A 1962 All 425 (429) (DB) °° A 1962 Orissa 189 °° A 1960 Bom 516 (518) (DB).

(3) Where Maharaja was de-recognised by sub-clause (a) of Art. 363-A, inserted by Constitution (Twenty-sixth Amendment) Act, 1971 and his status as ruler ceased, wife of such de-recognised Maharaja also ceases to be a Maharani and cannot lay claim on property that was granted to her for enjoyment as a Maharani. 1976 MPLJ 437 (442) : ILR (1978) MP 362 (DB).

(4) Even if in the merger agreement there is a clause providing for recognition by new sovereign of any existing rights, that clause is incapable of enforcement in the municipal Courts of the new sovereign. A 1961 Orissa 161 (164) (DB).

(5) Every subject of the ex-sovereign who wants to make good in the municipal Courts of the new sovereign the rights acquired by him must show that the new sovereign has waived or relinquished his power to ignore or repudiate those rights. A 1961 Guj 151 (175) (DB).

(6) Where the new sovereign assumes jurisdiction and it does some act and there is ambiguity as to whether the same amounts to a recognition of a pre-existing right or not, the covenant and the treaty might be looked at in order to ascertain the intention and purpose of that equivocal act. **A 1964 SC 1043 (1063, 1064).**

(7) Administration of Mayurbhanj State Order (1949) Cl. 9 (g) — Merger of State — Rejection of claim by State Government — Amounts to Act of State — Municipal Courts have no jurisdiction to entertain it. **A 1961 SC 1361** (1365).

(8) Administrative or executive order passed by ruler of covenanting State before merger — Right to property created by such order cannot be enforced in the Municipal Courts of the successor State, namely India unless recognised by the successor State. A 1966 Madh Pra 32 (34) (DB).

(9) Merger of several sovereign States to form a new State — At each stage covenants keeping old laws in force and new State taking over assets and liabilities of component States — New State not repealing old laws by its legislation — Liabilities of component States continue to be enforceable — A subject thereof can enforce his rights by a suit against the new State. A 1964 SC 1495 (1499, 1500, 1501).

[See also A 1960 Raj 256 (264) : 1960 Raj LW 257 (FB).]

(10) The Nizam being supreme in the three spheres, namely the executive, legislative and judicial, prior to the inauguration of the Constitution, his act in the capacity of a sovereign, whatever may be the consequences, cannot be attacked in a Court of law on the ground that it was illegal or unconstitutional. A 1959 Andh Pra 225 (229) (DB).

(11) Hyderabad (Abolition of Cash Grants) Act (XXXIII of 1952), Section 3 (1) — Rusums mentioned in schedule to Hyderabad Act were Crown grants and were subject to resumption at pleasure of Crown — If Crown prerogatives disappeared with introduction of Constitution the right to resume cash grants disappeared with them. A 1955 Hyd 44 (46) (DB).

(12) Order of Ruler of Sant State granting full proprietary rights in forests to Jagirdars — Not a legislative act but an executive act — Could not be continued in force by Cl. (4) of Administration of Indian States Order. A 1961 Guj 151 (173). (Reversed on another point in A 1964 SC 1043.)

(13) Jaora State — Firman by Ruler D/-25-1-1941 — All power of Ruler vested in Chief Minister — Order passed by in charge Chief Minister — Held, on facts that even if the order in question had been made by the officiating or in charge Chief Minister, it was a competent order. 1960 MPLJ 1055.

(14) Order of erstwhile Ruler in Vindhya Pradesh making cash grant is an executive act and has no force of law. **A 1966 SC 704.** (A 1962 Madh Pra 257, Reversed.)

(15) The Court of the District Judge has no jurisdiction to question the validity of the decision of the Ijlas-i-khas, made in a case, as that was command of the Sovereign, which had the force of the law as well as that of a decree. A 1958 Punj 116 (120, 121, 122) (DB).

(16) Firman of Maharana of Udaipur — Firman is declaration of the sovereign power and is law and binding on all. A 1962 Raj 196 (207) (DB). (Reversed on another point in A 1963 SC 1638.)

(17) Held on facts, that as soon as the State of U. P. which was the successor Government decided to abolish the jagirs, zamindaris and muafis in pursuance of a general policy to abolish all estates in the whole of Uttar Pradesh those deriving benefits from the contracts and agreements from the ex-Ruler could not put them forward against the general policy of the successor Government. **A 1959 SC 909** (912, 913) °° 1955 All LJ 622.

(18) Agreement between Ruler and Company in shape of contract exempting company from taxes and octroi and granting certain privileges in return for certain acts done by company — Agreement is not law. **A 1964 SC 888** (891, 892).

(19) Where in an income-tax case the assessee relied upon certain tax concessions agreed to be granted to him by the Ruler of the Covenanting State, the dispute arises only out

[a][363A. Recognition granted to Rulers of Indian States to cease and privy purses to be abolished.—Notwithstanding anything in this Constitution or in any law for the time being in force—

(a) the Prince, Chief or other person who, at any time before the commencement of the Constitution (Twenty-sixth Amendment) Act, 1971, was recognised by the President as the Ruler of an Indian State or any person who, at any time before such commencement, was recognised by the President as the successor of such Ruler shall, on and from such commencement, cease to be recognised as such Ruler or the successor of such Ruler;

(b) on and from the commencement of the Constitution (Twenty-sixth Amendment) Act, 1971, privy purse is abolished and all rights, liabilities and obligations in respect of privy purse are extinguished and accordingly the Ruler or, as the case may be, the successor of such Ruler, referred to in clause (a) or any other person shall not be paid any sum as privy purse.]

(a) Inserted by Constitution (Twenty-sixth Amendment) Act, 1971, S. 3 (28-12-71).

Article 363 — Note 4 (contd.)

of the agreement between the assessee and the former Ruler of Covenanting States and not out of the covenant between the Ruler and the Government. A 1955 Pepsu 3 (10) (DB).

[See also A 1958 Madh Pra 71 (79) (DB).]

(20) Succession to Jagir in former Jaipur State — Repeal of Jaipur Matmi Rules by Covenant and of Covenant by the Constitution — Procedure under Matmi Rules not revived — Suit to establish claim lies in Civil Court. ILR (1961) 11 Raj 93.

(21) Where a civil servant claims that according to the law of the covenanting State he is entitled to certain rights the dispute is one which arises under the law and not out of any provision of the covenant. A 1954 SC 680 (682).

[See also A 1955 Pepsu 65 (72) : ILR (1955) Patiala 327 (DB).]

(22) Article 16 of the covenant creating Madhya Bharat State taken by itself is not enforceable by an individual in the Courts for the reason that the Covenant has not been made a part of law of the State by any enactment. It does not, therefore, confer on the Civil Servants retiring after the formation of Madhya Bharat an enforceable right to pension. A 1953 Madh Bha 165 (172) (DB).

(23) Merger of Rewa State in Vindhya Pradesh — Order of Maharaja of Rewa fixing pension of its servant prior to merger — Order not a law but only an executive order and the succeeding Government could set it aside by another executive order. A 1966 SC 820 (820). (A 1961 Madh Pra 154 (FB), Reversed.)

(24) Huzur order of Maharaja of Baroda granting pension and premature retirement compensation to civil servant of State after accession but before merger — By virtue of Cl. 2 of Article VIII of Merger Agreement, Successor Government is bound by the order — Forfeiture of compensation paid — Compensation cannot be recovered under Section 143, Baroda Land Revenue Code — Word 'pension' in Cl. (a) of Article VIII must have wide interpretation so as to include lump sum payable as compensation upon retirement. A 1971 SC 846 (851 to 853).

(25) Contract with the erstwhile princely State before merger, fixing retirement age as 60 years — After merger the Government servant was, however, compulsorily retired at 55 years — Held that the order of retirement was perfectly valid in terms of Fundamental Rule 56 (j). Appropriate authority has got an absolute right to compulsorily retire a Government servant on his attaining the age of 55 years as contemplated under Fundamental Rule 56 (j). ILR (1974) Him Pra 665 (675, 676).

(26) Merger of former Indian State into new State — New State can impose fresh service conditions on employees of former State because on the merger, the contracts of employment between the former State and its employees terminate automatically and those who opt to serve in the new State or are taken by it, must serve on such terms as the new State may choose to impose. 1972 Lab IC 402 (405) (DB).

(27) Article 16 of the Rajasthan Covenant does not guarantee either the retention of any public officer or his continuance on a particular post. What an officer of a former covenanting State can legitimately claim is that if kept in service, his emoluments will not be reduced and if retired, he will receive compensation or proportionate pension. A 1956 Raj 104 (107) (DB).

[See also A 1961 Ker 52 (53) : 1960 Ker LT 891.]

5. Covenants — Interpretation.— (1) The Covenant is more akin to a treaty entered into by various States rather than a Statute passed by a Legislature, and accordingly it is only appropriate if the rules to be applied to its construction are those applicable to treaties rather than those applied to interpretation of Legislative enactments. A 1952 Madh Bha 57 62 (FB).

(2) The principle that time is of essence which is often discussed in Law Courts in cases arising out of breach of contracts cannot be applied to interpretation of the Covenant. A 1952 Madh B 57 (64, 65) (FB).

6. Jurisdiction.— (1) The phrase "jurisdiction in any dispute" does not mean merely the jurisdiction to give a final decision on a lis and includes consultative jurisdiction as a reference under Section 66 of the Income-tax Act. A 1955 Pepsu 3 (8) (DB).

[But see A 1966 All 440 (446) : (1966) 62 ITR 1 (FB). (Per Desai, C. J.).]

364. Special provisions as to major ports and aerodromes.—(1) Notwithstanding anything in this Constitution, the President may by public notification direct that as from such date as may be specified in the notification—

(a) any law made by Parliament or by the Legislature of a State shall not apply to any major port or aerodrome or shall apply thereto subject to such exceptions or modifications as may be specified in the notification, or

(b) any existing law shall cease to have effect in any major port or aerodrome except as respects things done or omitted to be done before the said date, or shall in its application to such port or aerodrome have effect subject to such exceptions or modifications as may be specified in the notification.

(2) In this Article—

(a) "major port" means a port declared to be a major port by or under any law made by Parliament or any existing law and includes all areas for the time being included within the limits of such port;

(b) "aerodrome" means aerodrome as defined for the purposes of the enactments relating to airways, aircraft and air navigation.

365. Effect of failure to comply with, or to give effect to, directions given by the Union.— Where any State has failed to comply with, or to give effect to, any directions given in the exercise of the executive power of the Union under any of the provisions of this Constitution, it shall be lawful for the President to hold that a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of this Constitution.

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Article 365 shall be omitted — See the Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (19) (a) (as re-lettered by C. O. 74).

366. Definitions.—In this Constitution, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say—

(1) "agricultural income" means agricultural income as defined for the purposes of the enactments relating to Indian income-tax;

[Govt. of India Act (1935), S. 311 (2) "agricultural income"; Income-tax Act (1961), S. 2 (1).]

(2) "an Anglo-Indian" means a person whose father or any of whose other male progenitors in the male line is or was of European descent but who is

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Article 364

(1) Where an industrial dispute relates to Marmagoa which is a major port, the order of reference by the Administrator is legal whether the territory of Goa falls within the Central or State sphere. A 1969 Goa 16 (28, 29) : 1969 Lab IC 151.

Article 365

(1) Governor of a State is not an employee of the Government of India. 1977 Raj LW 390.

ARTICLE 366 — SYNOPSIS

1. General.
2. Clause (1) — "Agricultural income".
3. Clause (2) — "Anglo-Indian".
4. Clause (6) — "Corporation tax".
5. Clause (9) — Estate duty.
6. Clause (10) — "Existing law".
   (a) General.
   (b) Orders passed by Sovereign Rulers.
   (c) Acts, Rules, Notifications judicially recognised as "existing laws".
   (d) Acts etc. judicially not recognized as "existing law".
7. Clause (12) — "Goods".
8. Clause (14) — "High Court".
9. Clause (15) — "Indian State".
10. Clause (17) — "Pension".
11. Clause (19) — "Public Notification".
12. Clause (20) — "Railway".
13. Clause (22) — "Ruler".
14. Clause (24) — "Scheduled Castes".
15. Clause (25) — "Scheduled Tribes".
16. Clause (28) — "Taxation".
17. Clause (30) — Union Territory.

1. General.— (1) Although the expression "existing law" as defined in Clause (10) of this article refers only to enacted law and does not include principles of law not contained in statute law, this meaning is inappropriate in the context of Article 19, Cl. (2) and the law of

domiciled within the territory of India and is or was born within such territory of parents habitually resident therein and not established there for temporary purposes only;

(3) "Article" means an Article of this Constitution;

(4) "borrow" includes the raising of money by the grant of annuities, and "loan" shall be construed accordingly;

[Government of India Act, 1935, S. 311 (2); "borrow".]

[a][(4A). * *]

(a) (4A) as inserted by Constitution (Forty-second Amendment) Act, 1976, omitted by Constitution (Forty-third Amendment) Act, 1977, S. 11 (13-4-78).

(5) "clause" means a clause of the Article in which the expression occurs;

(6) "Corporation tax" means any tax on income, so far as that tax is payable by companies and is a tax in the case of which the following conditions are fulfilled—

(a) that it is not chargeable in respect of agricultural income;

(b) that no deduction in respect of the tax, paid by companies is, by any enactments which may apply to the tax, authorised to be made from dividends payable by the companies to individuals;

(c) that no provision exists for taking the tax so paid into account in computing for the purposes of Indian income-tax the total income of individuals receiving such dividends, or in computing the Indian income-tax payable by, or refundable to, such individuals:

[Government of India Act (1935), Section 311 (2), "corporation tax".]

Article 366 — Note 1 (contd.)

contempt, which is saved under Clause (2) of Article 19, will include not merely the statutory law but the entire law of contempt, as was recognised in India prior to the advent of the Constitution. A 1952 Orissa 318 (343) : 1952 Cri LJ 1605 (DB).

(2) The definitions given in this article are applicable only for the purpose of construing the provisions of this Constitution and they are not applicable to the interpretation of the same words occurring in other Acts. **A 1957 SC 768 (774) ** A 1953 Nag 86 (88) (FB).**

[See also A 1929 PC 181 (183).]

2. Clause (1) — "Agricultural income".— (1) The meaning of "agricultural income" as given in this definition must be adopted regardless of any other considerations. **A 1957 SC 768 (773) ** A 1943 PC 20 (21) ** A 1958 Cal 585 (586).**

(2) 'Agricultural Income' — Definition — Not restricted to one given in Income-tax Act of 1922. ILR (1972) 1 Ker 390 : 91 ITR 438 : 1972 Tax LR 1219 (1223) : 1972 Ker LJ 361.

(3) The term "agriculture" has been used both in the narrow sense of the cultivation of the field and the wider sense of comprising all activities in relation to the land. **A 1957 SC 768 (773).**

(4) The term "agriculture" cannot be confined merely to the production of grain and food products for human beings and beasts but must be understood as comprising all the products of the land which have some utility either for consumption or for trade and commerce. **A 1957 SC 768 (789) ** A 1950 Mad 566 (567, 569).**

(5) Products, which grow wild on the land or of spontaneous growth not involving any human labour or skill upon the land, are not products of agriculture and the income derived therefrom is not agricultural income. **A 1957 SC 768 (790) ** A 1949 PC 294 (296) ** A 1949 PC 13 (15) ** A 1952 Nag 205 (210) ** A 1951 Nag 425 (428) (DB).**

(6) The provincial Act imposing tax on agricultural income will not be invalid merely because it adopts a definition of agricultural income narrower than the definition in the Income-tax Act. **A 1942 FC 8 (10).**

(7) Upon a true construction of the phrase "agricultural income" used in the Maharashtra Agricultural Income-tax Act, 1962 (Mah. Act No. XLI of 1962), the word "or" was used in the sense "and" and that matter was made abundantly clear by the Amending Act 1964. Therefore the State Legislature was held competent to enact Mah. Agricultural Income-tax Act, 1962. ILR (1974) Bom 649 (666) (DB).

(8) "Agricultural income" about which a State Legislature may enact under Entry 46 of List 2 would be such income as defined in the Income-tax Act. Income derived from sale of tea grown and manufactured is not solely derived from agriculture. **A 1963 SC 760 (764).**

(9) Explanation 2, added to S. 5 of Kerala Agricultural Income-tax Act, by Amending Act (9 of 1961) is not ultra vires. **A 1964 SC 572 (574).**

(10) Assessment of Agricultural income from sale of tea grown and manufactured by seller — Computation of income already made by Central Income-tax authorities is binding on Agricultural Income-tax Officer. **A 1968 SC 1213 (1216).** ((1965) 56 ITR 193 (Ker), Overruled.)

(11) Agricultural lands are lands "assessed to land revenue" — Lands in respect of which royalty cess is payable are such lands — Rent or revenue derived from such lands is 'agri-

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(7) "corresponding Province", "corresponding Indian State" or "corresponding State" means in cases of doubt such Province, Indian State or State as may be determined by the President to be the corresponding Province, the corresponding Indian State or the corresponding State, as the case may be, for the particular purpose in question;

[Government of India Act (1935), S. 311 (2): "corresponding Province".]

(8) "debt" includes any liability in respect of any obligation to repay capital sums by way of annuities and any liability under any guarantee, and "debt charges" shall be construed accordingly;

[Government of India Act (1935), S. 311 (2), "debt".]

(9) "estate duty" means a duty to be assessed on or by reference to the principal value, ascertained in accordance with such rules as may be prescribed by or under laws made by Parliament or the Legislature of a State relating to the duty, of all property passing upon death or deemed, under the provisions of the said laws, so to pass;

[Government of India Act (1935), S. 311 (2): "Estate duty".]

(10) "existing law" means any law, Ordinance, order, bye-law, rule or regulation passed or made before the commencement of this Constitution by any Legislature, authority or person having power to make such a law, Ordinance, order, bye-law, rule or regulation:

[Government of India Act (1935), S. 311 (2)—"existing Indian law".]

Article 366 — Note 2 (contd.)

cultural income. (1963) 48 ITR 339 (341) (DB) (Ker).

(12) An income to be agricultural income should be derived from land and the land should be used for agricultural purposes. There should be a nexus between land, income and agricultural operation. (1969) 71 ITR 742 (746) (DB) (Mad).

(13) Where the assessee, a Co-operative Society, acquired through Government agricultural land paying revenue, for non-agricultural purposes, and, by order, the land was converted to non-agricultural purpose, but the assessee subsequently raised agricultural crops on the land, held that the assessee was liable to Agricultural Income-tax under the Act. 1976 Tax LR 931 (932, 933) (DB) (Kant).

(14) The real ground as regards competency of Parliament regarding taxation of income other than agricultural income, is to consider whether the land on the transfer of which the profits or gains are said to arise is possessed of all the characteristics of an agricultural land and has not acquired the potentialities of being put to industrial or residential or commercial use. Once the land under consideration has acquired any of these potentialities, it ceases to be agricultural land for the purposes of the entries in the Lists in the Seventh Schedule. (1975) 98 ITR 237 (251, 252) (DB) (Guj).

3. Clause (2) — "Anglo-Indian".— (1) Person born of English father and Khasi mother can be classed as a Khasi Tribal, but decision will have to depend on circumstances and evidence. A 1958 Assam 128 (129, 130) (DB).

(2) Obiter — It may be reasonably contended that having regard to the context, the word 'parent' in Art. 366 (2) should necessarily mean male parent and will not include the mother. A 1958 Assam 128 (137) (DB).

4. Clause (6) — "Corporation tax".— (1) A tax, in order to be deemed a corporation tax, must be a tax on income and such tax must be payable by corporations and corporations alone. A 1960 Bom 470 (475, 476).

(2) Definition of, Corporation tax cannot be employed to interpret 'Corporations' in Article 31-A (1) (c). (1972) 2 Andh LT 61 (69) (DB).

5. Clause (9) — Estate duty.— (1) Estate Duty — Charge of estate duty on property situated abroad is covered by Section 5 and not Section 21 of Estate Duty Act — The definition of 'estate duty' in Art. 366 (9) of the Constitution cannot be cut down to have operation only to the properties actually situate within the territories of India. Article 245 (2) confers unlimited extra-territorial jurisdiction upon the Union Parliament and removes the fetter imposed in this respect upon the Federal Legislature by the Government of India Act, 1935. 1974 Tax LR 309 (311, 312, 314) (Mad).

(2) The power under S. 34 (1) (c) of the Estate Duty Act (1953) to aggregate for rate purposes the lineal descendant's share with the property that passed on the death of the deceased is incidental and ancillary to the power to legislate in respect of levy of estate duty. Section 34 (1) (c) is therefore within the legislative competence of the Parliament and is within the power granted to it by Entry 87, List 1 read with Art. 366 (9). 1973 Tax LR 710 (714, 715) (DB) (AP) ** 1973 Tax LR 1084 (1088) (Andh Pra).

6. Clause (10) — "Existing law" — General.
(a) Orders passed by Sovereign Rulers.
(b) Acts, Rules, Notifications judicially recognised as existing law.
(c) Acts etc. judicially not recognized as 'existing law'.

6. Clause (10) — "Existing law" — General. — (1) Definitions in Articles 13 and 372 use the word "include" and do not purport to be exhaustive. But otherwise there does not appear to be any substantial difference between the definition of "existing law" in this article and that of "law in force" in Art. 372, Explanation I. A 1956 Madh B 138 (139, 140) : 1956 Cri LJ 621 (FB) ** A 1957 Ker 146 (149) (DB).

(2) The expression 'existing law' as defined in Art. 366 (10) and occurring in Article 254

(11) "Federal Court" means the Federal Court constituted under the Government of India Act, 1935;

(12) "goods" includes all materials, commodities, and articles;

[Government of India Act (1935), S. 311 (2): "goods".]

(13) "guarantee" includes any obligation undertaken before the commencement of this Constitution to make payments in the event of the profits of an undertaking falling short of a specified amount;

[Government of India Act (1935), S. 311 (2): "guarantee".]

(14) "High Court" means any Court which is deemed for the purposes of this Constitution to be a High Court for any State and includes—

(a) any Court in the territory of India constituted or reconstituted under this Constitution as a High Court, and

(b) any other Court in the territory of India which may be declared by Parliament by law to be a High Court[a] for all or any of the purposes of this Constitution;

[Government of India Act (1935), S. 311 (2): "High Court".]

(a) See the Judicial Commissioner's Courts (Declaration as High Courts) Act, 1950 (15 of 1950) and the Goa, Daman and Diu Judicial Commissioner's Court (Declaration as High Court) Act, 1964 (16 of 1964).

(15) "Indian State" means any territory which the Government of the Dominion of India recognised as such a State;

[Government of India Act 1935, S. 311 (1): "Indian State".]

(16) "Part" means a Part of this Constitution;

Article 366 — Note 6 (contd.)

can be equated with "Law in force" as defined in Art. 13 (3) (b) and Art. 372 (3), Expln. 1. Thus an 'existing law' as used in Art. 254 may be a law inoperative and not in force when the Constitution came into force. The words "law occurring in Art. 254 with reference to enactments other than existing laws" do not have a different scope and are not confined to enactments when enforced. **1979 All LJ 401 (420) (FB).**

(3) This clause contains an exhaustive definition of the expression "existing law" for the purpose of the Constitution and wherever the expression occurs in this Constitution, it will have the meaning given in this definition. **A 1955 All 12 (16) (DB).**

(4) Where the meaning as given in this clause will be repugnant to the context in which the expression occurs, the meaning will not apply. **A 1954 Raj 100 (103) (FB)** •• **A 1955 All 12 (16) (DB)** •• **A 1952 Orissa 318 (343) : 1952 Cri LJ 1605 (DB).**

(5) The definition of "existing law" in this clause includes only enacted law and hence "existing law" does not include the principles of law which have not been embodied in statutory form. **A 1956 Assam 166 (169) (DB)** •• **A 1956 Cal 26 (31)** •• **A 1949 Bom 71 (72) : 50 Cri LJ 147 (DB).**

(6) Customary law is not covered by the expression "existing law". **A 1954 Hyd 161 (163) (FB)** •• **A 1957 Orissa 247 (252).**

(7) The definition is otherwise very wide and includes all forms of enacted or statutory law. **A 1956 Madh B 138 (139) : 1956 Cri LJ 621 (FB).**

(8) The definition of 'law' in Art. 13 as specifically including an Ordinance is limited for the purpose of that Article. But we have Article 366 where the term "existing law" is defined to include an Ordinance. Quite apart from these definitions, we think, on general jurisprudential grounds an Ordinance will pass as law. **A 1979 Ker 56 (68) : 1978 Ker LT 552 (DB).**

(9) Regulations concerning the public services made under the Government of India Act, 1935, are "existing law". **A 1957 All 436 (438)** •• **A 1955 Pat 381 (384) (DB).**

[See however A 1958 Ker 79 (79) (DB).]

(9A) A mere executive order will not be covered by the definition. **A 1955 SC 25 (31)** •• **A 1956 Madh B 138 (139) : 1956 Cri LJ 621 (FB)** •• **A 1956 Trav-Co 117 (118) (FB)** •• **A 1951 All 257 (323) (FB)** •• **A 1957 Madh Pra 145 (147) : 1957 Cri LJ 1134.**

(10) Prospectus governing the matter of admission to medical colleges in the State is not made under any Act, Ordinance or Provisions referred to in sub-clauses (a) to (d) of Art. 366 (26A), Cl. (f) also is not attracted. The prospectus published by Kerala Government Gazette is not purported to be passed under any statutory power. It is not by virtue of any provision of any statute that it has been passed by Government. Therefore it is merely an executive order and if that violates Art. 14 it is open to any Bench of the High Court to declare that it is so. **A 1978 (NOC) 263 (Ker).**

(11) Bengal Army Regulation Governor General's Order No. 179, D/- 12-9-1836 was purely an executive order and not an existing law. **A 1972 Him Pra 26 (30, 31).**

(12) Even a notification would come under the definition if it is issued by a competent authority under a delegated power of legislation. **A 1956 Madh B 138 (139) : 1956 Cri LJ 621 (FB).**

(13) Where a law was made before the Constitution, but its life was extended by an Act passed after the Constitution it does not cease to be an existing law for the purpose of this definition. **A 1952 Cal 100 (101) (DB).**

(17) "Pension" means a pension, whether contributory or not, of any kind whatsoever payable to or in respect of any person, and includes retired pay so payable, a gratuity so payable and any sum or sums so payable by way of the return, with or without interest thereon or any other addition thereto, of subscriptions to a provident fund;

[Government of India Act (1935), S. 311 (2): "pension".]

(18) "Proclamation of Emergency" means a Proclamation issued under clause (1) of article 352;

(19) "public notification" means a notification in the Gazette of India, or, as the case may be, the Official Gazette of a State;

[Government of India Act (1935), S. 311 (2): "public notification".]

(20) "railway" does not include—

(a) a tramway wholly within a municipal area, or

(b) any other line of communication wholly situate in the State and declared by Parliament by law not to be a railway;

[Government of India Act (1935), S. 311 (2): "railway".]

(21) (Rajpramukh) [omitted by the Constitution (Seventh Amendment) Act, 1956, Section 29 and Schedule] [1-11-1956].

[a][(22) "Ruler" means the Prince, Chief or other person who, at any time before the commencement of the Constitution (Twenty-sixth Amendment) Act, 1971, was recognised by the President as the Ruler of an Indian State or any person who, at any time before such commencement, was recognised by the President as the successor of such Ruler;]

(a) Substituted by Constitution (Twenty-sixth Amendment) Act, 1971, Section 4 (28-12-71).

Article 366 — Note 6 (contd.)

(14-15) Bombay Municipal Corporation Act, 1888 extended to some areas after coming into force of the Constitution — Such extension could not mean that the Act was made after coming into force of the Constitution. A 1980 Bom 93 (114) (DB).

(16) A law will not be an existing law unless it was made by an authority which was competent to make it. A 1955 All 12 (16, 17) (DB) °° A 1965 SC 1096 (1101).

(17) A law passed by a Legislature or other authority will be an existing law only for the territory for which such Legislature or other authority had the power to make the law. A 1954 Raj 97 (98) (FB).

(18) Law passed by the Legislature of an Indian State would be an existing law for the territory covered by the State. A 1954 Hyd 207 (209, 210) (FB) °° A 1956 J and K 26 (27) (DB).

(19) Where an Indian enactment although passed before the commencement of the Constitution is not applicable to a particular territory, it will not be existing law as regards that territory. A 1955 Manipur 41 (47) : 1955 Cri LJ 1603.

(20) The definition of the expression 'existing law' includes only laws passed by a competent authority as well as rules, bye-laws and regulations made by virtue of statutory powers. It would, therefore, not include administrative orders. A 1964 SC 1043 (1064) °° 1975 Lab IC 466 (474, 475, 476) (DB) (Delhi).

(21) Per Mathur, C. J. (Prem Prakash, J. concurring) :— The term 'law' includes an order by a competent authority having the force of law. Consequently, where any agreement is forbidden by an order of the competent authority having the force of law, it shall be an agreement forbidden by law as contemplated by Section 23 of the Contract Act. A 1975 All 166 (170) (FB).

(22) The expression "law in force" has been generally used as synonymous or interchangeable with the expression "existing law" but this will be of no avail in taking the matter any further. "In force" means "in effect". (1967) 33 Cut LT 283 (292) (DB).

(23) An enactment enacted before the Constitution by a competent Legislature is an existing law. However if that enactment has been declared to be void it no longer remains an existing law. A 1961 Orissa 196 (202) (DB).

(24) The Criminal Law Amendment Ordinance (38 of 1944) was promulgated by the Governor-General who had the power to pass or make such an Ordinance and was then an 'Existing Law" on 26th January, 1950. Article 372 of the Constitution expressly provides for the continuation in force of existing laws, unless the said law is altered or repealed or amended by a competent legislature or the competent authority. When it was shown that the said Ordinance has not been repealed or rescinded by the Parliament of India or by any competent authority, it was held that the Criminal Law Amendment Ordinance, 1974 is not only an 'existing law' but continues to remain in force even today. A 1974 All 263 (265) (DB).

(25) The provisions of S. 386 (1) (a), Calcutta Municipal Act (33 of 1951) neither by express terms nor by necessary implication bind the Government. Hence the prosecution by the Government through one of its officers under Section 488, W. B. Act (3 of 1923), is not maintainable in law. A 1960 SC 1355 (1359, 1360) : 1960 Cri LJ 1684. (A 1955 Cal 282, Reversed; ILR 25 Mad 457, Overruled.)

(23) "Schedule" means a Schedule to this Constitution;

(24) "Scheduled Castes" means such castes, races or tribes or parts of or groups within such castes, races or tribes as are deemed under Art. 341 to be Scheduled Castes for the purposes of this Constitution;

(25) "Scheduled Tribes" means such tribes or tribal communities or parts of or groups within such tribes or tribal communities as are deemed under article 342 to be Scheduled Tribes for the purposes of this Constitution;

(26) "Securities" includes stock;

[Government of India Act (1935), S. 311 (2): "securities".]

[a][(26A) * *]

[a] (26A) as inserted by Constitution (Forty-second Amendment) Act, 1976, omitted by Constitution (Forty-third Amendment) Act, 1977, S. 11 (13-4-78).

(27) "Sub-clause" means a sub-clause of the clause in which the expression occurs;

Article 366 — Note 6 (contd.)

(26) The reference to the law-making bodies in the definition is wide enough to include an outside body like the Parliament of the United Kingdom. A 1959 Mad 410 (416).

(27) In a conflict between 'existing Indian law' (namely, Land Improvement Loans Act, 1883 and Agriculturists' Loans Act, 1884) and Central Act (namely 1954 Act) the Central Act prevails. A 1961 Punj 34 (42) (FB).

(28) Of the three terms "law", "law in force" and "existing law" the last is much wider in scope and import and includes such things as orders, rules, bye-laws, etc. A 1951 Mad 1015 (1020) : 1952 Cri LJ 170 (DB).

(29) Delhi Municipal Corporation Act is not an existing law within the meaning of Art. 305 — It is a fresh law. 1973 Tax LR 2546 (2555) (DB) (Delhi).

6 (a). Orders passed by Sovereign Rulers.— (1) Orders issued by absolute monarch like Ruler of erstwhile Gwalior State had force of law and would amount to existing law. A 1961 SC 298 (302, 303). (A 1953 Madh B 257 (FB), Reversed.)

(2) Whenever a dispute arises as to whether an order passed by the monarch is legislative or otherwise, it has to be scrutinized. If it is a legislative order it becomes 'Existing law". A 1964 SC 1793 (1799).

(3) Order of Ruler holding certain houses to be private property of Ruler held to be executive and not law. It is only "existing law" in pre-existing States that would be law under Art. 366 (10). A 1967 Madh Pra 6 (11) (DB).

(4) Firman of Maharana of Udaipur — Firman is declaration of the Sovereign power and is law binding on all. A 1962 Raj 196 (207) (DB).

6 (b). Acts, Rules, Notifications judicially recognized as existing law.— (1) Law of Contempt of Court was an "existing law" when the Constitution came into force. A 1968 Ker 801 (309) : 1968 Cri LJ 1424 (DB) °° A 1969 Delhi 201 (207) : 1969 Cri LJ 884 (DB).

(2) Assam Motor Vehicles Taxation Act (1936) satisfies the definition of "existing law". ILR (1966) 18 Assam 494.

(3) Approved scheme under Chap. IV-A of Motor Vehicles Act (1939), is a 'law'. A 1968 Mys 1 (2) (FB).

(4) Land Acquisition Act is an "existing law". A 1958 All 872 (876) : 1959 All LJ 17 (DB). (Reversed on another point in A 1962 SC 764.) °° A 1959 Punj 538 (541) °° A 1965 Bom 224 (238) : 67 Bom LR 101 (DB).

(5) Provisions of Section 27 of U. P. Tenancy (Amendment) Act (10 of 1947) came into force before the Constitution came into existence and so it is an existing law. A 1961 All 191 (195) : 1960 All LJ 936 (DB).

(6) Hyderabad Markets Act (2 of 1339-F) being an "existing law" cannot be challenged on the ground that its application to Telengana area violates Article 301 or affects inter-State trade or commerce. A 1964 Andh Pra 373 (377) (DB).

(7) The Letters Patent fall under the definition of existing law. A 1958 Madh Pra 333 (335) : 1958 MPLJ 298 (DB).

(8) Provisions of Weekly Holidays Act prevail over Ajmer Shops and Commercial Establishments Act (4 of 1956) as the former is an existing law and the new law is repugnant to it. A 1959 Raj 257 (259) : 1959 Raj LW 678 (DB).

(9) Punjab Tahsildari Rules (1932) whether made under Section 9, Punjab Land Revenue Act (17 of 1887) or under Government of India Act (1919), continue in force under Section 276 Government of India Act 1935 and under Article 313 of Constitution. A 1960 Punj 168 (169) (DB).

(10) Bihar Public Service Commission (Limitation of Functions) Regulations (1944), Regulation 11 (1) is an existing law and continues to be in force until altered, repealed or amended. A 1956 Pat 228 (233) (DB).

(11) The provisions of City of Bangalore Improvement Act (5 of 1945) modifying the provisions of the Mysore Land Acquisition Act (7 of 1894) are clearly provisions of an existing law. A 1962 Mys 218 (231) (DB). (Reversed on another point in A 1969 SC 477.)

(12) The Mysore Agriculturists Relief Act (18 of 1928) is an existing law within the meaning of Art. 366 (10) and therefore is saved by Article 372. A 1965 Mys 54 (58) (FB).

(13) Indian Ports Act (1908), Section 3 is an "existing law" when it was extended to Goa, Daman and Diu. A 1969 Goa 16 (25).

(14) Travancore Taxation on Income (Investigation Commission) Act (14 of 1124) was existing law. A 1962 Ker 38 (40) (FB).

(15) Travancore Adaptation and Application of Laws Order was good law in force after 26th January, 1950. A 1952 Trav-Co 14 (19).

(28) "taxation" includes the imposition of any tax or impost, whether general or local or special, and "tax" shall be construed accordingly;

[Government of India Act (1935), S. 311 (2): "taxation".]

(29) "tax on income" includes a tax in the nature of an excess profits tax;

[Government of India Act (1935), S. 311 (2): "tax on income".]

[a][(30) "Union territory" means any Union territory specified in the First Schedule and includes any other territory comprised within the territory of India but not specified in that Schedule.]

(a) Substituted for original clause (30) by the Constitution (Seventh Amendment) Act, 1956, S. 29 and Schedule (1-11-1956).

Article 366 — Note 6 (b) (contd.)

(16) Section 60 of Cantonments Act (1924) was "a law in force" at the time of commencement of Constitution and is saved by Art. 372. A 1967 All 15 (19).

(17) Act not violating S. 299 (2) of Government of India Act is an existing law within the meaning of Art. 366 (10). A 1967 Punj 225 (232) (FB).

(18) Mysore Forest Act (11 of 1900), Sec. 37 conferring powers to make rules is an "existing law" but not the "rules" framed after the Constitution. A 1967 SC 1189 (1192). (A 1963 Orissa 24, Overruled.)

(19) Bihar Sugar Factories Control Act, 1937 and Rules framed thereunder were an existing law within the Article till Essential Commodities Act, 1955 was passed and enforced. A 1969 Pat 8 (10) (DB).

(20) The Punjab Excise Act and the various Rules giving effects to the provisions of the said Act fall within the category of the existing law, as defined by Cl. (10) of Article 366 of the Constitution and their continued application are saved by Article 372 of the Constitution, till such time these are altered, repealed or amended by a competent authority. A 1979 Punj 102 (108) (DB).

6 (c). Acts, etc. judicially not recognized as "existing law".— (1) Sales Tax Act passed before commencement of Constitution — Material and substantial alterations made by amendments subsequently — Amendment even making new law for some areas of States — Original Act ceases to be "existing law" within Article 306. A 1963 Ker 202 (209, 210). (A 1962 Cal 269, Dissented.)

(2) The rules in Bihar and Orissa Education Code are merely departmental regulations which do not create any statutory or legally binding rights and duties. A 1952 Orissa 259 (259) (DB).

(3) Entry in appendix IV, East Punjab Land Resettlement Manual has no force of law. (1965) 67 Pun LR 867 (870) (DB).

(4) First and second provisos to the sub-section are ultra vires Section 299 (2) of the Government of India Act 1935 being still-born are not "existing law" within the meaning of Article 366. A 1966 Punj 507 (509) •• A 1970 Delhi 44 (52) (DB).

(5) Notification under Section 27, Bihar and Orissa Excise Act (2 of 1915) imposing countervailing duty on foreign liquor imported into State — Later notification in 1961, enhancing the duty — Held, the Act and 'previous notification being 'existing law' were saved by Articles 305 and 372 and notification was valid — Later notification was not 'existing law' and must be struck down as invalid as it violated Arts. 301 and 304. A 1966 SC 1686 (1691, 1692). (ILR (1963) Cut 93, Partly Reversed.)

(6) Rule imposing restrictions on trade and commerce made after the Constitution under rule making power conferred by Pre-Constitution Act is not 'existing law'. Mere existence of authority in State under a Pre-Constitution Act to make rules will not make rules made under that authority after Constitution as existing law. A 1967 SC 1189 (1192). (A 1963 Orissa 24, Overruled.)

(7) Provision in Pre-Constitution Act void ab initio is not existing law. A 1970 Delhi 44 (52) (DB).

7. Clause 12 — "Goods".— (1) This definition is very wide and includes all materials, commodities and articles. A 1957 Cal 326 (328) •• A 1957 Madh Pra 45 (45).

(2) The term "goods" carries with it the Implication that the materials, commodities, etc., are for purposes of trade. The expression would not include within its ambit luggage and personal effects. A 1955 Assam 249 (260) (SB).

(3) Animals and 'birds in captivity' are moveable property and are therefore "goods". A 1960 Ker 360 (360) •• 1975 Tax LR 1719 (1720) (AP) •• 1971 Tax LR 1332 (1333) : 72 Pun LR 499.

(4) Word "Goods" has not been defined in Article 366 (12) in an exhaustive manner so as to exclude incorporeal movable property from the definition. A 1969 Mad 284 (289) (DB).

(5) Expression 'goods' includes 'electricity'. A 1970 Cal 75 (78).

8. Clause (14) — "High Court".— (1) The former High Court of Bhopal cannot be regarded as a High Court for purposes of Article 132 as it does not come under any of the clauses of this definition. A 1951 Bhopal 11 (12).

(2) The definition of a High Court in Explanation 1 to Article 124 (3) is a special one with reference to the qualifications necessary for the appointment of a person as Judge of the Supreme Court and it does not conflict with the definitions contained in this clause or Article 214, Cl. (2). A 1951 Pat 305 (307) : 1952 Cri LJ 540 (DB).

(3) Explanation (b) to Cl. (2) of Article 317 does not conflict with the definition of a High Court in Art. 214 (2) (since repealed) or in this clause. A 1951 Pat 305 (307) : 1952 Cri LJ 540 (DB).

(4) Special Appellate Tribunal under Madras Act (30 of 1956) is neither a High Court nor a

Article 366 — Note 8 (contd.)
Court — Application for leave to appeal to Supreme Court against its decision not maintainable. A 1962 Mad 508 (509, 510) : (1963) 1 Mad LJ 127 (DB).

9. Clause (15) — "Indian State".— (1) The Court can take judicial notice of recognition by the Government of the Dominion of India on production of such documents as the Court might consider necessary to enable it to take judicial notice of it. A 1944 Sind 188 (190) : 46 Cri LJ 110 (DB).

10. Clause (17) — "Pension".— (1) Whether cash grant mentioned in M. P. Abolition of Cash Grants Act (16 of 1963) is pension as defined in Art. 366 (17). Quaere. A 1965 Madh Pra 77 (81) (DB).

(2) Allowance granted by a Ruler to his brother on his marriage is a maintenance allowance and cannot be a "pension". A 1969 Madh Pra 127 (129) (DB).

11. Clause (19) — "Public Notification".— (1) Printing of notice in official gazette which was not out of the press — It cannot be deemed to be good notice to public at large. A 1968 Raj 24 (27) (DB).

(2) The term Notification has to be considered in the light of the meaning provided by Rajasthan General Clauses Act and a Government order will in law become a notification when (1) it is published in Government Gazette and (2) when the publication is under proper authority. A 1966 Raj 142 (150) (DB).

12. Clause (20) — "Railway".— (1) Company originally registered as tramway under Tramways Act became a Railway after the Railways Act was applied to it except Section 135 of the same. A 1967 SC 1747 (1751, 1753).

13. Clause (22) — "Ruler".— (1) 'Ruler' in relation to an Indian State must satisfy two conditions : (i) he must have signed an agreement as provided by Art. 291, and (ii) he must be recognized by the President as the Ruler of the State. A 1955 Bom 195 (196) (DB).

(2) The Ruler recognized by the President rules over no territory, and exercises no sovereignty over any subjects. He has no status of a potentate and no privileges which are normally exercised by a potentate. He is a citizen of India with certain privileges accorded to him because he or his predecessor had surrendered his territory, his powers and his sovereignty. A 1971 SC 530 (577) : (1971) 1 SCJ 295.

(3) (Per majority, Mitter & Ray, JJ., contra.) Article 366 (22) is a provision relating to recognition of Rulers; that is the direct and only purpose of the provision — It is not a provision relating to a covenant — The qualification of a person being recognized as a Ruler is undoubtedly that he is a Prince, Chief or other person who had entered into a covenant or agreement as is referred to in Article 291 or that he is the successor to such a Ruler. Reference to the covenant or the agreement of the nature mentioned in Article 291 is for determining who may be recognized as a Ruler — Because of that reference the provision enacted with the object of conferring authority upon the resident to recognize a Ruler, will not be deemed one relating to the covenant or agreement. A 1971 SC 530 (532).

(4) (Per Hegde, J.) :— The words "other person" in the first part of Art. 366 (22) means some one analogous to a Prince or Chief of a former Indian State who had entered into the Covenant or Agreement referred to in that clause. It cannot be some third person because no person other than a Ruler of an Indian State had entered into any Covenant or Agreement with the Dominion of India. A 1971 SC 530 (614) : (1971) 1 SCJ 295.

(5) The definition of Ruler in this clause is artificial and is therefore applicable only for interpreting the provisions of the Constitution. A 1953 Nag 86 (88) (FB).

(6) Recognition as a Ruler does not alter his status as an Indian citizen which he has after the Constitution. A 1964 SC 444 (447).

(7) "Ruler" as defined in Orissa Private Lands of Ruler (Assessment of Rent) Act (13 of 1958) has a wider import than the definition in Article 366 (22). A 1964 SC 1195 (1199).

(8) The definition of 'Ruler' prescribed by Art. 366 (22) is an inclusive definition and its latter part takes in successors of a 'Ruler' who satisfy the test of its first part, and so, the son who has been recognized by the President as the successor of his deceased father, must be held to be a Ruler under Art. 366 (22). A 1964 SC 1663 (1665) : (1965) 1 SCJ 273.

(9) Consent to sue a former Ruler is no consent to sue his successor. Successor recognized under Art. 366 (22) has, in his own independent right, the personal immunity from civil action. A 1969 Andh Pra 106 (108) (DB).

(10) To be treated as a Ruler under Art. 363 (1) the claimant must be recognized by the President as a Ruler under Art. 366 (22). A 1966 Cal 570 (572) (DB).

(11) Orissa State Lands of Rulers (Assessment of Rent) Act (13 of 1958), Sec. 5 proviso would apply to the private lands of Rulers as defined in Art. 366 (22) but not to the private lands of their dependants or relatives. ILR (1964) Cut 948 (951) (DB).

(12) The rights guaranteed to a Ruler are not "property", and as such non-recognition of a legal heir of a past Ruler does not involve infringement of property rights under Art 19 (1) (f). A 1963 Punj 461 (467).

(13) The paramountcy which the British Crown enjoyed vis-a-vis the Indian States is not now enjoyed by Central Government. A 1963 Punj 461 (467) (DB).

(14) Ruler of former State of Bastar which had ceded to Government is an ex-Ruler for the purposes of M. P. Abolition of Proprietary Rights (Estate, Mahals, Alienated Lands) Act (1 of 1951) — By agreement of merger, a Ruler of former State ceases to be a Ruler but for purposes of Constitution and for privy purse — Even a Court may not recognize him as Ruler for purposes outside Constitution. A 1961 SC 775 (778).

(15) Provisions of Sec. 87-B, Civil P. C. granting personal privilege of immunity are not ultra vires of Arts. 14 and 19 (1) (f). A 1969 Andh Pra 106 (107) (DB).

(16) The power of President to recognise a Ruler is a political power which is not justiciable. President also has power to withdraw such recognition. Recognition does not invest a Ruler with the private property of ex-Ruler.

Article 366 — Note 13 (contd.)
(1969) 2 SCWR 699 ** A 1969 Andh Pra 423 (435, 437) (DB).

(17) Unless it is shown that the action of the President is without authority, ultra vires, or non-est, the decision taken by the President acting under Cl. (22) of Article 366 is not open to revision by a Civil Court. The 26th Amendment of the Constitution which came into force during the pendency of the suit being prospective in nature would not make the suit infructuous if it is otherwise maintainable. 1977 Sim LC 440 (452, 453) (Him Pra).

(18) (Per Hegde, J.) Order dated 6-9-70 by President derecognising Rulers of former Indian States being for a collateral purpose i. e., to do that indirectly what could not be done directly in Parliament must be held to be ultra vires Art. 366 (22). **A 1971 SC 530 (618) : (1971) 1 SCJ 295.**

(19) (Per Majority; Mitter and Ray, JJ. Contra) :— Power may be exercised in the course of and for recognising another person as a successor to the Ruler, having regard to the laws and customs governing the State. The President is not competent to recognise a person as a Ruler who is not by the custom and laws governing succession to Rulership qualified to be a Ruler. The President cannot obviously withdraw recognition of a Ruler and recognise another person, as a matter of political patronage. **A 1971 SC 530 (569) : (1971) 1 SCJ 295.**

(20) In recognising or derecognising Ruler, President exercises executive and not political power. (Per Majority; Ray, J., Contra.) **A 1971 SC 530 (564, 565) : (1971) 1 SCJ 295.**

(21) The recognition of the Ruler is a right to succeed to the gaddi of the Ruler. This recognition of Rulership by the President is an exercise of political power vested in the President and is thus an instance of purely executive jurisdiction of the President. The recognition of Rulership is one of personal status The right to private properties of Rulers are not the matters of recognition of Rulership. The recognition of Rulership is not an indicia of property but it entitles the Rulers to the enjoyment of the privy purse contemplated in Article 291 and the personal rights, privileges and dignities of the Ruler of an Indian State mentioned in Article 362 of the Constitution. Therefore, recognition of Rulership is not a deprivation of right to property. The most significant words in Cl. (22) of Article 366 are 'for the time being is recognised by the President', not only in relation to a Ruler but also in relation to a successor of such Ruler. These words indicate beyond any doubt that the power of the President to recognise a Ruler is embedded and inherent in the clause itself. Again, the words 'for the time being' indicate that the President has power not only to recognise but also to withdraw recognition whenever occasion arises. **A 1970 SC 1946 (1949) : (1970) 2 SCJ 343.**

14. Clause (24) — "Scheduled Castes".— (1) For determination of backward classes, caste cannot be exclusive consideration. A 1967 Andh Pra 353 (359) (DB).

(2) Reserved seat for Backward Classes for election to Panchayat Election Board under Madras Village Panchayat Act cannot be contested by a convert to christianity. ILR (1963) Andh Pra 500 (507) (DB).

(3) The definition of the "Scheduled Castes" has reference only to those castes, races or tribes as are mentioned to be scheduled castes under Article 341 of the Constitution of India. Under this Article, the President has to specify by public notification castes, races or tribes or parts of or groups within castes, races or tribes which are to be deemed to be scheduled castes in relation to any State or Union territory. The declaration has to be made in respect of a particular State or Union territory and where it is not a State, after consultation with the Governor thereof. From the use of the expressions "with respect to any State or Union territory" and "in relation to that State or Union territory" in Art. 341 (1) it is clear that the declaration of scheduled castes has relation only to that particular State or Union Territory for which declaration is made and not for other State or Union Territories. Under the Constitution (Scheduled Castes) Order 1950 also the declaration of castes, races or tribes as scheduled castes are applicable only to those members who were residents of the localities in respect of which these castes, races and tribes have been declared to be scheduled castes. Hence a member of a caste declared to be scheduled caste in one State and residing therein cannot be considered as belonging to scheduled caste of another State. ILR (1976) 1 Punj 769 (773) (DB).

15. Clause (25) — "Scheduled Tribes".— (1) Members embracing Christianity do not cease to be Oraons and are entitled to rights and privileges of tribals — They can contest election to Parliamentary seat meant for Scheduled Tribes. A 1964 Pat 201 (206) (DB).

(2) The best to determine the question appears to be that Pangwala is a person who is a resident of Pangi, has merged or absorbed himself among Pangwalas and has been adopted or accepted by Pangwalas as one of them. An adopted stranger may be as much a Pangwala as a person whose ancestors had settled in Pangi. Link of consanguinity of ethnical affinity may be one of the elements that go to constitute a tribe but a tribe as it expands depends more and more on common social and political institutions and less on actual kinship. (1968) 39 Ele LR 99 (118) (Delhi).

16. Clause 28 — "Taxation." — (1) The special contribution payable by an employer under Chapter V-A of the Employees' State Insurance Act, 1948, is a "tax". A 1957 All 136 (139, 141) (DB).

(2) Toll levied by Government on motor vehicles passing over a certain bridge was held to be a "tax." A 1958 Raj 138 (139).

(3) There can be no doubt that Customs duty or Excise duty is an impost within the meaning of Article 366 (28). Effect of Article 366 (28) read with Articles 245, 285 (1) and 289 (1) is that property of the Union is not to be taxed in State and vice versa. **A 1963 SC 1760 (1781).**

(4) Licence fee under Sections 298 (2) and 294 on owners and drivers of rickshaws is not tax but fee involving element of quid pro quo — Fee fixed held disproportionate to service rendered and was ultra vires. **A 1962 All 277 (285) : 1962 All LJ 63 (FB).**

367. Interpretation.— (1) Unless the context otherwise requires, the General Clauses Act, 1897, shall, subject to any adaptations and modifications that may be made therein under article 372, apply for the interpretation of this Constitution as it applies for the interpretation of an Act of the Legislature of the Dominion of India.

(2) Any reference in this Constitution to Acts or laws of, or made by, Parliament or to Acts or laws of, or made by, the Legislature of a State [a][* *], shall be construed as including a reference to an Ordinance made by the President or, to an Ordinance made by a Governor, [b][* * *] as the case may be.

Article 366 — Note 16 (contd.)

(5) Levy is also a kind of tax and Constitution does not make any distinction between the two. A 1967 All 19 (23) : 1966 All LJ 622 (DB).

(6) The word "tax" would include not only taxes but also cesses and fees. **A 1966 Goa 1 (16) (FB).**

(7) Under Article 366 (28) the tax includes imposition of any tax or impost which means every variety of impost, and the mandate is that the word 'tax' shall be construed accordingly. (1968) 1 Mys LJ 524 (DB).

(8) 'Impost' is a word of wide import which includes fee as well. Therefore the word 'tax' in Article 275 includes 'fee' as well. The expression 'tax' in Article 265 of the Constitution includes 'fee' and no fee can be levied or collected except by authority of law. 1975 BBCJ 397 (399) (DB) (Pat).

(9) Royalty on minerals under Bihar Minor Mineral Concession Rules, 1964 is not fee but tax within Article 366 (28). A 1965 Pat 491 (494) (DB).

(10) Royalty under Punjab Minor Mineral Concession Rules (1964) can neither be classed as tax nor fees but it is more akin to rent. A 1969 Punj 79 (90) (DB).

(11) Article 15 of the Schedule 1 of the Bombay Court-fees Act, 1959 imposed a tax in the guise of a fee and is not covered by one of the taxation entries in the State list of the 7th Schedule of the Constitution of India. Hence it was not competent to the State legislature to enact this particular Article in the Schedule of the Bombay Court-fees Act. **(1973) 14 Guj LR 537 (567) (FB).**

(12) It is true that the expression "Union territories" bears a different meaning in the framework and the scheme of the Constitution. Delhi is a "Union territory" under the Constitution of India. But in the context of the Industrial Disputes Act, the Union Territory of Delhi is a "State". **1975 Lab IC 1265 (1268, 1269) (FB) (Delhi).**

ARTICLE 367 — SYNOPSIS

1. Applicability of General Clauses Act to interpretation of the Constitution — (Clause (1)).
2. "Foreign State" Clause (3).
3. Definition of State. See Notes under Art. 12.
4. Person.
5. Pre-Constitution Laws.

1. Applicability of General Clauses Act to interpretation of the Constitution — (Clause (1)).— (1) The General Clauses Act, 1897, was enacted for the purpose of the interpretation of the enactments of the Central Legislature. Under Art. 372 this Act continues in force even after the Constitution. A 1951 All 703 (708) : 52 Cri LJ 1094.

(2) The word "interpretation" in the clause has been used in the sense which would include "construction" also. A 1951 All 703 (708) : 52 Cri LJ 1094.

(3) As Article 367 does not mention Article 372-A changes made in General Clauses Act under Art. 372-A cannot be applied in interpreting Constitution. **1975 Lab IC 1265 (1271) (FB) (Delhi).**

(4) Not only the "general definitions" in the General Clauses Act, but also the "General Rules of Construction" in the Act will apply to the Constitution. A 1951 All 703 (708) : 52 Cri LJ 1094.

(5) The General Clauses Act is to be used for all purposes for which it is used in respect of Acts. A 1951 All 703 (708) : 52 Cri LJ 1094.

(6) Under Section 5 (3) of the General Clauses Act, an Act comes into operation immediately on the expiration of the day preceding the commencement of the Act. Applying the same principle to the Constitution (which under Article 394 came into force on the 26th January 1950, except certain provisions), it must be deemed to have come into operation immediately on the expiration of the 25th January 1950 and not after 10 A. M. on the 26th January 1950 when the President took the oath. A 1952 Madh B 31 (35) (DB).

(7) Notification, dated 25th May, 1961 altering age of superannuation from 58 years to 55 years — Governor was competent to issue notification in view of Art. 309 read with Art. 367 (1). **A 1962 All 328 (332) : 1962 All LJ 31 (FB).**

(8) By virtue of Section 16 of the General Clauses Act, the power of "appointment" conferred by Article 229 (1) of the Constitution on the Chief Justice of a High Court would include the power of dismissal. **A 1956 SC 285 (291).**

(9) Definition of 'offence' contained in Section 3 (38) of the General Clauses Act applies to Article 20 (3). A 1958 Cal 682 (685) : 1958 Cri LJ 1469 (DB). **(Overruled** on another point in A 1962 SC 759.) ** 1979 STI 49 (52) (DB) (Punj).

"A" in the citations stands for AIR

(3) For the purposes of this Constitution "foreign State" means any State other than India:

Provided that, subject to the provisions of any law made by Parliament, the President may by order declare any State not to be a foreign State for such purposes as may be specified in the order.

(a) The words "specified in Part A or Part B of the First Schedule" omitted by the Constitution (Seventh Amendment) Act, 1956, S. 29 and Schedule (1-11-1956).

(b) The words "or Rajpramukh", omitted, ibid.

Note—See the Constitution (Declaration as to Foreign States) Order, 1950, published as C. O. 2, dated 23-1-1950, declaring Commonwealth countries as not foreign States for the purposes of the Constitution—Gaz. Ind., 1950, Ext. p. 80N.

JAMMU AND KASHMIR

In its application to the State of Jammu and Kashmir, to Art. 367 shall be added the following clause, namely:—

"(4) For the purposes of this Constitution as it applies in relation to the State of Jammu and Kashmir,—

(a) references to this Constitution or to the provisions thereof shall be construed as references to the Constitution or the provisions thereof as applied in relation to the said State.

Article 367 — Note 1 (contd.)

(10) Applying Section 21 of General Clauses Act read with Article 367 (1), it becomes clear that power of Rajpramukh or Governor under Article 309 includes a power to add, to amend, vary or rescind the Civil Service Rules once made. A 1961 Mys 37 (41) (DB).

(11) Interpretation of Statutes — Provisions should be so read as to harmonise one with the other and as to advance the remedy intended by the statute. (1967) 2 Andh WR 53 (DB).

(12) On reading Sections I4 and 21 of the General Clauses Act, it would follow that the power to make rules regulating the conditions of service also implies a power to vary, amend or rescind these provisions issued in the form of Notifications, Orders or Rules. (1967) 10 Law Rep 555 (DB) (Mys).

(13) Inclusive definition of State in Section 3 (58), General Clauses Act, being repugnant to subject or context of Art. 246 does not apply by virtue of Art. 367. **A 1968 SC 637 (641).**

(14) By virtue of this article, Section 3 (58), General Clauses Act applies to interpretation of Article 3. Hence "State" in that article includes Union Territories. **A 1966 SC 644 (648).** (The contrary assumptions in A 1966 SC 845 held not correct.)

(15) General Clauses Act (1897), Section 8 — The words "under sub-sec. (2) (b) of Section 241 of the Act" occurring in Fundamental Rule 2 have to be construed as "under Art. 309 of the Constitution". 1972 All LJ 905 (907).

(16) The U. P. Fundamental Rule 56 (Amendment and Validation) Act (5 of 1970) is within legislative competence of U. P. Legislature — Section 21 of the General Clauses Act does not apply. **1971 Lab IC 418: A 1971 All 178 (183) (FB).**

(17) Provisions in respect of Jammu and Kashmir — Interpretation of Art. 370 — Section 21 of General Clauses Act is applicable — Power of making orders under Article 370 — Can be exercised from time to time. **1970 Lab IC 873 : A 1970 SC 1118 (1124).**

(18) Members of Police force belonging to Union Territory can have their jurisdiction extended to other States — Article 372-A conferred fresh power on President to adapt General Clauses Act. **A 1970 SC 1126 (1131).**

(19) By virtue of the Constitution (Application to Jammu & Kashmir) Second Amendment Order (1965) as made under Art. 370 (1) by the President, sub-cl. (b), clause (4) of Art. 367 was amended and accordingly reference to Sadar-i-Riyasat is to be construed as reference to Governor. By virtue of Section 18 of General Clauses Act, as the Governor is the successor to the Sadar-i-Riyasat, he would be entitled to exercise all the powers of the Sadar-i-Riyasat. The nature of the explanation to Article 370 (1) of the Constitution, does not bring about any alteration either in the frame work or the fundamentals of the Jammu & Kashmir Constitution. State Governor still continues to be the head of the Government aided by a council of ministers and the only change effected is his designation and the mode of his appointment. **A 1972 SC 963 (967 to 970) : 1972 Cri LJ 597.**

(20) Jurisdiction of Governor under Article 188 — Concurrent with persons appointed by him under Art. 188 — Option to choose between them vests in the member. This conclusion follows both from the construction of the Constitutional provisions of Arts. 188 and 367 read with Ss. 14 to 16 of the General Clauses Act 1897 and the general accepted theory that an authority which delegates its powers does not divest itself of its powers and can resume them in full or in part. A 1978 Mad 342 (349, 351).

(aa) references to the person for the time being recognised by the President on the recommendation of the Legislative Assembly of the State as the Sadar-i-Riyasat of Jammu and Kashmir, acting on the advice of the Council of Ministers of the State for the time being in office, shall be construed as references to the Governor of Jammu and Kashmir;

(b) references to the Government of the said State shall be construed as including references to the Governor of Jammu and Kashmir acting on the advice of his Council of Ministers:

Provided that in respect of any period prior to the 10th day of April, 1965, such references shall be construed as including references to the Sadar-i-Riyasat acting on advice of his Council of Ministers:

(c) references to a High Court shall include references to the High Court of Jammu and Kashmir;

(d) references to the permanent residents of the said State shall be construed as meaning persons who, before the commencement of the Constitution (Application to Jammu and Kashmir) Order, 1954, were recognised as State subjects under the laws in force in the State or who are recognised by any law made by the Legislature of the State as permanent residents of State; and

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Article 367 — Note 1 (contd.)

(21) Power to suspend District Judges pending disciplinary proceedings is excluded from power of Governor under Art. 233. **A 1973 Orissa 244 (256) (FB).**

(22) In interpreting Art. 165 of the Constitution, the Court should take note of Article 367. Both on the terms of Art. 367 and on the language of Section 13 of the General Clauses Act, the implication that the provision in the singular for appointment of an Advocate-General would include the plural is to be read "unless there is anything repugnant in the subject or context". The provisions of the Rules framed under Art. 165 (2) and (3) persuade the Court to hold that in actual practice, it is possible to secure a smooth and harmonious functioning of two incumbents the Advocate-General and the Additional Advocate General in the same office. 1978 Lab IC 1336 (1339) (DB) (Ker).

2. "Foreign State" — (Clause (3)). — (1) When a question arises as to the boundary between one country and foreign country adjacent to it, the municipal Courts can only act on the view of the Government of the country and cannot decide the question independently. **A 1949 FC 143 (146, 147).**

(2) Under the proviso to clause (3) read with Article 392 (3), the Governor-General has promulgated the Constitution (Declaration as to Foreign States) Order, 1950. The effect of the Order is only that a State in the Commonwealth is not a foreign State for the purpose of the particular article of the Constitution in which the expression "foreign State" occurs. A 1957 Madh B 1 (3) (DB) ** A 1956 Madh B 211 (213) (DB).

(3) Where the question was whether a decree passed on 3-1-1951 by Palghat Court which was a foreign Court vis-a-vis the State of Travancore by virtue of the definition in Section 2 (5), Travancore Civil P. C. (1100 M. E.), could be executed in a Court at Perumbavoor in Travancore it was held that the interpretation clause in Article 367 (3) could not have any effect on the question. **A 1958 Ker 15 (17) (FB).**

(4) Declaration as to Foreign States Order, 1950 does not have the effect of making citizens of Pakistan, Indian citizens for purposes of Article 7. A 1961 Pat 112 (115, 116) : 1961 (1) Cri LJ 412 (DB).

(5) By reason of Art. 367 (3) State of West Bengal was no longer a foreign State with reference to the State of Mysore. But this only applied to judgments pronounced after commencement of the Constitution. A 1960 Mys 1 (6) (DB).

(6) The old Mysore State and State of Madras are now not foreign States in relation to each other. A 1952 Mys 69 (73) (DB).

(7) Pakistan may not be foreign State by virtue of Clause 2 of the Constitution (Declaration as to Foreign States) Order, 1950 — But that does not mean that a citizen of Pakistan becomes a citizen of India in order to claim fundamental right under Article 19. A 1965 Cal 312 (320) : 1965 (1) Cri LJ 679 (DB).

(8) The Constitution (Declaration as to Foreign States) Order 1950, made under Article 392 (3) read with Article 367 (3) does not take Pakistan outside the category of foreign powers. Pakistan is a foreign power for purpose of Section 3 of Preventive Detention Act (1950). **A 1960 SC 625 (627, 628): 1960 Cri LJ 764.**

3. Definition of State.— See Notes under Article 12.

4. Person.— (1) Ad hoc committee superseding managing committee of a school is a domestic tribunal. The domestic tribunal is a 'person' as per definition in the General Clauses Act. A 1959 Tripura 27 (32, 33).

(2) Word 'person' — Managing Committee of School is a 'person' as per definition in Section 3 (42) of the General Clauses Act. A 1969 Orissa 30 (31) (DB).

(3) Under Section 3 (42) of the General Clauses Act, "person" shall include any company or association or body of individuals, whether incorporated or not. The same meaning must be applied to the word "person" used in Article 226 or elsewhere

(e) references to a Governor shall include references to the Governor of Jammu and Kashmir:

Provided that in respect of any period prior to the 13th day of April, 1965, such references shall be construed as references to the person recognised by the President as Sadar-i-Riyasat of Jammu and Kashmir and as including references to any person recognised by the President as being competent to exercise the powers of Sadar-i-Riyasat" — See the Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. 14 (b) (as substituted, amended, relettered by C. O. 56 and C. O. 74.)

PART XX

AMENDMENT OF THE CONSTITUTION

368. [a][Power of Parliament to amend the Constitution and procedure therefor].— [b][(1) Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article.]

[b][(2)] An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and

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Article 367 — Note 4 (contd.)
in the Constitution also. A 1953 Cal 289 (291).

(4) A corporation which is a person by virtue of Section 3 (42), General Clauses Act read with Article 367, is a citizen and eligible for rights under Article 19. A 1961 Ker 268 (280).

5. Pre-Constitution Laws.— (1) The expression 'Law made by the Legislature of State' in Article 254 (1) and Art. 367 (2) refers to a post-Constitution law. A 1960 Bom 532 (538, 539) (DB).

(2) Consultations under Article 234 held before 26-1-1950 — Section 6 of the General Clauses Act read with Article 367 will save validity of the consultation. A 1968 All 67 (73).

(3) The declaration by the Government must be declared void as from date of enforcement of Constitution. A 1954 All 608 (617, 622) (DB).

(4) C. P. and Berar Sales Tax Act (XXI of 1947), Section 2 (g). Expl. II (as originally enacted and in force during the material period) was intra vires by virtue of Sec. 6 of General Clauses Act read with Art. 367. 1961 MPLJ 894 (DB).

(5) Offence committed and prosecution launched before Constitution came into force — Result of prosecution not affected in view of Section 6 of the General Clauses Act. A 1951 Mys 26 (27) : 52 Cri LJ 251 (DB).

ARTICLE 368 — SYNOPSIS

1. Scope.
2. Methods of amendment.
3. Procedure.
4. Amendment of Fundamental Rights.
5. Constitution (17th Amendment) Act 1964.

1. Scope.— (1) Any attempt to amend the Constitution by a Legislature other than the Parliament and in a manner different from that provided in the article will be void and inoperative. A 1958 Bom 94 (98) (DB).

(2) Section 9 of the Industrial Disputes Act, 1947, cannot take away the jurisdiction of the High Court under Article 226, inasmuch as such right can only be abridged by an amendment as provided in this article. A 1951 Raj 161 (163) (DB).

(3) It cannot be said that the power of amending the Constitution provided for under this article is conferred not on Parliament but on the two Houses of Parliament as a designated body. **A 1951 SC 458 (461).**

(4) Since constitutional amendment falls within the exclusive power of Parliament, the fact that the effect of such amendment is to save matters covered by the State List in the Seventh Schedule is of no consequence. **A 1951 SC 458 (464).**

(5) This article does not in terms exempt Article 1 or the First Schedule from its operation. A 1957 Andh Pra 734 (736) (DB).

(6) Article 4 is as much a part of the Constitution as this article. Both of them should, therefore, be read together. A 1957 Andh Pra 734 (738) (DB) ** A 1957 Bom 165 (168) (DB) ** **A 1960 SC 845 (859). (Overruled** in A 1966 SC 644 on another point.) ** A 1961 Andh Pra 50 (53) (DB).

(7) Section 6 (a) of the Judicial Commissioners' Courts (Declaration as High Courts) Act, 1950, does not purport to amend any part of the Constitution and, therefore, it is not ultra vires. A 1952 Him Pra 5 (6) : 1952 Cri LJ 114.

(8) It was held by the Supreme Court that the adaptation of this article made by the President by the Constitution (Removal of Difficulties) Order No. 2 of 26-1-1950 was within the powers conferred on him by Article 392 and was valid and constitutional. **A 1951 SC 458 (462, 463).**

(9) Dispute regarding boundaries between India and Pakistan — Reference to Tribunal by both countries — Transfer of certain territory to Pakistan in pursuance of award — It is not cession of Indian territory — No alteration in Article 1 involved — Constitutional amendment under Art. 368

when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, [c][it shall be presented to the President who shall give his assent to the Bill and thereupon] the Constitution shall stand amended in accordance with the terms of the Bill:

Provided that if such amendment seeks to make any change in—

(a) article 54, article 55, article 73, article 162 or article 241, or

(b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or

(c) any of the Lists in the Seventh Schedule, or

(d) the representation of States in Parliament, or

(e) the provisions of this article,

the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States [e][* * *] by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.

[d][(3) Nothing in article 13 shall apply to any amendment made under this article.]

[f][(4) No amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this article [whether before or after the commencement of section 55 of the Constitution (Forty-second Amendment) Act, 1976] shall be called in question in any court on any ground.

(5) For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article.]

(a) Substituted for marginal heading "Procedure for amendment of Constitution" by Constitution (Twenty-fourth Amendment) Act, 1971, S. 3 (5-11-71).

(b) Art. 368 renumbered, cl. (2), and before such renumbered cl. (2), cl. (1) inserted, ibid.

Article 368 — Note 1 (contd.)

not necessary. A 1969 Delhi 64 (71, 72) (DB).

(10) Debates in Constituent Assembly cannot be taken into account for interpretation of Article 368. **A 1967 SC 1643 (1682, 1728). (Overruled** on another point in A 1973 SC 1461.)

(11) Article 368 provides for the procedure for the amendment of the Constitution. The power to amend Constitution must inevitably include the power to amend Article 1 and that logically would include the power to cede national territory in favour of a foreign State. **A 1960 SC 845 (856).**

(12) Division of Berubari Union No. 12 — Act intends division half and half in substance and not in a mathematical way. **A 1966 SC 644 (650).**

(13) The Chandernagore Merger Act promulgated by Parliament under Article 3 is not to be deemed to be an amendment of the Constitution for purpose of Article 368. A 1962 Cal 248 (250) : (1961) 43 ITR (ED) 59.

(14) Article 368 does not enable Parliament to alter the basic structure or framework of the Constitution. Therefore it cannot be said that the power of Parliament to amend the Constitution is plenary and is not subject to any limitations. **A 1975 Andh Pra 315 (349) (FB).**

(15) Article 368 does not enable Parliament to alter the basic structure or framework of the Constitution. But the fundamental rights under Articles 14, 19 and 31 in so far as they relate to property rights do not constitute the basic structure or essential features of the Constitution. Right to property conferred by Articles 19 and 31 and the right of equality in its relation to right to property cannot form the basic structure or essential features of the Constitution, and are not outside the purview of the amending power of Parliament. So far as the rights under Articles 14, 19 and 31 in relation to property are concerned the Parliament has power to abridge or abrogate the same by exercising the power of amendment under Article 368. Therefore the provisions of the A. P. Land Reforms (Ceiling on Agricultural Holdings) Act are protected by the provisions of Articles 31-A, 31-B and the first part of Article 31-C of the Constitution from attack on the basis of Arts. 14, 19 and 31. **A 1975 Andh Pra 315 (333, 338, 339, 340) (FB).**

(16) The Parliament by adding clause (5) to Art. 352 merely made explicit what was implicit in Art. 352 prior to its amendment by the Constitution (38th Amendment) Act, 1975. The basic structure of the Constitution as it existed prior to the 38th amendment never contemplated judicial review of President's action under Art. 352 excluding

(c) Substituted for words "it shall be presented to the President for his assent and upon such assent being given to the Bill", ibid.

(d) Inserted, ibid.

(e) The words "specified in Part A or Part B of First Schedule" omitted by the Constitution (Seventh Amendment) Act, 1956, S. 29 and Schedule (1-11-1956).

(f) Inserted by Constitution (Forty-second Amendment) Act, 1976, S. 55 (3-1-77).

JAMMU AND KASHMIR

In its application to the State of Jammu and Kashmir, to Art. 368,—

(a) a proviso shall be added, namely:—

"Provided further that no such amendment shall have effect in relation to the State of Jammu and Kashmir unless applied by order of the President under cl. (1) of Art. 370."

(b) After clause (3) of article 368, the following clause shall be added, namely:—

"(4) No law made by the Legislature of the State of Jammu and Kashmir seeking to make any change in or in the effect of any provision of the Constitution of Jammu and Kashmir relating to—

(a) appointment, powers, functions, duties, emoluments, allowances, privileges or immunities of the Governor; or

(b) Superintendence, direction and control of elections by the Election Commission of India, eligibility for inclusion in the electoral rolls without discrimination, adult suffrage and composition of the Legislative Council, being matters specified in sections 138, 139, 140 and 50 of the Constitution of Jammu and Kashmir,

shall have any effect unless such law has, after having been reserved for the consideration of the President, received his assent.".

See Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (15).

NOTE:— Provisions as to amendments to the Constitution in selected other countries are as under:—

(1) U. S. Constitution article V contains process of constitutional amendments. The process involves two stages — initiation and ratification. The proposal to

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Article 368 — Note 1 (contd.)

the Court's jurisdiction, therefore, does not change any basic structure of the Constitution. Therefore the Constitution (38th Amendment) Act is valid. 1977 Cri LJ (NOC) 89 (DB) (All).

(17) Maintenance of Internal Security (Amendment) Ordinance (1975) and Maintenance of Internal Security (Second Amendment) Ordinance (1975) do not seek to amend any provision of the Constitution and therefore cannot be said to be amending any basic feature of the Constitution. They only seek to amend the provisions of the Maintenance of Internal Security Act. These ordinances though violating the fundamental rights guaranteed under Arts. 14, 21 and 22. do not amend any provision of the Part III of the Constitution. In exercise of his ordinance making power under Art. 123 (3) of the Constitution the President has only chosen to amend the Maintenance of Internal Security Act and has not touched any provision of the Constitution as such. A 1976 AP 1 (32) (DB).

(18) The Constitution (Fortieth Amendment) Act placing the amended statutes in issue in the Ninth Schedule cannot be questioned nor those Acts can be questioned on the ground of basic structure doctrine which is only applicable to the Constitutional Amendment Laws as such. The same would be position with regard to Presidential Order made under Art. 359 (1-A) of the Constitution. A 1977 Bom 99 (122) (DB).

(19) 'Constituent power' of Parliament — Supremacy — It is the Constitution and not the constituent power which is supreme. **A 1975 SC 2299 (2428, 2442, 2443).**

(20) Zonal transfer of Civil Servant — Writ petition against transfer — Petition also challenging validity of insertion of cl. (4) to Art. 368 by 42nd Amendment — High Court is not competent to grant interim relief against transfers — But it is competent to examine validity of amendment to Constitution. 1980 Lab IC 188 (191) (DB) (Andh Pra).

(21) Art. 368 is not primarily intended for amending the Constitution as applicable in Jammu and Kashmir but it is for the purpose of carrying the amendments made in the Constitution for the rest of India into the Constitution as applied in the State of Jammu and Kashmir. Even in this process, the powers of the President under Art. 370 have to be exercised and consequently, the applicability of Art. 368 does not curtail the power of the President under Art. 370. **A 1970 SC 1118 (1124, 1125) : 1970 Lab IC 873.**

(22) Constitution (Twenty-fourth Amendment) Act (1971) expressly empowering Par-

amend the Constitution is initiated, either in the two Houses of the Congress by two-thirds majority or on the application of the Legislatures of two-thirds of the several States constituting the Federation. The amendment when made takes effect only when ratified by the Legislatures of three-fourths of the several States of the Union.

(2) In Australia the proposed amendment has to be passed by absolute majority of both the Houses of the Parliament. Then it has to be submitted to the electors for approval and if the same is approved by a majority of the electors voting, the amendment is sent to the Governor for assent. Amending process is thus three-tiered.

(3) Art. 79 of the West German Constitution, 1946, deals with the process of amendment to the Constitution. The provisions immune to amending process are: (1) The basic rights guaranteed under Art. 1 thereof: (2) Federal and democratic form of the constituent States as declared by Art. 20; and (3) Federal nature of the government and the right of the States to participate in Legislation.

(4) Japanese Constitution of 1946, Art. 96, provides for the Constitutional amendment process. The said Article requires a referendum, in addition to a special majority of votes in the Legislature, for constitutional amendment. Fundamental human rights guaranteed to the People of Japan, by arts. 11 and 97, are unamendable as the said rights are conferred upon the present and future generations in trust, to be held for all time inviolate.

Article 368 — Note 1 (contd.)

liament to amend by way of addition, variation or repeal any provision of the Constitution and making Art. 13 not applicable to such Amendment — Is valid. **A 1973 SC 1461 (1494, 1552, 1609, 1610, 1631. 1648, 1649, 1686, 1796, 1797, 1890, 1891, 1966, 1967, 1984, 1985, 2011, 2055).**

(23) Law in Art. 13 (2) refers to the exercise of an ordinary legislative power and does not include Constitutional amendments under Art. 368. **A 1973 SC 1461 (2055).** (A 1967 SC 1643, **Overruled.**)

(24) Section 2-A, Industrial Disputes Act as inserted by Amendment Act, 35 of 1965 is not ultra vires of Parliament under Entry 22 in List 3 of Schedule 7 of Constitution — Entry 22 should be construed liberally so as to include disputes of individual workman — It cannot be said that Amending Act virtually amends the Constitution and therefore is invalid on ground of non-compliance with Art. 368 of Constitution. (1969) 19 Fac LR 352 (357, 358) (Delhi).

(25) Clause (4) of Art. 368 deprives the jurisdiction of Courts to question the amendments of the Constitution on any ground. The expression "made" or "purporting to have been made" in clause (4) of Art. 368 signifies the very wide and exhaustive nature of this ouster of jurisdiction of Courts. (1977) 1 Cal LJ 257 (260, 261).

(26) Per Beg J.— The theory of "basic structure" of the Constitution cannot be used to build into the Constitution an imaginary part which may be in conflict with Constitutional provisions. The Constitution cannot have a base cut away from the super-structure. Indeed the emergency provisions could themselves be regarded as part of the basic structure of the Constitution. At any rate, they are meant to safeguard the basis of all orderly Government according to law. The theory of a basic structure of the Constitution cannot be considered as anything more than a part of a well recognised mode of construing a document. The Constitution, like any other document, has to be read and construed as a whole. **A 1976 SC 1207 (1317).**

(27) Validation of election—Constitutional validity — Clause (4) of Art. 329-A as introduced by the Constitution 39th Amendment Act of 1975 is unconstitutional. **A 1975 SC 2299 (2355).**

(28) (Malayan Case) Appellant constable who pleaded guilty to a charge of an offence of assault under S. 353 of the Penal Code, was discharged conditionally upon his entering into a bond for a period of 2 years. The Chief Police Officer informed that action to dismiss him was intended to be taken and asked him to make representations. Appellant's representations were not considered and he was dismissed without giving an oral hearing. **Held** that though the power of dismissal of a constable was delegated but of appointment was not delegated to the Chief Police Officer, the appellant's dismissal did not contravene Article 135 (1) of the Federal Constitution in view of its subsequent amendment, which had retrospective effect. (1979) 2 Malayan LJ 276.

2. Methods of amendment.— (1) There are Constitutions which can only be altered with some special formality, while there are other Constitutions the terms of which may be modified or repealed with no other formality than is necessary in the case of other legislation. The former may be described as "controlled" and the latter as "uncontrolled" Constitutions. **A 1920 PC 91 (96).**

(2) The Indian Constitution is a controlled Constitution. **A 1951 All 257 (295) (FB).**

(3) Various methods of constitutional amendments have been adopted in written Constitutions, such as by referendum, by a special convention, by legislation under special procedure and so on. **A 1951 SC 458 (461).**

Article 368 — Note 2 (contd.)

(4) The Indian Constitution provides for three classes of amendments. **A 1951 SC 458 (461).**

(5) Amendment of the Constitution — Procedure to be followed — Alteration of text of existing provision not necessary. A 1966 All 377 (382).

(6) In India the procedure followed to amend the Constitution was to alter the text of any existing provision by adding or deleting or substituting words. A 1966 All 377 (382).

3. Procedure.— (1) This article is not a "complete code" in respect of the procedure provided by it. There are gaps in the procedure as to how and after what notice a Bill is to be introduced, how it is to be passed by each House and how the President's assent is to be obtained. **A 1951 SC 458 (461).**

(2) Assuming that amendment of the Constitution is not legislation even where it is carried out by ordinary legislation by passing a Bill introduced for the purpose and that Articles 107 to 111 cannot in terms apply when Parliament is dealing with a Bill under Article 368, there is no obvious reason why Parliament should not adopt, on such occasions, its normal procedure, so far as that procedure can be followed consistently with statutory requirements. **A 1951 SC 458 (462).**

(3) Indo-Pakistan Agreement relating to division of Berubari Union and Exchange of Cooch-Bihar Enclaves — Involves cession of national territory in favour of Pakistan — Implementation of agreement by legislative action essential — Law relatable to Art. 368 would be sufficient. **A 1960 SC 845 (855, 861). (Overruled** in A 1966 SC 644 on another point.)

(4) Amendment of Constitution — Ratification by State Legislatures — Assent of Governor not required — Legislature does not include Governor — Constitution (Fifteenth Amendment) Act (1963) — Amendment valid. A 1964 Cal 500 (502, 503).

(5) Ratification — Amendment need not be placed before or considered by all States. A 1964 Cal 500 (502, 503).

(6) The broad scheme of Article 368 is that if Parliament proposes to amend any provision of the Constitution not enshrined in the proviso, the procedure prescribed by the main part of the Article has to be followed. The Bill introduced for the purpose of making the amendment in question, has to be passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting. After the bill is passed as aforesaid, it has to be presented to the President for his assent and when he gives his assent, the Constitution shall stand amended in accordance with the terms of the bill. That is the position in regard to the amendment of the provisions of the Constitution to which the proviso does not apply. **A 1965 SC 845 (850, 851).**

(7) Article 226 is one of the constitutional provisions which fall under Cl. (b) of the proviso; and so if Parliament intends to amend the provisions of Article 226, the bill proposing to make such an amendment must satisfy the requirements of the proviso. **A 1965 SC 845 (851).**

(8) If the direct effect of the amendment of fundamental rights is to make a substantial inroad on the High Courts' powers under Article 226, it would become necessary to consider whether the proviso would cover such a case or not. The proviso would apply where the amendment in question seeks to make any change, inter alia, in Art. 226, and the question in such a case would be does the amendment seek to make a change in the provisions of Art. 226? The answer to this question would depend upon the effect of the amendment made in the fundamental rights. **A 1965 SC 845 (851, 852).**

(9) Chapter VI of Part VI is not covered by the Proviso to Art. 368. So it was not necessary to follow the procedure laid down in the proviso in order to add Art. 233-A in Part VI, Chapter VI. **A 1969 All 594 (599) (FB).**

4. Amendment of Fundamental Rights.— (1) Contains both power and procedure to amend Constitution — All Articles including those relating to fundamental rights can be amended, (A 1967 SC 1643, Overruled) provided that the basic structure and framework of the Constitution are not altered. **A 1973 SC 1461 (1498, 1500, 1534, 1535, 1609, 1610, 1628, 1629, 1718, 1746, 1776, 1777, 1822, 1828, 1859, 1860, 1903, 1904, 1966, 1967, 1979, 2019, 2055) ** A 1951 SC 458 : 1952 SCR 89 ** A 1965 SC 845 **** (1967) 33 Cut LT 263 (DB) ****** A 1967 Guj 229 (241) (DB).

(2) The Constitution (First Amendment) Act, 1951, (Fourth Amendment) Act, 1955, and (Seventeenth Amendment) Act 1964 abridge the scope of the fundamental rights. But on the basis of earlier decisions they were declared valid by applying the principle of prospective overruling. **A 1967 SC 1643 (1669, 1692, 1718, 1727, 1742). (Overruled** on another point in A 1973 SC 1461.) **** A 1968 SC 1395 (1401) : 1968 Lab IC 1525.**

(3) By virtue of the Constitution (Application to Jammu and Kashmir) Second Amendment Order (1965) as made under Art. 370 (1) by the President, sub-cl. (b) of clause 4 of Art. 367 was amended and accordingly reference to Sadar-i-Riyasat is to be construed as reference to Governor. By virtue of Sec. 18 of General Clauses Act, the Governor is the successor to the Sadar-i-Riyasat, he would be entitled to exercise all the powers of the Sadar-i-Riyasat. The nature of the explanation to Art. 370 (1) of Constitution does not bring about any alteration either in the framework or the fundamentals of the Jammu and Kashmir Constitution. The State Governor still continues to be the head of the Government aided by a council of ministers, and the only change effected is in his designation and the mode of his appointment. **A 1972 SC 963 (968, 969) : 1972 Cri LJ 597.**

(4) Per Khanna, J.— It was pointed out that no distinction was made by his Lord-

PART XXI

[a][TEMPORARY, TRANSITIONAL AND SPECIAL PROVISIONS]

369. Temporary power to Parliament to make laws with respect to certain matters in the State List as if they were matters in the Concurrent List.— Notwithstanding anything in this Constitution, Parliament shall, during a period of five years from the commencement of this Constitution, have power to make laws with respect to the following matters as if they were enumerated in the Concurrent List, namely:—

(a) trade and commerce within a State in, and the production, supply and distribution of, cotton and woollen textiles, raw cotton (including ginned cotton and unginned cotton or kapas), cotton seed, paper (including newsprint), foodstuffs (including edible oilseeds and oil), cattle fodder (including oil-cakes and other concentrates), coal (including coke and derivatives of coal), iron, steel and mica;

(b) offences against laws with respect to any of the matters mentioned in clause (a), jurisdiction and powers of all courts except the Supreme Court with respect to any of those matters, and fees in respect of any of those matters but not including fees taken in any court;

Article 368 — Note 4 (contd.)

ship in A 1973 SC 1461 so far as the ambit and scope of the power of amendment is concerned between a provision relating to fundamental rights and provisions dealing with matters other than fundamental rights. The limitation inherent in the word "amendment" according to which it is not permissible by amendment of the Constitution to change the basic structure of the Constitution was to operate equally on articles pertaining to fundamental rights as on other articles not pertaining to those rights. **A 1975 SC 2299 (2369, 2370).**

5. Constitution (17th Amendment) Act 1964.— (1) Per majority.— Pith and substance of the Act falls within substantive part of Art. 368 and not under Cl. (b) of proviso to Article 368 — Act is constitutionally valid. **A 1965 SC 845 (853, 854).**

(2) Per majority:— The Act is not ultra vires of Parliament under Arts. 245 and 246 — It is not land legislation falling under Sch. 7, List 2, Entry 18 but merely validates land legislation passed by States. **A 1965 SC 845 (853, 854).**

(3) Per majority.— Power to amend Constitution can be exercised retrospectively — Constitution (17th Amendment) Act 1964 not unconstitutional on ground that it validates Act added to ninth schedule but declared invalid. **A 1965 SC 845 (854).**

(4) It is declared by the Special Bench that the Constitution (Seventeenth Amendment) Act (1964) is valid though on different reasonings. Hidayatullah, J. however upheld the validity of S. 2 of the Constitution (Seventeenth Amendment) Act, 1964, but declared that S. 3 was ultra vires the amending process. **A 1967 SC 1643 (1669). (Overruled** on another point in A 1978 SC 1461.)

(5) Acts included in Sch. 9 — Amendments to those Acts made subsequent to such inclusion are not entitled to protection under Art. 31-B. **A 1959 J and K 35 (39, 41) (FB).**

(6) Ninth Schedule as amended by Constitution (17th Amendment) Act (1964), together with Article 31-B saves Assam Act 9 of 1961. A 1966 Assam 51 (54).

Article 369

(1) This article gives power to Parliament for a period of five years from the commencement of the Constitution to make laws with respect to certain matters mentioned in Clauses (a) and (b), as if they were matters mentioned in the Concurrent List. **A 1951 Cal 120 (123) : 52 Cri LJ 934 (FB).**

(2) The effect of the words "as if they were enumerated in the Concurrent List" is that the provisions of Art. 254 are attracted in respect of the laws passed by Parliament in exercise of the powers conferred by this article. See A 1955 Bom 35 (36) (DB).

(3) The duty under the Dhoties (Additional Excise Duty) Act, 1953, is an excise duty which Parliament has the authority to levy under Entry 84 of List 1. The validity of the legislation cannot be questioned on the ground of Parliament's encroachment on the State field under Entries 24 and 27 of List 2 as production, supply and distribution of cotton textiles is the matter mentioned in Cl. (a) of this article and as the legislation is made within the period of five years prescribed by the article. A 1955 Raj 114 (119) (DB).

(4) The words "things done or omitted to be done before the expiry thereof" authorise the trial and conviction of a person after the expiration of a temporary Act for the offence committed during the life of the Act. A 1956 Orissa 194 (199) : 1956 Cri LJ 1334 (DB).

(5) The Essential Supplies (Temporary Powers) Act, 1946, being a law made by Parliament, did come to an end after expiry of five years as provided by Art. 369 but a prosecution started against accused could be continued even after expiry of the temporary Act. A 1959 Madh Pra 93 (93, 95) : 1959 Cri LJ 325 : 1959 MPLJ 65.

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but any law made by Parliament, which Parliament would not but for the provisions of this article have been competent to make, shall, to the extent of the incompetency, cease to have effect on the expiration of the said period, except as respects things done or omitted to be done before the expiration thereof.

(a) Substituted for 'Temporary and Transitional Provisions' by the Constitution (Thirteenth Amendment) Act, 1962, S. 2 (a) (w.e.f. 1-12-1963).

JAMMU AND KASHMIR

In its application to the State of Jammu and Kashmir, Art. 369 shall be omitted—See Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. 16 (a).

370. Temporary provisions with respect to the State of Jammu and Kashmir.— (1) Notwithstanding anything in this Constitution,—

(a) the provisions of article 238[a] shall not apply in relation to the State of Jammu and Kashmir;

(b) the power of Parliament to make laws for the said State shall be limited to—

(i) those matters in the Union List and the Concurrent List which, in consultation with the Government of the State, are declared by the President to correspond to matters specified in the Instrument of Accession governing the accession of the State to the Dominion of India as the matters with respect to which the Dominion Legislature may make laws for that State; and

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Article 369 (contd.)

(6) The phrase "things done or omitted to be done" is sufficiently wide to continue a prosecution not completed under a temporary Act. A 1959 Madh Pra 93 (94, 95) : 1959 Cri LJ 325.

(7) Defence of India Rules (1962), Rule 35 (5) — Essential commodity — Inclusion of wheat and wheat products — Not repugnant to any Article in Constitution. A 1964 Cal 279 (283) : 1964 (1) Cri LJ 662.

Article 370

(1) The policy of the Constitution which appears from this article is that the Constitution was framed for the entire Union of India but the provisions of that Constitution should not apply to the territories of the State of Jammu and Kashmir until and unless the President made an order that they shall apply. A 1956 J & K 1 (3) : 1956 Cri LJ 48 (FB).

(2) The provisions of Article 370 continued in force and remained effective even after the Constituent Assembly of the Jammu and Kashmir State had passed the Constitution of the State. A 1971 J & K 120 (125, 126) (DB).

(3) Article 370 applies to Jammu and Kashmir State ex proprio vigore and also by virtue of the Constitution (Application to Jammu and Kashmir) Order, 1950. It did not depend for its application on Article 394. Hence deletion of Article 394 by Constitution (Application to Jammu and Kashmir) Order, 1954 is of no consequence. Article 370 continues to apply to Jammu and Kashmir even after the Constitution of the State was passed. A 1971 J & K 120 (125) (DB).

(4) The effect of the article was to give jurisdiction to the Union Parliament to make laws for the State on matters specified either in the Instrument of Accession or by later additions made with the concurrence of the State Government. A 1953 J & K 25 (30) (DB).

(5) The President under this article can issue an Order applying the provisions of the Constitution after a mere consultation with the State Government only where those provisions relate to a matter specified in the Instrument of Accession itself. A 1956 J & K 1 (13, 14) : 1956 Cri LJ 48 (FB) °° A 1953 J & K 25 (32) (DB).

(6) The power conferred on the President by this article to make Orders is not a delegated power. Hence the considerations which apply to delegated legislations cannot be applied to the Orders made by the President under this article. A 1956 J & K 1 (3) : 1956 Cri LJ 48 (FB).

(7) There is no excessive delegation of powers to the President under Article 370. The power conferred on the President is not absolute or uncanalized so as to violate Article 14 of the Constitution. A 1971 J & K 120 (128) (DB).

(8) The article empowers the President to make exceptions and modifications when applying the provisions of the Constitution to the State of Kashmir. The words "exceptions" and "modifications" cannot be interpreted by reference to the meaning given to them when they occur in the other provisions of this Constitution. A 1956 J & K 1 (4) : 1956 Cri LJ 48 (FB). (President can except particular thing, person or place from operation of provision.)

(9) In the context of the Constitution the court must give the widest effect to the meaning of the word 'modification' used in Art. 370 (1) and in that sense it includes an amendment. Therefore the President had the power to make the modification which he did in Art. 81. A 1961 SC 1519 °° A 1956 J & K 1 (13, 14) : 1956 Cri LJ 48 (FB).

(10) The expression "modification" also means addition. A 1959 J & K 35 (40) (FB).

(11) When the President added Cl. (c) to Article 35 what he did was to modify the provisions of that article and hence had not acted beyond his powers. A 1966 J & K 1 (4, 13, 14) : 1956 Cri LJ 48 (FB).

(12) Interpretation of — Provisions in respect of J. & K. State — Section 21, General Clauses Act is applicable — Power of making orders

(ii) such other matters in the said Lists as, with the concurrence of the Government of the State, the President may by order specify.

Explanation.—For the purposes of this article, the Government of the State means the person for the time being recognised by the President as the Maharaja of Jammu and Kashmir acting on the advice of the Council of Ministers for the time being in office under the Maharaja's Proclamation dated the fifth day of March, 1948;

(c) the provisions of article (1) and of this article shall apply in relation to that State;

(d) such of the other provisions of this Constitution shall apply in relation to that State subject to such exceptions and modifications as the President may by order specify:

Provided that no such order which relates to the matters specified in the Instrument of Accession of the State referred to in paragraph (i) of sub-cl. (b) shall be issued except in consultation with the Government of the State:

Provided further that no such order which relates to matters other than those referred to in the last preceding proviso shall be issued except with the concurrence of that Government.

Article 370 (contd.)

under Article 370 can be exercised by the President from time to time. 1974 Kash LJ 225 (230) °° A 1970 SC 1118 (1123 to 1125) : 1970 Lab IC 873 °° A 1970 J & K 143 (145, 146) : 1970 Cri LJ 1365.

(13) Clause (c) added by the President to Article 35 in its application to Jammu and Kashmir engrafted an exception on the Constitution in respect of Fundamental Rights and was not ultra vires the power of the President. **A 1956 SC 197 (201) : 1956 Cri LJ 421 (2).**

(14) The President on 26-1-1950 issued the Constitution (Application to Jammu and Kashmir) Order, 1950. By that Order he specified the matters in the Union List which corresponded to the matters mentioned in the Instrument of Accession and also made the Constitution applicable to the State with certain omissions, exceptions and modifications. That Order was later on superseded by the Constitution (Application to Jammu and Kashmir) Order, 1954.

(15) J. & K. Big Landed Estates (Abolition) Act (XVII of 2007)) was passed when Yuvaraj had plenary legislative powers and hence its validity cannot be challenged. **A 1959 SC 749 (761).**

(16) The inclusion of an Act or provision of an Act in the Ninth Schedule is not made as a matter of course — What was brought into the Act subsequently was outside the scope of the Ninth Schedule and consequently outside the scope of the protection of Article 31-B. **A 1959 J & K 35 (38, 39) (FB).**

(17) Jammu and Kashmir Detention Act, 13 of 1964 — Not ultra vires of State Legislature. A 1969 J & K 77 (87) : 1969 Cri LJ 907 (DB).

(18) Application of Article 35 (c) to Jammu and Kashmir is not in contravention of Article 32 (4) — No abridgement of fundamental right of detenu to seek remedy against detention in the Supreme Court of India. **A 1971 SC 1217 (1220).**

(19) Extension of protection to Jammu and Kashmir Law relating to preventive detention — Extension of immunity from time to time to the State law against challenge on the ground of infringement of the fundamental rights under Article 22 (5) is within the competence of the President. 1972 Cri LJ 692 (693 to 695) (J & K).

(20) Article 370 never ceased to apply to Jammu & Kashmir — Effect — Jammu & Kashmir Preventive Detention Act (13 of 1964) is not void. **A 1970 SC 1118 (1123, 1125) : 1970 Lab IC 873.**

(21) By virtue of the Constitution (Application to Jammu and Kashmir) Second Amendment Order (1965) as made under Article 370 (1) by the President, sub-clause (b), Clause (4) of Article 367 was amended and accordingly reference to Sadar-i-Riyasat is to be construed as reference to Governor. By virtue of Section 18 of the General Clauses Act, as the Governor is the successor to the Sadar-i-Riyasat, he would be entitled to exercise all the powers of the Sadar-i-Riyasat. The nature of the explanation to Article 370 (1) of the Constitution does not bring about any alteration either in the frame work of the fundamentals of the Jammu and Kashmir Constitution. State Governor still continues to be the head of the Government aided by a Council of Ministers and the only change effected is his designation and the mode of his appointment. **A 1972 SC 963 : 1972 Cri LJ 597.**

(22) Central Reserve Police Force Act (1949) is enacted by competent Legislature and is validly extended to the State of Jammu and Kashmir. **1971 Cri LJ 1489 (1491) (FB) (J & K).**

(23) In exercise of the powers conferred by Section 105-A, the Additional District Magistrate in Delhi has jurisdiction and power to execute the warrants of arrest and search issued by the Criminal Courts in the State of Jammu and Kashmir. Section 105-A, Cr. P. C. is valid 1974 Cri LJ 1182 (1185) (Delhi).

(24) Article 368 is not primarily intended for amending the Constitution as applicable in Jammu and Kashmir but is for the purpose of carrying out the amendments made in the Constitution for the rest of India into the Constitution as applied in the State of Jammu & Kashmir. Even to this process, the powers of the President under Article 370 have to be exercised and, consequently, the applicability of Article 368 does not curtail the power of the President under Article 370. **A 1970 SC 1118 (1125) : 1970 Lab IC 873.**

(2) If the concurrence of the Government of the State referred to in paragraph (ii) of sub-clause (b) of clause (1) or in the second proviso to sub-cl. (d) of that clause be given before the Constituent Assembly for the purpose of framing the Constitution of the State is convened, it shall be placed before such Assembly for such decision as it may take thereon.

(3) Notwithstanding anything in the foregoing provisions of this article, the President may, by public notification, declare that this article shall cease to be operative or shall be operative only with such exceptions and modifications and from such date as he may specify:

Provided that the recommendation of the Constituent Assembly of the State referred to in clause (2) shall be necessary before the President issues such a notification.

(a) Part VII, which contained Art. 238, is now omitted by the Constitution (Seventh Amendment) Act, 1956.

JAMMU AND KASHMIR

In exercise of powers conferred by clause (3) of Art. 370, the President, on the recommendation of the Constituent Assembly of the State of Jammu and Kashmir, is pleased to declare that, as from the 17th day of November, 1952, the said art. 370 shall be operative with the modification that for the "Explanation" in clause (1) thereof the following Explanation is substituted, namely:—

"**Explanation.**—For the purposes of this Article the Government of the State means the person for the time being recognised by the President on the recommendation of the Legislative Assembly of the State as the Sadar-i-Riyasat[a] of Jammu and Kashmir, acting on the advice of the Council of Ministers of the State for the time being in office." — See C. O. 44 published in Gaz. Ind., 1952, Pt. II, S. 3, Ext., p. 916.

(a) Sub-sec. (3) of S. 2 of the Constitution of Jammu and Kashmi: (as inserted by the J. and K. Constitution (Sixth Amendment) Act, 1965, S. 3) runs as follows:

"(3) Any reference in this Constitution to the Sadar-i-Riyasat shall, unless the context otherwise requires, be construed as a reference to the Governor."

Section 27 of that Constitution as substituted by the said Amending Act, speaks of appointment of a Governor by the President (of India) by warrant under his hand and seal.

[a][371. Special provision with respect to the States of [b][* * *] Maharashtra and Gujarat.— [c][(1) * * * * *]

(2) Notwithstanding anything in this Constitution, the President may, by order made with respect to [d][the State of Maharashtra or Gujarat,] provide for any special responsibility of the Governor for—

(a) the establishment of separate development boards for Vidarbha, Marathwada, [e][and the rest of Maharashtra or, as the case may be,] Saurashtra,

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Article 370 (contd.)

(25) Taxation Laws (Extension to Jammu and Kashmir) Act is not void because concurrence of the Governor to its application to Jammu and Kashmir was not ratified under Article 370 (2), by Constituent assembly. As concurrence was given not before the Assembly was convened but after it had started functioning and it had itself sponsored the application, no notification was necessary. A 1971 J & K 120 (127) (DB).

(26) The President under Article 370 and the Parliament under Article 246 have power to legislate for Jammu and Kashmir State even upon subjects like Income-tax not mentioned in Instrument of Accession, because accession is an 'act of State' and subjects of former State can claim protection only of such rights as the new sovereign recognises. A 1971 J & K 120 (126, 127) (DB).

Article 371

(1) Member of the Punjab Legislature or Regional Committee enjoys no special privilege or immunity in matter of preventive detention — Non obstante clause in Article 371 cannot have effect of conferring some special immunity or privilege on member of Legislature. A 1966 Punj 255 (256, 258) : 1966 Cri LJ 793.

(2) Andhra Pradesh Regional Committee Order (1958), Para. 3 — Regional Committee constituted under Para. 3 — Defect in procedure in holding its meetings — Bill in pursuance of its report passed into an Act — Article 212 (1) applies — Validity cannot be questioned on ground of irregularity of procedure. A 1965 Andh Pra 306 (310, 313).

(3) Andhra Pradesh Regional Committee Order (1958) and bye-laws made thereunder — Andhra

Kutch and the rest of Gujarat with the provision that a report on the working of each of these boards will be placed each year before the State Legislative Assembly;

(b) the equitable allocation of funds for developmental expenditure over the said areas, subject to the requirements of the State as a whole; and

(c) an equitable arrangement providing adequate facilities for technical education and vocational training, and adequate opportunities for employment in services under the control of the State Government, in respect of all the said areas, subject to the requirements of the State as a whole.]

(a) Substituted for the original art. 371 by the Constitution (Seventh Amendment) Act, 1956, S. 22 (1-11-1956).

(b) The words 'or Punjab' omitted by the Punjab Reorganisation Act, 1966 (31 of 1966), S. 26 (1-11-1966), and words "Andhra Pradesh" omitted by Constitution (Thirty-second Amendment) Act, 1973, S. 2 (1-7-74).

(c) Cl. (1) omitted, ibid.

(d) Substituted for 'the State of Bombay' by the Bombay Reorganisation Act, 1960 (11 of 1960), S. 85 (a) (w.e.f. 1-5-1960).

Article 371 (contd.)

Pradesh Legislative Assembly Rules — 'Regional' bill referred to Regional Committee — Bill passed by Legislature after considering Regional Committee's report — Absence of notice to some members of the Regional Committee about its meeting — Effect — Proceedings of Committee, if null and void — Injunction to restrain Council of Ministers from presenting the Bill to the Governor for assent — Power of High Court. A 1965 Andh Pra 306 (314, 315).

(4) Reservation of seats for Multi-purpose candidates under Osmania University Act (9 of 1959) — Source of power is Section 26 of Act and Article 371 of the Constitution — Reservation cannot be challenged. A 1962 Andh Pra 212 (218, 219) (DB).

(5) A. P. Regional Committee's Order (1958), Para. 1 — Purpose of Order — Avowed purpose is to protect regional interests of Telangana. (1968) 2 Andh WR 273 (277) (DB).

(6) Andhra Pradesh Buildings (Lease, Rent and Eviction) Control Act (XV of 1960) is not a legislation on markets and hence the procedure laid down in Item 8 of the Andhra Pradesh Regional Committee Order 1958 need not be followed. (1968) 2 Andh WR 273 (284) (DB).

(7) Zonal transfer of civil servant — Writ petition against transfer also challenging validity of insertion of Clause (4) of Article 368 by 42nd Amendment — High Court is not competent to grant interim relief against transfers — But it can examine validity of amendment. 1980 Lab IC 188 (191) (DB) (AP).

(8) As per Clause (4) thereof, an order made under Clause (3) may authorise the Administrative Tribunal to receive representations for the redress of grievances relating to any matter within its jurisdiction as the President may specify in the order and to make such orders thereon as the Administrative Tribunal deems fit. It is in exercise of the powers that the A. P. Administrative Tribunal Order, 1975 was passed — "All other conditions of Service" not defined in the Order — "Conditions of Service" couched in such wide terms as "all other .. .. .." and its sweep is so comprehensive that they are capable of subsuming all the relief that a person holding a post under a local authority, claims which claims are referable both directly or indirectly, to the relationship of a person holding a public post in the local authority under whose control such person has been working. The interpretation is in accord with Article 371-D (3) and (4) pursuant to which the impugned order was passed. (1979) 1 APLJ 207 (214) (DB).

(9) Andhra Pradesh Administrative Tribunal Order, 1975 dated 19-5-1975 — Construed loosely in its widest general sense, this elastic phrase "Civil Service of the State" in Cl. (3) can be stretched to include the "officers and Servants of the High Court," as well as members of the subordinate judiciary. Understood in its narrow sense in harmony with the basic, Constitution Scheme embodied in Chapters V and VI, Part VI and centralised in Arts. 229 and 235 thereof, the phrase will not take in High Court staff, and the subordinate judiciary. **A 1979 SC 193 (205) : 1978 Lab IC 1672.**

(10) Andhra Pradesh Administrative Tribunal Order (1975), Rules 6 and 7 — Expressions "with respect to appointments" in para. 6 and "Persons employed" in para. 7 — Interpretation of — Writ petition directing respondents to entertain petitioner's application for selection to a civil post — Maintainability — High Court's jurisdiction is barred. 1979 Lab IC (NOC) 74 (Andh Pra).

(11) Order constituting Administrative Tribunal — Writ petition before Supreme Court challenging constitutional validity of the Order — Grant of stay during pendency of petition — Not without jurisdiction. 1976 Lab IC 1099 (1105) (DB) (Andh Pra).

(12) Clause (k) — If the provisions of Cl. (k) of Article 371, read with the non obstante clause are compared and contrasted with the provisions of the Article 372 (1) of the Constitution it will be clear that though both provide for continued operation of the earlier laws yet under Article 372 (1), pre-Constitution laws have been allowed to operate only so far they are consistent with the provisions of the Constitution and that so far as they are not so consistent, they have ceased to operate, while under Article 371 (k) of the Constitution, the earlier Sikkim Laws have been guaranteed con-

(e) Substituted for 'the rest of Maharashtra', by the Bombay Reorganisation Act, 1960 (11 of 1960), S. 85 (b) (1-5-1960).

OBJECTS AND REASONS

"It is proposed to replace Art. 371 by another article making a special provision with respect to the States of Andhra Pradesh and Punjab. This article will enable the President to constitute regional committees of the State Legislaive Assembly and secure their proper functioning by directing suitable notifications to be made in the rules of business of Government and in the rules of procedure in the Assembly." —S. O. R., Gaz. Ind., 1956, Pt. II. S. 2, Ext., p. 221.

JAMMU AND KASHMIR

Article 371 shall be omitted—See Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (16) (a).

[a][371A. **Special provision with respect to the State of Nagaland.**— (1) Notwithstanding anything in this Constitution,—

(a) no Act of Parliament in respect of—
  (i) religious or social practices of the Nagas,
  (ii) Naga customary law and procedure,
  (iii) administration of civil and criminal justice involving decisions according to Naga customary law,
  (iv) ownership and transfer of land and its resources,
  shall apply to the State of Nagaland unless the Legislative Assembly of Nagaland by a resolution so decides;

(b) the Governor of Nagaland shall have special responsibility with respect to law and order in the State of Nagaland for so long as in his opinion internal disturbances occurring in the Naga Hills-Tuensang Area immediately before the formation of that State continue therein or in any part thereof and in the discharge of his functions in relation thereto the Governor shall, after consulting the Council of Ministers, exercise his individual judgment as to the action to be taken:

Provided that if any question arises whether any matter is or is not a matter as respects which the Governor is under this sub-clause required to act in the exercise of his individual judgment, the decision of the Governor in his discretion shall be final, and the validity of anything done by the Governor shall not be called in question on the ground that he ought or ought not to have acted in the exercise of his individual judgment:

Provided further that if the President on receipt of a report from the Governor or otherwise is satisfied that it is no longer necessary for the Governor to have special responsibility with respect to law and order in the State of Nagaland, he may by order direct that the Governor shall cease to have such responsibility with effect from such date as may be specified in the order;

(c) in making his recommendation with respect to any demand for a grant, the Governor of Nagaland shall ensure that any money provided by the

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Article 371 (contd.)

tinued operation even though they or some of them are violently inconsistent with or are shockingly violative of the provisions of the Constitution until they are amended or repealed by a competent Legislature or other competent authority. (1977) 2 Sikkim LJ 22.

(13) The Arms Act, 1959 has been validly extended to Sikkim even though the corresponding Sikkim Law, being the Sikkim Arms Rules, 1962 has not been repealed at any time before such extension and enforcement. The Sikkim Arms Rules, 1962, have automatically stood overborne or overthrown and impliedly repealed by the extension and enforcement of the Arms Act, 1959 under Clause (n) of Art. 371-F. 1979 Cri LJ 310 (318) (Sikkim).

(14) Expression "enactment", also includes the Rules already made in exercise of powers conferred by the enactment — Passport Rules (1950) and Registration of Foreigners Rules, 1939 automatically started to operate in Sikkim as a result of extension and enforcement of Registration of Foreigners Act (1939) and Passport (Entry into India) Act (1920) to and in Sikkim. 1979 Cri LJ 1281 (1288) : (1978) 4 Sikkim LJ 75.

Article 371A

(1) Scheduled Districts Act (1874), Ss. 6 and 7 — Validity — Act was not invalid on ground of excessive delegation of legislative authority — Rules for Administration of Justice and Police in the Naga Hills District made in 1906 and revised in 1937 — Rules were validly enacted and continue to apply in Nagaland and are not also hit either by Article 21 or by Article 14 of Constitution. A. 1967 SC 212 (223) : 1967 Cri LJ 265.

Government of India out of the Consolidated Fund of India for any specific service or purpose is included in the demand for a grant relating to that service or purpose and not in any other demand;

(d) as from such date as the Governor of Nagaland may by public notification in this behalf specify, there shall be established a regional council for the Tuensang district consisting of thirty-five members and the Governor shall in his discretion make rules providing for—

(i) the composition of the regional council and the manner in which the members of the regional council shall be chosen:

Provided that the Deputy Commissioner of the Tuensang district shall be the Chairman ex officio of the regional council and the Vice-Chairman of the regional council shall be elected by the members thereof from amongst themselves;

(ii) the qualifications for being chosen as, and for being, members of the regional council;

(iii) the term of office of, and the salaries and allowances, if any, to be paid to members of, the regional council;

(iv) the procedure and conduct of business of the regional council;

(v) the appointment of officers and staff of the regional council and their conditions of services; and

(vi) any other matter in respect of which it is necessary to make rules for the constitution and proper functioning of the regional council.

(2) Notwithstanding anything in this Constitution, for a period of ten years from the date of the formation of the State of Nagaland or for such further period as the Governor may, on the recommendation of the regional council, by public notification specify in this behalf,—

(a) the administration of the Tuensang district shall be carried on by the Governor;

(b) where any money is provided by the Government of India to the Government of Nagaland to meet the requirements of the State of Nagaland as a whole, the Governor shall in his discretion arrange for an equitable allocation of that money between the Tuensang district and the rest of the State;

(c) no Act of the Legislature of Nagaland shall apply to the Tuensang district unless the Governor, on the recommendation of the regional council, by public notification so directs and the Governor in giving such direction with respect to any such Act may direct that the Act shall in its application to the Tuensang district or any part thereof have effect subject to such exceptions or modifications as the Governor may specify on the recommendation of the regional council:

Provided that any direction given under this sub-clause may be given so as to have retrospective effect;

(d) the Governor may make regulations for the peace, progress and good government of the Tuensang district and any regulations so made may repeal or amend with retrospective effect, if necessary, any Act of Parliament or any other law which is for the time being applicable to that district;

(e) (i) one of the members representing the Tuensang district in the Legislative Assembly of Nagaland shall be appointed Minister for Tuensang affairs by the Governor on the advice of the Chief Minister and the Chief Minister in tendering his advice shall act on the recommendation of the majority of the members as aforesaid;

(ii) the Minister for Tuensang affairs shall deal with, and have direct access to the Governor on, all matters relating to the Tuensang district but he shall keep the Chief Minister informed about the same;

(f) notwithstanding anything in the foregoing provisions of this clause, the final decision on all matters relating to the Tuensang district shall be made by the Governor in his discretion;

(g) in Arts. 54 and 55 and cl. (4) of Art. 80, references to the elected members of the Legislative Assembly of a State or to each such member shall include references to the members or member of the Legislative Assembly of Nagaland elected by the regional council established under this article;

(h) in article 170—

(i) clause (1) shall, in relation to the Legislative Assembly of Nagaland, have effect as if for the word 'sixty', the words 'forty-six' had been substituted;

(ii) in the said clause, the reference to direct election from territorial constituencies in the State shall include election by the members of the regional council established under this article;

(iii) in clauses (2) and (3), references to territorial constituencies shall mean references to territorial constituencies in the Kohima and Mokokchung districts.

(3) If any difficulty arises in giving effect to any of the foregoing provisions of this article, the President may by order do anything (including any adaptation or modification of any other article) which appears to him to be necessary for the purpose of removing that difficulty:

Provided that no such order shall be made after the expiration of three years from the date of the formation of the State of Nagaland.

Explanation.— In this article, the Kohima, Mokokchung and Tuensang districts shall have the same meanings as in the State of Nagaland Act, 1962.]

(a) Inserted by the Constitution (Thirteenth Amendment) Act, 1962, S. 2 (w.e.f. 1-12-1963).

NOTE.— Constitution (Removal of Difficulties) Order No. X, Para. 2, (w.e.f. 1-12-1963), provides that Art. 371A shall have effect as if the following proviso were added to clause (2) (e) (i) thereof, namely :—

"Provided that the Governor may, on the advise of the Chief Minister, appoint any person as Minister for Tuensang affairs to act as such until such time as persons are chosen in accordance with law to fill the seats allocated to the Tuesang district in the Legislative Assembly of Nagaland."—See Gaz. Ind., 29-11-1963, Pt. II, S. 3 (i), Ext., p. 833.

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Article 371A shall be omitted—See the Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (16) (a) (as amended by C. O. 74).

[a][371B. **Special provision with respect to State of Assam.**— Notwithstanding anything in this Constitution, the President may, by order made with respect to the State of Assam, provide for the constitution and functions of a committee of the Legislative Assembly of the State consisting of members of that Assembly elected from the tribal areas specified in [b][Part I] of the table appended to paragraph 20 of the Sixth Schedule and such number of other members of that Assembly as may be specified in the order and for the modifications to be made in the rules of procedure of that Assembly for the constitution and proper functioning of such committee.]

(a) Inserted by the Constitution (Twenty-second Amendment) Act, 1969, S. 4 (25-9-1969).

(b) Substituted for 'Part A' by the North Eastern Areas (Reorganisation) Act, 1971 (81 of 1971) S. 71 (g) (21-1-1972).

[a][371C. **Special provision with respect to the State of Manipur.**— (1) Notwithstanding anything in this Constitution, the President may, by order made with respect to the State of Manipur, provide for the constitution and functions of a committee of the Legislative Assembly of the State consisting of members of that Assembly elected from the Hill Areas of that State, for the modifications to be made in the rules of business of the Government and in the rules of procedure of the Legislative Assembly of the State and for any

special responsibility of the Governor in order to secure the proper functioning of such committee.

(2) The Governor shall annually, or whenever so required by the President, make a report to the President regarding the administration of the Hill Areas in the State of Manipur and the executive power of the Union shall extend to the giving the directions to the State as to the administration of the said areas.

Explanation.— In this article, the expression "Hill Areas" means such areas as the President may, by order, declare to be Hill Areas.]

(a) Inserted by Constitution (Twenty-seventh Amendment) Act, 1971, S. 5 (15-2-72).

[a][371D. **Special provisions with respect to the State of Andhra Pradesh.**— (1) The President may by order made with respect to the State of Andhra Pradesh provide, having regard to the requirements of the State as a whole, for equitable opportunities and facilities for the people belonging to different parts of the State, in the matter of public employment and in the matter of education, and different provisions may be made for various parts of the State.

(2) An order made under clause (1) may, in particular,—

(a) require the State Government to organise any class or classes of posts in a civil service of, or any class or classes of civil posts under, the State into different local cadres for different parts of the State and allot in accordance with such principles and procedure as may be specified in the order the persons holding such posts to the local cadres so organised;

(b) specify any part or parts of the State which shall be regarded as the local area—

(i) for direct recruitment to posts in any local cadre (whether organised in pursuance of an order under this article or constituted otherwise) under the State Government;

(ii) for direct recruitment to posts in any cadre under any local authority within the State; and

(iii) for the purposes of admission to any University within the State or to any other educational institution which is subject to the control of the State Government;

(c) specify the extent to which, the manner in which and the conditions subject to which, preference or reservation shall be given or made—

(i) in the matter of direct recruitment to posts in any such cadre referred to in sub-clause (b) as may be specified in this behalf in the order;

(ii) in the matter of admission to any such University or other educational institution referred to in sub-clause (b) as may be specified in this behalf in the order.

to or in favour of candidates who have resided or studied for any period specified in the order in the local area in respect of such cadre, University or other educational institution, as the case may be.

(3) The President may, by order, provide for the constitution of an Administrative Tribunal for the State of Andhra Pradesh to exercise such jurisdiction, powers and authority [including any jurisdiction, power and authority which immediately before the commencement of the Constitution (Thirty-second Amendment) Act, 1973, was exercisable by any court (other than the

Supreme Court) or by any tribunal or other authority] as may be specified in the order with respect to the following matters, namely :—

(a) appointment, allotment or promotion to such class or classes of posts in any civil service of the State, or to such class or classes of civil posts under the State, or to such class or classes of posts under the control of any local authority within the State, as may be specified in the order;

(b) seniority of persons appointed, allotted or promoted to such class or classes of posts in any civil service of the State, or to such class or classes of civil posts under the State, or to such class or classes of posts under the control of any local authority within the State, as may be specified in the order;

(c) such other conditions of service of persons appointed, allotted or promoted to such class or classes of posts in any civil service of the State or to such class or classes of civil posts under the State or to such class or classes of posts under the control of any local authority within the State, as may be specified in the order.

(4) An order made under clause (3) may—

(a) authorise the Administrative Tribunal to receive representations for the redress of grievances relating to any matter within its jurisdiction as the President may specify in the order and to make such orders thereon as the Administrative Tribunal deems fit;

(b) contain such provisions with respect to the powers and authorities and procedure of the Administrative Tribunal (including provisions with respect to the powers of the Administrative Tribunal to punish for contempt of itself) as the President may deem necessary;

(c) provide for the transfer to the Administrative Tribunal of such classes of proceedings, being proceedings relating to matters within its jurisdiction and pending before any court (other than the Supreme Court) or tribunal or other authority immediately before the commencement of such order, as may be specified in the order;

(d) contain such supplemental, incidental and consequential provisions (including provisions as to fees and as to limitation, evidence or for the application of any law for the time being in force subject to any exceptions or modifications) as the President may deem necessary.

(5) The order of the Administrative Tribunal finally disposing of any case shall become effective upon its confirmation by the State Government or on the expiry of three months from the date on which the order is made, whichever is earlier:

Provided that the State Government may, by special order made in writing and for reasons to be specified therein, modify or annul any order of the Administrative Tribunal before it becomes effective and in such a case, the order of the Administrative Tribunal shall have effect only in such modified form or be of no effect, as the case may be.

(6) Every special order made by the State Government under the proviso to clause (5) shall be laid, as soon as may be, after it is made, before both Houses of the State Legislature.

(7) The High Court for the State shall not have any powers of superintendence over the Administrative Tribunal and no court (other than the Supreme Court) or tribunal shall exercise any jurisdiction, power or authority in respect of any matter subject to the jurisdiction, power or authority of, or in relation to, the Administrative Tribunal.

(8) If the President is satisfied that the continued existence of the Administrative Tribunal is not necessary, the President may by order abolish the Administrative Tribunal and make such provisions in such order as he may deem fit for the transfer and disposal of cases pending before the Tribunal immediately before such abolition.

(9) Notwithstanding any judgment, decree or order of any court, tribunal or other authority,—

(a) no appointment, posting, promotion or transfer of any person—

(i) made before the 1st day of November, 1956, to any post under the Government of, or any local authority within, the State of Hyderabad as it existed before that date; or

(ii) made before the commencement of the Constitution (Thirty-second Amendment) Act, 1973, to any post under the Government of, or any local or other authority within, the State of Andhra Pradesh; and

(b) no action taken or thing done by or before any person referred to in sub-clause (a),

shall be deemed to be illegal or void or ever to have become illegal or void merely on the ground that the appointment, posting, promotion or transfer of such person was not made in accordance with any law, then in force, providing for any requirement as to residence within the State of Hyderabad or, as the case may be, within any part of the State of Andhra Pradesh, in respect of such appointment, posting, promotion or transfer.

(10) The provisions of this article and of any order made by the President thereunder shall have effect notwithstanding anything in any other provision of this Constitution or in any other law for the time being in force.

371E. Establishment of Central University in Andhra Pradesh.— Parliament may by law provide for the establishment of a University in the State of Andhra Pradesh.]

(a) Arts. 371D and 371E inserted by Constitution (Thirty-second Amendment) Act, 1973, S. 3 (1-7-74).

[a][**371F. Special provisions with respect to the State of Sikkim.**— Notwithstanding anything in this Constitution,—

(a) Legislative Assembly of the State of Sikkim shall consist of not less than thirty members;

(b) as from the date of commencement of the Constitution (Thirty-sixth Amendment) Act, 1975 (hereafter in this article referred to as the appointed day)—

(i) the Assembly for Skkim formed as a result of the elections held in Sikkim in April, 1974 with thirty-two members elected in the said elections (hereinafter referred to as the sitting members) shall be deemed to be the Legislative Assembly of the State of Sikkim duly constituted under this Constitution;

(ii) the sitting members shall be deemed to be the members of the Legislative Assembly of the State of Sikkim duly elected under this Constitution; and

(iii) the said Legislative Assembly of the State of Sikkim shall exercise the powers and perform the functions of the Legislative Assembly of a State under this Constitution;

(c) in the case of the Assembly deemed to be the Legislative Assembly of the State of Sikkim under clause (b), the references to the period of [b][five years] in clause (1) of article 172 shall be construed as references to a period of [b][four years] and the said period of [b][four years] shall be deemed to commence from the appointed day;

(d) until other provisions are made by Parliament by law, there shall be allotted to the State of Sikkim one seat in the House of the People and the State of Sikkim shall form one parliamentary constituency to be called the parliamentary constituency for Sikkim;

(e) the representative of the State of Sikkim in the House of the People in existence on the appointed day shall be elected by the members of the Legislative Assembly of the State of Sikkim;

(f) Parliament may, for the purpose of protecting the rights and interests of the different sections of the population of Sikkim make provision for the number of seats in the Legislative Assembly of the State of Sikkim which may be filled by candidates belonging to such sections and for the delimitation of the assembly constituencies from which candidates belonging to such sections alone may stand for election to the Legislative Assembly of the State of Sikkim;

(g) the Governor of Sikkim shall have special responsibility for peace and for an equitable arrangement for ensuring the social and economic advancement of different sections of the population of Sikkim and in the discharge of his special responsibility under this clause, the Governor of Sikkim shall, subject to such directions as the President may, from time to time, deem fit to issue, act in his discretion;

(h) all property and assets (whether within or outside the territories comprised in the State of Sikkim) which immediately before the appointed day were vested in the Government of Sikkim or in any other authority or in any person for the purposes of the Government of Sikkim shall, as from the appointed day, vest in the Government of the State of Sikkim;

(i) the High Court functioning as such immediately before the appointed day in the territories comprised in the State of Sikkim shall, on and from the appointed day, be deemed to be the High Court for the State of Sikkim;

(j) all courts of civil, criminal and revenue jurisdiction, all authorities and all officers, judicial, executive and ministerial, throughout the territory of the State of Sikkim shall continue on and from the appointed day to exercise their respective functions subject to the provisions of this Constitution;

(k) all laws in force immediately before the appointed day in the territories comprised in the State of Sikkim or any part thereof shall continue to be in force therein until amended or repealed by a competent Legislature or other competent authority;

(l) for the purpose of facilitating the application of any such law as is referred to in cl. (k) in relation to the administration of the State of Sikkim and for the purpose of bringing the provisions of any such law into accord with the provisions of this Constitution, the President may, within two years from the appointed day, by order, make such adaptations and modifications of the law, whether by way of repeal or amendment, as may be necessary or expedient, and thereupon, every such law shall have effect subject to the adaptations and modifications so made, and any such adaptation or modification shall not be questioned in any court of law;

(m) neither the Supreme Court nor any other court shall have jurisdiction in respect of any dispute or other matter arising out of any treaty, agreement, engagement or other similar instrument relating to Sikkim which was entered into or executed before the appointed day and to which the Government of India or any of its predecessor Governments was a party, but nothing in this clause shall be construed to derogate from the provisions of article 143;

(n) the President may, by public notification, extend with such restrictions or modifications as he thinks fit to the State of Sikkim any enactment which is in force in a State in India at the date of the notification;

(o) if any difficulty arises in giving effect to any of the foregoing provisions of this article, the President may, by order, do anything (including any adaptation or modification of any other article) which appears to him to be necessary for the purpose of removing that difficulty:

Provided that no such order shall be made after the expiry of two years from the appointed day;

(p) all things done and all actions taken in or in relation to the State of Sikkim or the territories comprised therein during the period commencing on the appointed day and ending immediately before the date on which the Constitution (Thirty-sixth Amendment) Act, 1975, receives the assent of the President shall, in so far as they are in conformity with the provisions of this Constitution as amended by the Constitution (Thirty-sixth Amendment) Act, 1975, be deemed for all purposes to have been validly done or taken under this Constitution as so amended.

(a) Inserted by Constitution (Thirty-sixth Amendment) Act, 1975, S. 3 (26-4-75).

(b) Substituted for words "six years" and "five years" respectively by Constitution (Forty-fourth Amendment) Act, 1978, S. 43 (6-9-1979).

372. Continuance in force of existing laws and their adaptation.— (1) Notwithstanding the repeal by this Constitution of the enactments referred to in article 395 but subject to the other provisions of this Constitution, all the law in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority.

(2) For the purpose of bringing the provisions of any law in force in the territory of India into accord with the provisions of this Constitution, the President may by order make such adaptations and modifications of such law, whether by way of repeal or amendment, as may be necessary or expedient, and provide that the law shall, as from such date as may be specified in the order, have effect subject to the adaptations and modifications so made, and any such adaptation or modification shall not be questioned in any court of law.

ARTICLE 372 — SYNOPSIS

1. Scope.
2. "Notwithstanding the repeal by this Constitution".
3. "Subject to the other provisions of this Constitution."
4. "All the law in force".
5. Explanation I.
6. "In the territory of India."
7. "Until altered or repealed or amended by a competent Legislature or other competent authority.
8. President's power to make adaptations and modifications of any law in force — Clause (2).
9. Adaptation of Laws Order, 1950.
10. "Any such adaptation or modification shall not be questioned in a court of law" — Clause (2).
11. Explanation III.

1 Scope.— (1) Clause (1) of the article provides for the continuance of all the law in force notwithstanding the repeal of the Indian Independence Act, 1947, and the Government of India Act, 1935 by Article 395. The continuance of the law contemplated by this clause is subject to the other provisions of the Constitution. **A 1956 SC 142 (145) : 1956 Cri LJ 315.**

(2) The doctrine of adoption propounded by Hobbes in his Leviathan that "the Legislature is he, not by whose authority the laws were first made, but by whose authority they continue to be laws" is found embodied in Article 372 of the Constitution of India securing the continuance in force of the laws. A 1976 AP 375 (394).

(3) The Defence of India Act, 1939, which expired on 30-9-1946 could not be deemed to have been continued by virtue of this article. **A 1954 SC 683 (686) : 1954 Cri LJ 1736.**

(4) This article does not have the effect of making Section 6 of the General Clauses Act, 1897, applicable to the Defence of India Act, 1939, and to the rules and orders made thereunder. A 1957 Pun 265 (268) (DB).

(5) The rule of construction that the Crown is not bound by a statute save by express provision or by necessary implication cannot be called the law of the land after the Constitution. It is not 'a law in force' within Article 372. **A 1967 SC 997 (1007) : 1967 Cri LJ 950.** (A 1960 SC 1355 and A 1947 PC 34, Overruled.)

(6) Article 372 must be read subject to Article 277 in fiscal matters. ILR (1964) Mys 116 •• **A 1964 SC 1172 (1178, 1179).**

(7) Between the provision in Art. 372 (3) (b) of the Constitution and the words in Section 120 of the States Reorganisation Act, 1956, there is no distinction. The law as adapted or modified occupies the field for purpose of future amendments equally effectively in both cases. **A 1959 Ker 182 (182, 183) (FB).**

(8) Article 372 cannot be invoked for the purpose of coming to the conclusion that Section 122, Civil P. C. ceased to be in force on commencement of Constitution — Applicability of Article 372 postulates that there is inconsistency between Section 122, Civil P. C. and Proviso to Article 227 of Constitution. A 1969 Guj 18 (20) : 9 Guj LR 873 (DB).

(9) By the execution of the agreement between President of India and Rajpramukh of Travancore-Cochin, the effect of Article 277 has been completely wiped out between the parties and it is no longer open to the State to fall back upon Article 277 after the expiry of the agree-

(3) Nothing in clause (2) shall be deemed—

(a) to empower the President to make any adaptation or modification of any law after the expiration of [a][three years] from the commencement of this Constitution; or

(b) to prevent any competent Legislature or other competent authority from repealing or amending any law adapted or modified by the President under the said clause.

Explanation I.— The expression "law in force" in this article shall include a law passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that it or parts of it may not be then in operation either at all or in particular areas.

Explanation II.— Any law passed or made by a Legislature or other competent authority in the territory of India which immediately before the commencement of this Constitution had extra-territorial effect as well as effect in the territory of India shall, subject to any such adaptations and modifications as aforesaid, continue to have such extra-territorial effect.

Explanation III.— Nothing in this article shall be construed as continuing any temporary law in force beyond the date fixed for its expiration or the date on which it would have expired if this Constitution had not come into force.

Article 372 — Note 1 (contd.)

ment. A 1968 Ker 105 (112) (FB). (1964 Ker LJ 738, Overruled.)

(10) Deputy Minister of State — Not disqualified under Article 191 (1) (a) from being member of Legislative Assembly or Legislative Council — Protection under Article 191 (2) available. A 1968 Bom 219 (221).

(11) U. P. Agricultural Income-tax Act (III of 1949) (as amended by U. P. Agricultural Income-tax (Amendment) Act (XIV of 1953), Section 2, Clause (II), Explanation — Amendment by Explanation is effective under Article 372. 1955 All LJ 322 (322, 323) °° 1955 All LJ 325.

(12) Emergence of new State or change of sovereignty within State does not bring about any change in private rights of its citizens or law governing such rights. A 1959 Mad 410 (417).

(13) As the Court-fees Act (1870) cannot be deemed to have been continuing as a Central Act when the Constitution came into operation it cannot thereafter be considered to be an Act of the Union of India. This is so by virtue of Article 372 (1). A 1960 Bom 96 (98).

2. "Notwithstanding the repeal by this Constitution."— (1) This saving clause limits the operation of Article 395 to the enactments actually mentioned therein and excludes from its operation the legislation passed under such enactments. A 1956 Assam 166 (168) (DB) °° A 1956 Cal 222 (223) (DB).

(2) Article 372 saves Essential Supplies (Temporary Powers) Act, 1946, in spite of the repeal of the Indian (Central Government and Legislature) Act, 1946 on the commencement of the Constitution. **A 1952 Pat 185 (191) : 1952 Cri LJ 493 (FB).**

(3) The purpose of the first clause of this article was clearly to negative the possibility of any existing law being held to be no longer in force by reason of the repeal of the law which authorised its enactment and it is a safeguard usually inserted by draftsmen in similar circumstances. **A 1941 FC 16 (24).**

(4) The use of the expression "notwithstanding the repeal by this Constitution" can be fully explained as one designed to stress the fact of the subsidiary legislation being still alive while the present Act stands repealed. A 1956 Cal 222 (224) (DB).

(5) Even an Act repealed by Article 395 will continue in force subject to the other provisions of the Constitution by virtue of this article. **A 1957 SC 540 (556).**

[But see A 1954 Mad 543 (547) (DB).]

(6) Section 6 of the General Clauses Act 1897, had no application to the repeal of statutes made by Parliament in England, (which repeal has been brought about by the Constitution) and it is for this reason that this article provides that notwithstanding the repeal of those statutes, the laws enacted under them and in force immediately before the commencement of the Constitution shall continue in force thereafter also. **A 1954 SC 683 (686) : 1954 Cri LJ 1736.**

(7) Section 6 of the General Clauses Act which is made applicable to the interpretation of the Constitution by Article 367 (1), can have no application to preserve rights and privileges acquired while the Government of India Act was in force. **A 1954 SC 158 (163).**

(8) The effect of the words "notwithstanding the repeal" is that the existing laws have been continuous in their operation. See **A 1945 FC 25 (29).**

(9) Santhal Parganas Settlement Regulations (Regn. 3 of 1872) — Was law in force before advent of Constitution — Still holds good by virtue of Article 372. A 1969 Pat 331 (333) (DB).

(10) The repeal of the Government of India Act, 1935, would not confer constitutional validity on a notification, which was ultra vires as contravening the prohibition as contained in Section 296 of that Act, from the date on which the Constitution came into force. A 1953 Assam 170 (175) (DB).

(11) The Governor-General having lawfully issued the Criminal Law Amendment Ordinance

Explanation IV.— An Ordinance promulgated by the Governor of a Province under Section 88 of the Government of India Act, 1935, and in force immediately before the commencement of this Constitution shall, unless withdrawn by the Governor of the corresponding State earlier, cease to operate at the expiration of six weeks from the first meeting after such commencement of the Legislative Assembly of that State functioning under clause (1) of article 382, and nothing in this article shall be construed as continuing any such Ordinance in force beyond the said period.

[Government of India Act (1935), Ss. 292, 293: See also the India and Burma (Existing Laws) Act, 1937 (1 Edw. 8 and 1 Geo. 6, C. 1), S. 1.]

(a) Substituted for 'two years' by the Constitution (First Amendment) Act, 1951, S. 12 (18-6-1951).

NOTE :— See the Adaptation of Laws Order, 1950, (C. O. 4), Gaz. Ind., 26-1-1950, Ext., p. 449 as amended by S. R. O. 115, Gaz. Ind., 5-6-1950, Pt. II, S. 3, Ext., p. 51; by S. R. O. 8170, Gaz. Ind., 4-11-1950, Pt. II, S. 3, Ext., p. 903: S. R. O. 508, Gaz. Ind., 4-4-1951, Pt. II, S. 3, Ext., p. 287: S. R. O. 1140B, Gaz. Ind.,

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Article 372 — Note 2 (contd.)

No. 38 of 1947 under his powers under S. 72 of the 9th Schedule of the Govt. of India Act, 1935 the repeal of the 9th Schedule could not affect the continuance of the Ordinance. The ordinance is an existing law within the meaning of Art. 366 (10) of the Constitution and under Article 372 it continues to be in force. A 1974 All 263 (265).

3. "Subject to the other provisions of this Constitution."— (1) These words mean that if there are other provisions in the Constitution which make a law passed before the Constitution invalid, such a law cannot be continued by the provisions of this article. A 1958 All 126 (131).

(2) There is no provision in the Constitution similar to S. 241 (5) of the Government of India Act 1935, the provisions in Section 241 (5) have become obsolete. (1977) 2 Serv LR 782 (792) (DB) (Pat).

(3) What these words mean is that if any law happens to be contrary to any provision of the Constitution, to that extent that law would cease to continue in force, that is, it would be rendered void. A 1955 All 99 (104) °° A 1958 J & K 29 (34) : 1958 Cri LJ 885 (FB) °° A 1964 SC 207 (213, 214). (A 1962 Ker 72 (FB), Reversed.) °° 1973 Tax LR 2503 (2512, 2513, 2518) : 1973 All LJ 739.

(4) There is an irreconcilable conflict between Section 69 read with Section 29 of the Cochin Abkari Act (1 of 1077, M. E.) and Articles 245 (1) and 246 (3) and hence the provisions of the Constitution shall prevail. A 1965 Ker 8 (11, 12, 13).

(5) The general intent of the Constitution is that pre-existing laws are to operate after the Constitution only so far as they are consistent with the Constitution and that so far as they are not so consistent they are to cease to operate. A 1955 Cal 451 (455) (DB).

(6) Laws which were existing law in territories other than excluded or partially excluded areas would not be existing law under Art. 372 in relation to excluded or partially excluded areas. The Land Customs Act, 1924 cannot therefore be said to apply to Santhal Parganas as an existing law. **A 1970 SC 951 (959) : 1970 Cri LJ 875.**

(7) Phrase "Subject to the provisions of this Constitution" in Art. 372 applied to a law made before the Constitution came into force — It has no reference to competence of Parliament or of a State Legislature to enact such a law after Constitution came into force. A 1958 All 872 (875, 876) : 1959 All LJ 17 (DB). (**Reversed** on another point in A 1962 SC 764.)

(8) Under Article 372 (1) only such existing laws as are in consonance with the scheme of the Constitution are saved. 1955 Andh LT (Cri) 205.

(9) The general proposition that the word law for the purposes of Article 372, as well as for Article 265, need not necessarily be statute law but any law that had the force of law prior to the Constitution would be saved by virtue of Article 372 has no validity. (1965) 2 Andh LT 297.

(10) Notification under Section 27, Bihar and Orissa Excise Act (2 of 1915) imposing countervailing duty on foreign liquor imported into State saved by Articles 305 and 372 — Later notification in 1961, enhancing the duty invalid as violating Articles 301 and 304. **A 1966 SC 1686 (1690).**

(11) Expression "subject to other provisions of the Constitution" means that if there is conflict between pre-existing law and provision of the Constitution, latter will prevail — Art. 372 is subject to Article 278. **A 1964 SC 207 (213, 214, 215).** (A 1962 Ker 72 (FB), Reversed.) °° A 1969 Punj 331 (335).

(12) The Railway (Local Authorities Taxation) Act (1941) creating a liability of the Railway to pay the Municipal Tax could not be said to have been continued in force as an existing law under Art. 372 of the Constitution the Act of 1941 is repugnant to Cl. (1) of Art. 285. **A 1978 SC 1803 (1806).** (A 1970 Mys 37, Reversed.)

(13) The U. P. Sales Tax Act (15 of 1948) continued to be in force in the State of Uttar Pradesh only to the extent to which it did not contravene the provisions of Article 286, Cl. (1) (a). A 1955 All 99 (104).

(14) The U. P. Municipalities Act (2 of 1916) was continued in force by Section 292 of the Government of India Act, 1935 and Section 18 (3) of the Indian Independence Act, 1947, and is even now in force by virtue of the provisions of Article 372. **A 1961** All 583 (586, 588) : 1961 All LJ 386.

(15) The Kerala General Sales Tax Act (11 of 1125) does not violate Article 277 and is therefore within legislative competence. **A 1968 Ker 105 (109) (FB).**

(16) No more than Article 13, Clause (1) does Article 372 (1) operate as an automatic repeal of a statute at the commencement of the Constitution even if the statute fails to satisfy

3-7-1952, Pt. II, S. 3, p. 616 I. Article 382 is omitted by Constitution (Seventh Amendment) Act, 1956 (1-11-56).

JAMMU AND KASHMIR

In its application to the State of Jammu and Kashmir, in article 372—

(i) clauses (2) and (3) shall be omitted;

(ii) references to laws in force in the territories of India shall include references to hidayats, ailans, ishtihars, circulars, robkars, irshads, yadashts, State Council Resolutions, Resolutions of the Constituent Assembly, and other instruments having the force of law in the territory of the State of Jammu and Kashmir; and

(iii) references to the commencement of the Constitution shall be construed as references to the commencement of this Order.

—See Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (16) (b) (14-5-1954).

Article 372 — Note 3 (contd.)

the test imposed by this Article in the phrase "subject to the other provisions of this Constitution." A 1953 Mad 729 (732) : 1953 Cri LJ 1364 (DB).

(17) The words "subject to the provisions of this Constitution" do not make this Article subject to the provisions of Articles 245 and 246. A 1958 All 126 (131).

(18) Motor Vehicles Act (1939), Chap. IV-A, Section 68-B (as amended by Act 100 of 1956) — Not void as it is not repugnant to Art. 372 — It is not a fetter on future legislation. A 1959 Andh Pra 292 (299, 300) : (1958) 2 Andh WR 211 (DB).

(18-A) The validity of an Act passed by a competent Legislature prior to the Constitution cannot be tested in the light of the legislative distribution of powers effected by Seventh Schedule. A 1958 All 126 (131) °° A 1957 Ker 146 (149, 150) (DB) °° A 1954 Pat 346 (346, 347) (DB).

(18-B) Though Bihar and Orissa Excise Act (2 of 1915), is a pre-Constitution Act, Art. 372 being subject to the other provisions of the Constitution including the legislative lists in Sch. 7, Art. 372 is of no assistance in protecting the Act from being challenged as ultra vires. As Section 29 of the Act was held ultra vires State Legislature it was held that Section 29 could not be protected. ILR (1971) Cut 1186 (1205).

[Reversed on another point in A 1972 SC 1816.]

(19) U. P. Zamindari Abolition and Land Reforms Act (1 of 1951) — Act does not cease to be operative when provincial legislature which passed it was dissolved. A 1953 All 92 (93, 94) : 1952 All LJ 677 (DB).

(20) Scheduled Districts Act (1874), Ss. 6 and 7 — Act and Rules thereunder were not invalid on ground of excessive delegation of legislative authority nor are they hit either by Art. 21 or 14. A 1967 SC 212 (223) : 1967 Cri LJ 265.

(21) The words "subject to the other provisions of this Constitution" do not render the laws passed by a competent authority as non-existent. A 1958 All 126 (131, 132) °° A 1955 All 99 (104)

(22) The laws which had been passed by the Central Legislature prior to the Constitution do not automatically cease to have effect. A 1957 Punj 91 (92) : 1957 Cri LJ 540 °° A 1958 J & K 29 (35) : 1958 Cri LJ 885 (FB) °° A 1951 All 816 (817) : 52 Cri LJ 1474 (DB) °° A 1958 Cal 365 (373).

(23) The Essential Supplies (Temporary Powers) Act, 1946, which is a Central Act does not cease to be in force at the date of the commencement of the Constitution. A 1951 All 816 (817) : 52 Cri LJ 1474 (DB).

(24) The Police Act, 1861, remains in force at the commencement of the Constitution. A 1957 Punj 91 (92) : 1957 Cri LJ 540 °° A 1958 Cal 365 (372).

(25) Article 13 expressly renders all laws in force in the territory of India immediately before the commencement of the Constitution void so far as they are inconsistent with the Fundamental Rights contained in Part III. A 1950 Cal 274 (285, 286) : 51 Cri LJ 1110 (SB) °° A 1958 All 126 (131, 132) °° A 1950 Pat 265 (270) : 51 Cri LJ 1081 (DB).

(26) The following laws have been judicially held to be inconsistent with Part III and, therefore, not continued after the Constitution :

(a) Section 14, Fugitive Offenders Act, 1881 (44 and 45 Vict. c. 69) A 1953 Mad 729 (732, 736) : 1953 Cri LJ 1364 (DB).

(b) Section 124-A, Penal Code, 1860. A 1951 Punj 27 (29, 30) : 52 Cri LJ 449 (DB).

[Note : The validity of this section is now not open to question under Art. 19 — See in this connection. A 1962 SC 955 (969) : 1962 (2) Cri LJ 103.]

(c) Bengal Criminal Law Amendment Act 1930 and W. B. Security Ordinance (No. 2 of 1949). A 1950 Cal 274 (286) : 51 Cri LJ 1110 (SB).

(d) C. P. and Berar Public Safety Act, 1948. A 1950 Nag 203 (206) : 51 Cri LJ 1372 (DB).

(e) The customary Law of Pre-emption as enforced by the Courts prior to the Constitution. A 1954 Hyd 161 (163) (FB) °° A 1954 Raj 100 (103) (FB).

(27) The following laws have been held to be not unconstitutional and hence continued by this Article

(a) Section 2 (g), Expl. II of C. P. and Berar Sales Tax Act (21 of 1947). 1961 MPLJ 894.

(b) Section 20 of Punjab Courts Act (6 of 1918). A 1969 Punj 331 (334, 335) (DB).

Article 372 — Note 3 (contd.)

(c) The Mysore Agriculturists' Relief Act (18 of 1928). A 1965 Mys 54 (58) (FB).

(d) Madras Motor Vehicles Rules (1940) Rule 160-C. A 1956 Andhra 129 (132) (DB).

(e) Mysore House Rent and Accommodation Control Order (1948), Cl. 9 (1). A 1961 SC 272 (274)

(f) Rajasthan Stamp Law (Adaptation) Act (7 of 1952), Section 6, Second Proviso. A 1961 Raj 181 (181) (DB).

(g) Central Reserve Police Force Act (1949), not ultra vires the Central Legislature. ILR (1974) Andh Pra 405 (431) °° A 1974 Cal 39 (61) (DB). (A 1973 Cal 56, Reversed.)

(h) The Delhi Special Police Establishment Act is an Act validly made under the Govt. of India Act, 1935 and continues in force after the coming into force of the Constitution under Art. 372. A 1970 Mad 464 (470) °° (1970) 2 Mad LJ 709.

(28) The C. P. and Berar Prohibition Act (7 of 1938) continues to be in force by operation of this article. **A 1951 Nag 58 (84, 85, 87, 89) : 52 Cri LJ 1140 (FB).**

(29) The Service Rules framed by the Orissa Government prescribing knowledge of Oriya of a certain standard do not violate Art. 16, and, hence they are continued in force by virtue of this Article. A 1955 Orissa 113 (115) (DB).

(30) Civil Servant — Misconduct prior to Constitution — Final action taken after Constitution should be in accordance with Constitution and not according to pre-Constitution Rules which ceased to have effect. A 1960 Andh Pra 479 (482) (DB).

(31) The prerogative of an ex-Ruler of an Indian State relating to death sentence is inconsistent with the provisions of Arts. 72, 161 and 238 (now repealed) and, therefore, a covenant affirming the prerogative no longer survives. **A 1956 SC 142 (145) : 1956 Cri LJ 315.**

(32) Every order of an ex-Ruler of a former princely State cannot be regarded as law, particularly those which were in violation of his own laws. **1968 Jab LJ 108 (113) (SC).**

(33) Power of Maharaja of Cochin to grant suspension, remission or commutation of sentence cannot be invoked or exercised after commencement of Constitution. ILR (1955) Trav-Co 788 (DB).

(34) Order by Ruler determining nature of some grant — Order is final and fully effective — Parties cannot question it or can go behind it. 1966 Raj LW 469 (DB).

(35) Article 133 overrides the right of appeal under Section 109, Civil P. C. A 1951 Mad 1051 (1055) (DB).

(36) The right of appeal under S. 476-B, Criminal P. C., must yield to the restricted right of appeal under Article 134 of the Constitution. A 1951 Mad 1060 (1063) : 1952 Cri LJ 61 (DB).

(37) Section 85 (5) of the U. P. Panchayat Raj Act (26 of 1947), must be read subject to the provisions of Articles 226 and 227. A 1952 All 963 (964) : 1952 Cri LJ 1695 (DB).

(38) A law may also be repugnant to a law made by Parliament and, therefore, it will not be continued in force under this article read with Article 254. **A 1952 Hyd 187 (190) : 1952 Cri LJ 1740 (FB).**

(39) Regulation 52 of the Regulations framed under Section 266, sub-section (3) of the Government of India Act, 1935, is not consistent with the Constitution. A 1955 Cal 451 (454, 457) (DB).

(40) There is nothing in Sections 3 and 4 of the Madhya Bharat Interim Legislative Assembly Act (23 of 1949) which is inconsistent with any provision of the Constitution. A 1952 Madh Bha 31 (34) (DB).

(41) The provisions of the Manipur Constitution Act, continue to remain in force under this article. A 1955 Manipur 41 (46) : 1955 Cri LJ 1603.

4. "All the law in force."— (1) This expression is not defined for the purposes of this article. In the absence of any definition, the expression would bear its natural and grammatical meaning. A 1956 Assam 166 (169) (DB).

(2) There is not any material difference between the expressions "existing law" and a "law in force." The words "law in force" are wide enough to include not merely a legislative enactment but also any regulation or order. **A 1955 SC 25 (31) °° A 1957 Ker 146 (149) (DB) °° A 1966 Assam 29 (34) (DB).** (**Reversed** on another point in A 1972 SC 223.)

(3) No doubt the expression "law in force" has been generally used as synonymous or interchangeable with the expression "existing law", it is of no avail in taking the matter any further. (1957) 33 Cut LT 263 (DB).

(4) The Letters Patent falls under the definition of 'existing law' in Article 366 (10) of the Constitution as it is an order made under statutory authority. A 1958 Madh Pra 333 (335, 336) (DB) °° A 1977 Cal 239 (240) °° A 1972 Cal 470 (477, 478).

(5) Admiralty jurisdiction was conferred on High Court of Bombay by Clause 48 of Letters Patent issued under Charter of 1823 and was contained in Section 106 of the Govt. of India Act 1915 and Section 223 of the Govt. of India Act of 1935 and lastly by Arts. 225 and 372 of the Constitution of India. A 1973 Bom 18 (20).

(6) Bihar Sugar Factories Control Act 1937 was an existing law within Article 366 (10) and continued to be in force under Article 372 till the Essential Commodities Act was passed by Parliament. A 1969 Pat 8 (9, 10) (DB).

(7) Punjab Excise Act and the various Rules giving effect to the provisions of the said Act fall within the category of existing law as defined by Clause (10) of Article 366 of the Constitution and their continued application are saved by Art. 372 of the Constitution till such time these are altered, repealed or amended by a competent Legislature. A 1979 Punj 102 (108).

(8) Cantonment Act of 1924 is an existing law which continues to be in force under Article 372 (2) of the Constitution and the Cantonment Boards have authority to levy property tax under S. 60 of the Act. A 1979 MP 188 (190) : 1979 MPLJ 555.

(9) The Opium Act is a pre-Constitution Law and is therefore protected and preserved by Article 372. It cannot be struck down on the ground of want of legislative competence. 1977 Tax LR 1771 (1777) (MP).

Article 372 — Note 4 (contd.)

(10) The expression "all the law in force includes any statutory law. A 1954 SC 680 (682) °° A 1953 SC 63 (65) : 1953 Cri LJ 515 °° A 1954 Trav-Co 131 (135) (FB) °° A 1952 Pat 185 (191) : 1952 Cri LJ 493 (FB) °°A 1951 Nag 58 (84, 85, 87, 89) (FB) °° A 1962 SC 167 (169, 170) °° A 1961 SC 964 (967) °° A 1967 All 15 (19).

(11) The expression "existing laws" includes not only Acts passed by the Central Legislature but also Acts passed by Governor-General-in-Council and the Provincial Legislature on concurrent topics, as well as the rules made under any of these Acts. (1967) 69 Bom LR 326 (338) (DB).

(12) There is no repugnancy between Bombay Forward Contract Control Act (64 of 1947) and the Essential Supplies (Temporary Powers) Act (1946), Article 372 continued both these Acts after the Constitution A 1961 SC 823 (827).

(13) The expression "all the law in force" includes an Ordinance. A 1956 J & K 26 (27) (DB) °° A 1955 Cal 614 (615) : 1955 Cri LJ 1582 (DB) °° A 1955 Pepsu 23 (25) °° A 1952 Pat 148 (Pr. 5) : 1952 Cri LJ 476 (DB) °° A 1952 Raj 137 (138) (DB) °° A 1952 Trav-Co 66 (69) °° A 1960 SC 1312 (1316) : 1961 Cri LJ 165 °° A 1969 J & K 5 (6) : 1969 Cri LJ 67 (FB).

(14) An order by a competent authority is covered by the expression "all the law in force". A 1956 Assam 166 (169) (DB) °° A 1952 Assam 95 (96) (DB).

(15) The expression "all the law in force" includes a rule. A 1956 Andhra 161 (164, 165) : 1956 Cri LJ 1049 (FB) °° A 1956 Raj 145 (150) (DB) °° A 1955 Pat 381 (384) (DB) °° A 1954 Mad 543 (547) (DB) °° A 1951 Mys 65 (65) : 52 Cri LJ 822 (DB) °° A 1956 Andhra 161 (164, 165) : 1956 Cri LJ 1049 (FB) °° (1967) 9 Orissa JD 139 (DB).

(16) The Auditor General's Rules dated 13th April 1926 made by the Secretary of State for India in Council in exercise of powers vested under Section 96-D (1) of the Government of India Act 1919 are a set of statutory rules. Admittedly those rules were in force at the time of commencement of the Constitution in 1950 and as existing law were continued in force under Article 372 of the Constitution. ILR (1972) Cut 400 (403).

(17) (Bom.) Law Officers Conditions of Service Rules and Rules for the Conduct of the Legal Affairs of Government, R. 58 (5) — Rules though framed under S. 241 (2), Government of India Act (1935) are statutory Rules and have force of law and in view of Art. 372 those rules which were part of the existing law continue to apply even after the commencement of the Constitution. (1972) 13 Guj LR 317 (321).

(18) The Cabinet resolution cannot override the Rules made under the Government of India Act and continued as existing law under the Constitution. An executive decision has to give way when it conflicts with a statutory rule. 1975 Lab IC 1327 (1331) (Orissa)

(19) Rules framed by erstwhile Nawab of Touk are not mere executive orders or domestic instructions — Rules amount to existing law within Art. 366 (10). 1961 Raj LW 386 (DB).

(20) So long as the Legislature does not pass any Act regarding the recruitment and conditions of service of the persons appointed to the service of the State, the Saddar-i-Riyasat is free to make such rules as it desires in order to regulate the conditions of service of the State. A 1964 J and K 14 (15) (DB).

(21) Jaintia Hills Autonomous District (Administration of Justice) Rules (1953), R. 22 — Rule is valid provision. A 1963 Assam 31 (36) (DB).

(22) A regulation is a law in force within this article. A 1957 All 436 (438).

(23) Patiala State Forces Regulations — Provision being mandatory could not be disregarded — Order against provisions held illegal. ILR (1965) 1 Punj 752.

(24) Regulation 11 (1) of Bihar Public Service Commission (Limitation of Functions) — Regulation being an existing Law continues to be in force until altered, repealed or amended. A 1956 Pat 228 (232, 233) (DB).

(25) Bihar Sugar Factories Control Act (1937) is a pre-Constitution Act and it could have continued to be in force only till it was altered, repealed or amended by a competent Legislature or other competent authority. A 1970 SC 267 (269).

(26) Section 11 of Regulation of 1358-F not being in conflict with any of the provisions of the Constitution must be held to be in force. A 1959 Andh Pra 159 (164, 165) (DB).

(27) A mere executive order cannot come within the definition of "existing law" and is not, therefore, "a law in force". A 1955 SC 25 (31) °° A 1956 Trav-Co 117 (118) (FB) °° A 1958 Ker 79 (79) (DB) °° A 1956 Pepsu 26 (28) °° A 1966 Madh Pra 32 (34) (DB) °° A 1965 Madh Pra 183 (185) (DB).

(28) Order holding certain houses to be private property of Ruler held to be executive and not law. A 1967 Madh Pra 6 (11, 12).

(29) A notification issued by the Government or any competent authority in the exercise of delegated power of legislation is a part of the law itself. A 1956 Madh B 138 (139) : 1956 Cri LJ 621 (FB) °° A 1953 Nag 228 (230) (DB).

(30) A notification issued in the exercise of executive functions cannot be said to be a law in force. A 1956 Madh B 138 (139) : 1956 Cri LJ 621 (FB) °° A 1952 Trav-Co 14 (19).

(31) Governor-General's Order No. 179, D/-12-9-1836 issued under Bengal Army Regulations was purely an executive action without any statutory sanction behind it. The Bengal Army Regulations have been repealed by Cantonment (House Accommodation) Act (11 of 1902) which was repealed by Act of 1923 and then by Act of 1924 which provides for acquisition of immovable property. The Regulation is not an existing law. Therefore the notice given by Military Estates Officer to the petitioner to vacate the land under his structure by 30-4-1949 based on Governor-General's Order, D/-12-9-1836 was held illegal. A 1972 HP 26 (30).

(32) A notification issued by the Governor-General under Section 94, sub-section (3), Government of India Act, 1935, was an order and it was held to come within the expression "law in force". A 1955 SC 25 (31).

(33) A notification issued under Section 4 of the Essential Supplies (Temporary Powers) Act, 1946, was an order and was a law in force. A 1957 Madh Pra 145 (147) : 1957 Cri LJ 1134 (DB).

(34) Notification enhancing tax superseding previous notification — Contractors chal-

Article 372 — Note 4 (contd.)

lenging enhancement — High Court holding Sections 5 and 10 of Andhra Pradesh (Telangana Area) Abkari Act (1 of 1316-F) invalid due to excessive delegation — Tax position relegated back to Notification prior to 26-1-1950 — Notification prior to 26-1-50 which would form part of the Statute saved by Article 372 of Constitution of India — Rates given in Hali currency could be converted into I. G. currency. ILR (1970) 1 Andh Pra 1 (22).

(35) The notification dated 1-12-1961 issued by the State Government appointing 1-1-1962 as the date on which certain provisions of Kerala Panchayat Act would come into force was held to be a law in force at the time of commencement of the Constitution. 1970 Ker LT 991. (1969 Ker LT 689, Overruled.)

(36) The Army Instructions cannot be taken to be a law within the meaning of this article. A 1955 Cal 543 (547) (DB).

(37) The Covenants entered into by the Rulers of the former Indian States with the Government of India have not the status of law and are not saved by this article. A 1955 Raj 135 (139, 140) (FB) °° A 1953 Madh B 65 (74) (FB).

(38) Laws of Covenanting States continue to operate after merger. A 1960 Raj 256 (276) (FB).

(38A) Agreement between Rulers and Company in shape of contract, exempting company from taxes and octroi and granting certain privileges in return for certain acts done by company — Agreement is not law. A 1964 SC 888 (891) °° A 1963 SC 953 (958, 959) °° A 1965 Raj 162 (166) (DB).

(39) Personal grant by Ruler of Nabha as a sovereign — It is law — Grant repudiated by new Pepsu State — Repudiation is not act of State and is justiciable in municipal Courts. A 1960 Punj 644 (645).

(40) Order by former Ruler of Indian State fixing certain monthly allowance to be paid to his brother — Held order was not law. A 1966 SC 704 (706, 707). (A 1962 Madh Pra 257, Reversed.) °° A 1964 SC 1793 (1796, 1797, 1798, 1799).

(41) Order by Ruler of former State of Rewa granting pension to State servant — Order held was not law — Order held did not make a grant. A 1966 SC 820 (820, 821). (A 1961 Madh Pra 154 (FB), Reversed.)

(42) Right in forest created by Ruler of Indian State by Tharao — Right not recognised by Government after merger of State — Right cannot be enforced in Municipal Court — Tharao held was not law. A 1964 SC 1043 (1056, 1075, 1082, 1092). (A 1961 Guj 151, Reversed.)

(43) Huzur Shree Shankar Order No. 158, D/- 5-5-1932 passed by Ruler of Holkar State authorising charging of interest on delayed payment of industrial tax in respect of a particular individual was an order purely of executive nature. Hence it cannot be treated as 'existing law' which has been continued after coming into force of the Constitution. A 1971 Madh Pra 177 (181).

(44) Managing agent's commission — No deduction can be made in computing profits — Notification of Ruler disallowing such deduction has the force of law. A 1963 SC 332 (336).

(45) Kalambandis of 1912 and 1935 — Orders issued by absolute monarch like Ruler of erstwhile Gwalior State had force of law and would amount to existing law. A 1961 SC 298 (303). (A 1953 Madh B 257, Reversed.)

(46) Only those orders of the Ruler which are jurisprudentially legislative acts will continue as laws under Article 372. A 1964 SC 1903 (1910, 1911, 1912, 1913). (A 1960 Madh Pra 330, Reversed.)

(47) Existing law at the date of the Constitution can only be altered by a statutory provision — As Huzur Order made by Maharaja of Baroda in exercise of his sovereign powers had a force of law, it was existing law at the date of the Constitution when it was not modified by any statutory provision. 1969 UJ (SC) 89 (91).

(48) The Regulations which constituted law in the Ex-State of Mayurbhanj continue in force under Para 5 (b) of the Administration of Mayurbhanj State Order, 1949, Para 4 of the State Merger (Governor's Provinces) Order, 1949, S. 5 of the Orissa Merged State (Laws) Act, 1950 and Art. 372 of the Constitution of India, unless they have been modified or repealed by any other law passed by the Orissa Legislature. 1972 Lab IC 1321 (1323) : 38 Cut LT 200 (SB). ((1956) 22 Cut LT 54, Overruled.)

(49) "All the law in force" — Order dated 22-1-1938 passed by former Ruler of Kota determining nature of 'Sarola Jagir' and giving it the status of impartible estate governed by the rule of primogeniture, although in the past it had been treated as joint family property — Held Legislative and not executive action — The mere fact that it was laid down for one single Jagir and was not a general law applicable to others in the State was immaterial — The property was held to be governed by the law of primogeniture. A 1971 SC 910 (912, 913, 914) : (1971) 2 SCJ 586.

(50) Management of Jain temple vesting in Ruler of Udaipur State under Law made by him before coming into force of Constitution of India and continued to be in the State concerned by virtue of Art. 372 of the Constitution — It cannot re-vest in the Jain shasan on coming into force of the Constitution. A 1975 SC 706 (714, 715) : (1975) 1 SCJ 497.

(51) Punjab Sikh Gurdwaras Act (8 of 1925), Ss. 7 (3) and 8 — Gurdawara declared to be a Sikh Gurdawara long prior to the Constitution and managed by Interim Gurdawara in 1946 by Firman of Erstwhile Ruler of Patiala State — The Firman of the Maharaja was the law of Pepsu State and having the force of law continued to be in force by virtue of Art. 372. A 1975 SC 1069 (1078).

(52) When the laws of a merged State are adopted by an Act of Parliament, they become Indian Laws for all purposes and stand on the same footing as any other law in force in India binding equally on the State as well as on the citizens. A 1972 Goa 33 (37).

(53) The Jammu and Kashmir Stamp Act was a law in force before the commencement of the Constitution of India. The application of the Constitution of India to the State could not therefore affect the validity or the operation of the Act. A 1975 J & K 50 (52) (FB).

(54) Conditions laid down by British Government in respect of Jagir land — Conditions cannot be deemed to become inoperative on wake of independence and holders of land do

Article 372 — Note 4 (contd.)
not become absolute owners thereof. 1965 Cur LJ 752 (Punj).

(55) The article applies not only to statutory enactments then in force but to all laws, including even personal laws, customary laws and common laws. **A 1941 FC 16 (31) °° A 1954 Raj 100 (103) (FB) °°** A 1965 Bom 9 (11) : 1965 (1) Cri LJ 18 (DB) °° A 1960 Bom 552 (554) (DB) °° A 1959 Madh Pra 212 (216) (DB) °° A 1958 Madh Pra 423 (425).

[But see A 1952 Bom 84 (89) : 1952 Cri LJ 354 (DB) °° A 1952 Bom 16 (25) (DB).]

(56) The article applies to personal and customary laws, like Hindu and Muhammadan laws. **A 1954 Hyd 161 (163) (FB) °° A 1954 Raj 100 (103) (FB) °° A** 1956 Cal 222 (224) (DB).

(57) The article applies to the principles of English Common Law which have been held by judicial decisions to be applicable to India. A 1956 Cal 26 (31) °° A 1955 Bom 305 (313) (DB) °° A 1955 Cal 423 (428) °° **A 1965 SC 1061 (1068) °°** A 1965 All 474 (477, 478) : 1964 All LJ 956 (DB) °° A 1961 Punj 292 (294, 295) °° A 1959 Punj 533 (534, 535).

(58) Obiter :— The expression "law in force" occurring in Art 372 (1) has been interpreted to mean the rules of common law relating to substantive rights which had been adopted by this country and enforced by judicial decisions before the coming into force of this Constitution. The law of defamation which the Courts in India have enforced and are enforcing is a part of the common law of England. (1976) 78 Bom LR 125 (146) °° 1977 Tax LR (NOC) 17 : (1977) 1 Cal LJ 101.

(59) Copyright Act of 1914 which substantially applied the English Copyright Act of 1911 to India is operative law even after coming into force of the Constitution of India by virtue of Article 372. A 1971 Bom 48 (51, 52).

(60) The rights to priority of Government dues over other dues to be recovered from a debtor is a common law right which was recognised in India before the Indian Constitution and is preserved after the coming into force of the Constitution by reason of Art. 372 of the Constitution. A 1970 Mad 190 °° (1971) 73 Bom LR 623.

(61) The article occurs in Part XXI of the Constitution which provides for temporary and transitional provisions. It was necessary that the law in force should continue and, therefore, instead of using the expression "existing law" which refers to statutes, a comprehensive expression "all the law in force" was used in the article. A 1956 Assam 166 (169) (DB).

(62) The expression 'existing law' as defined in Article 366 (10) of the Constitution and occurring in Article 254 can be equated with "law in force" as defined in Art. 13 (3) (b) and Art. 372 (3). **1979 All LJ 401 (420) (FB).**

(63) The Explanation is not exhaustive but only illustrative of the meaning of "law in force", for the purpose of this article. A 1956 Cal 222 (224) (DB).

(64) The levy, assessment and collection of land revenue, in respect of ryotwari lands, not having been rendered illegal by reason of Article 265, are continued by force of this article. A 1958 Mad 539 (543) (DB).

(65) The decisions of the Judicial Committee of the Privy Council are binding on the High Courts as law in force. **A 1953 Orissa 117 (119, 120) (SB) °° A 1953 Bom 209 (212) °° A** 1952 Nag 205 (207, 210) °° **A 1965 All 65 (67, 68) (FB) °°** A 1953 Cal 524 (526) (DB).

[But see A 1955 Cal 282 (284, 288) : 1955 Cri LJ 792 (DB) °° A 1954 Assam 139 (143) (DB).]

(66) The Supreme Court will not be bound by the decisions of the Privy Council or of the Federal Court. **A 1954 SC 245 (249) °°** A 1964 Cal 396 (399) (DB).

(67) The law settled by the Federal Court will continue to be applicable even after the advent of this Constitution till it is altered by the Supreme Court or by a competent authority. A 1959 Andh Pra 359 (360) (DB).

(68) Privy Council decisions are entitled to very great respect. **A 1950 SC 169 (171) : 51 Cri LJ 1270 °° A 1952 Pat 341 (345) (SB).**

(69) In those cases in which judgments of Federal Court were reversed by P. C. what determines the rights of the parties and to be given effect to is the decision of the P. C. because of Articles 372 and 295. **A 1951 Mys 72 (75) : 52 Cri LJ 992 (FB).**

(70) Treaties which are part of International Law do not form part of the law of the land, and, unless expressly made so by the legislative authority, cannot be continued under this article. A 1951 Raj 127 (129) : 52 Cri LJ 1021 (DB).

(71) After the attainment of a sovereign independent status, the Courts in India are not bound to follow the English rules of Private International Law or for the matter of that, any rule, excepting their own. A 1952 Cal 508 (516, 523).

(72) Section 12 or Section 14 of the Fugitive Offenders Act, 1881 (44 & 45 Vict., c. 69), which is an Act of the British Parliament, has no force in India by reason of the provisions of this article. **A 1954 SC 517 (519) : 1954 Cri LJ 1337.**

(73) Institution incorporated under Royal Charter — Approval from Privy Council not obtained as required by the Charter — Suit by member to restrain giving effect to bye-laws not maintainable — It could not be said that by virtue of Clause 22 of Adaptation of Laws Order read with Article 372 of Constitution Crown could exercise under Cl. 18 of Charter any authority. A 1964 Cal 73 (75, 76).

(74) Article 372 (1) read with the explanation, provides for keeping intact the summary jurisdiction of the High Courts to punish for contempt of Court which was valid law prior to enforcement of Constitution. **A 1960 Pat 430 (446) : 1960 Cri LJ 1254 (FB) °° A 1969 Delhi 201 (207) : 1969 Cri LJ 884 (FB) °°** A 1968 Ker 301 (309) : 1968 Cri LJ 1424 (DB).

(75) Provisions for administration of justice made by notification of 1903 did not form part of law in force in territories of India immediately before commencement of Constitution — Hence Article 372 has no application to those provisions. (1965) 69 Cal WN 692.

(76) Hindu Women's Rights to Property Act (1937), does not apply to devolution or succession to agricultural lands even after enactment of Constitution. A 1965 Punj 254 (256) (DB) °° A 1968 Cal 83 (85) (DB).

(77) Orissa Mining Areas Development Fund Act (27 of 1952) — Validity — Subject-matter of Act falls under List II, Entries 23 and 66

Article 372 — Note 4 (contd.)
of Sch. 7 of the Constitution — Validity not impaired by List I, Entries 52 and 54 read with Central Act 65 of 1951 and Central Act 53 of 1958 respectively. **A 1961 SC 459 (472, 473).**

(78) The Madras City Municipal Act having been enacted while the powers of the Local Legislatures were governed by the Government of India Act, 1915, the constitutional validity of the legislation is not open to any challenge. **A 1964 SC 1172 (1174).**

(79) The Regulations contained in Order No. 179 of 1836 regarding grant of lands situated in cantonment are provisions of a statutory nature which were continued by the Govt. of India Act from 1859 to 1935. They must thus be deemed to be continued in force in view of Art. 372 (1) of the Constitution. A 1973 Delhi 169 (176) (DB).

5. Explanation I.— (1) This Explanation provides that even though a law has not been brought into force at all or in any particular area, it shall still be regarded as a 'law in force' if it has been passed by a Legislature or other competent authority in the territory of India and has not been repealed. A 1956 Cal 222 (225) (DB).

(2) The Constitution has given an extended meaning to the expression "law in force" by including therein any law or any part thereof which may not be in operation at the date of the commencement of the Constitution at all or in particular areas. A 1952 Bom 16 (23, 24) (DB).

(3) The phrase "in the territory of India" in Expln. I to Article 372, governs the expression 'the law made by the authority'. **A 1956 Andhra 161 (165) : 1956 Cri LJ 1049 (FB).**

(4) The term "other competent authority" in Explanation I is wide enough to include the Governor or any other authority which has been empowered to make rules and regulations having the force of law. A 1954 All 813 (814, 815) (DB).

(5) When the Constitution intends to refer to a law which is in force at the time of the Constitution it uses the expression "law in force" and "existing law" means law enacted before the Constitution though it may not have been brought into operation in whole or in part. A 1954 Mad 621 (631, 632) (DB).

(6) In this Explanation the emphasis is on laws duly passed by a Legislature but not yet brought into force. It thus contemplates a particular class of Acts and does not seek to restrict the scope of the expression "law in force" in Cl. (1) of the article. A 1956 Cal 222 (225) (DB).

(7) The Police Act, 1861, is a piece of legislation which though in existence does not come into force in any area by itself. In view of this Explanation, this Act would be a "law in force". A 1957 Raj 28 (29) (DB).

(8) **Held** on facts that the expression "ceases to be in force" in Cl. 8 of Provinces and States (Absorption of Enclaves) Order (1950) was not analogous to repeal; it only suspended the operation of the C. P. and Berar Panchayats Act on 20-1-50 so far as the village in question was concerned and therefore, that Act continued to be in force in that village as it was a "law in force" as expounded by this Explanation. A 1954 Madh B 78 (80) : 1954 Cri LJ 795 (DB).

(9) The Indore Stamp Act Adaptation Act (5 of 1950), which received the assent of the Rajpramukh on 24-11-1949, but became operative from 29-1-1950 is a law continuing in force after the commencement of the Constitution by virtue of this article read with the Explanation. A 1956 Madh B 177 (178) (DB).

(10) In order that a law not in operation at the date of the commencement of the Constitution may be included in the expression "law in force" it is necessary that it should have been passed or made by a Legislature or other competent authority before the commencement of the Constitution. A 1958 All 126 (131).

(11) The High Court is a "competent authority" for the purpose of the Rules of Procedure made by it under the Code of Civil Procedure. **A 1956 Andhra 161 (165) : 1956 Cri LJ 1049 (FB).**

(12) The phrase "in the territory of India" in this Explanation governs the expression "the law made by the authority". If the authority though residing outside the territory of India, had jurisdiction to make law in India, it is a law made by an authority in the territory of India. **A 1956 Andhra 161 (165) : 1956 Cri LJ 1049 (FB).**

6. "In the territory of India".— (1) This article refers to those laws which were in force in the territory of India and does not in terms continue any laws which had international implications. A 1951 Punj 356 (356).

(2) This article has not the effect of keeping alive Section 122 of the British Bankruptcy Act, 1914 (4 & 5 Geo. V, C. 59). A 1951 Punj 356 (356).

(3) The Imperial Copyright Act of 1911 was "a law in force in the territory of India immediately before the commencement of the Constitution" and it continues in force by virtue of Art. 372 (1). A 1959 Mad 410 (416).

(4) Article 372 speaks of laws in force in territory of India immediately before the commencement of the Constitution. The N. W. F. P. Rules though covered by expression, Rule in Section 18 of the Independence Act (1947) would refer to service under or in the N. W. F. Province and not anywhere. Hence they were not a law in force in the territory of India immediately prior to January 26, 1950. The Rules therefore could not continue in force in India after the commencement of the Constitution. **A 1975 Delhi 82 (87) (FB).**

(5) The words "laws in force" in the territory of India in Art. 35 (b) also occur in Article 372 which continue in force existing laws which existed not only in the provinces of British India but in all Indian States. In the context of Art. 35 (b) and Art. 372 what has to be seen is not whether the State of Hyderabad was part of the Territory of India before the commencement of the Constitution but whether its territory is included in India after its commencement. The same test applies to the old provinces or part of provinces of British India. **A 1973 SC 827 (831).**

7. "Until altered or repealed or amended by a competent Legislature or other competent authority".— (1) The article recognises the contingency of an existing law being altered, repealed or amended. A 1953 Mad 260 (260) (DB).

(2) The article confers necessary power on a competent Legislature or other authority to

Article 372 — Note 7 (contd.)
alter, repeal or amend, although the expression "until altered or repealed, etc." is expressed in a negative form. (1953) 24 ITR 280 (297) (DB) (Cal).

(3) Protection given to Pre-Constitution Law under Article 372 was given to the Amending Act of the Pre-Constitution Law as the amendments were intra vires the State Legislature. A 1970 Mad 152 (153) : (1969) 2 Mad LJ 468.

(4) Letters Patent (Bombay), Clause 16 — States Re-organisation Act (1956), Sections 52 and 69 — High Courts Act (1861), Ss 1 and 9 — Jurisdiction conferred by Clause 16 of Letters Patent — Not impervious to legislative interference by State Legislature. A 1965 Mys 76 (84) (DB).

(5) Power of Parliament to legislate — Power overrides restrictions imposed by pre-Constitution legislations. A 1966 Pat 375 (378) : 1966 Cri LJ 1183 (DB).

(6) Where an authority is given power to exercise legislative functions by means of an order such order is legislative in its nature. 1962 Ker LT 766.

(7) The word "until" ordinarily connotes a point of time and the expression "until altered, repealed or amended" is equivalent to saying "until the alteration, repealment or amendment". **A 1941 FC 16 (31).**

(8) The word "until" in this article does not refer to the date on which the law altering or repealing or amending the existing law may be made, but refers to the date with effect from which such law may be made to operate, whether that date be in the future or in the past. (1953) 24 ITR 280 (297) (DB) (Cal).

(9) There is nothing in this article which debars a competent Legislature, which has altered, repealed or amended a previously existing law, from giving the new provision a retrospective effect from dates earlier than when the Act was passed. **A 1941 FC 16 (31).** (A 1940 All 272 (280) (FB), Reversed.) °° A 1953 Madh B 65 (74) (FB) °° A 1941 Lah 182 (183) (FB) °° (1953) 24 ITR 280 (297) (DB) (Cal) °° A 1953 Mad 260 (260) (DB) °° A 1951 Bom 438 (439) (DB) °° A 1941 Pat 413 (414, 415) (DB) °° ILR (1956) 2 Cal 516 (528) (DB).

(10) Unless there is an Act which actually alters, repeals or amends it, that law must, in view of the provisions of this article, continue in force and cannot be considered as non-existent. **A 1941 FC 16 (31).**

(11) Madras Hindu Religious Endowments Act (II of 1927), S. 69 — Constitutionality — Act was valid and continued to be in force till it was replaced by Madras Act (XIX of 1951) by reason of Art. 372. A 1963 Andh Pra 292 (294, 295) (DB).

(12) It is not absolutely necessary that a statute must be repealed by express language. Repeal, and certainly alteration or amendment, can be effected by necessary implication. **A 1941 FC 16 (31).**

(13) If the Bihar Act (Bihar Sugar Factories Control Act 1937) provides anything to the contrary to the order passed under the Essential Commodities Act (1955), the same must be held to have been altered in view of Article 372 of the Constitution which provides that all laws in force in the territory of India immediately before the commencement of this Constitution shall continue in force thereon until altered, repealed or amended by a competent authority. **A 1970 SC 267 (269) : 1970 Cri LJ 367.**

(14) The prerogative of the Maharaja of Cochin relating to the execution of the death sentences must be deemed to have been repealed or abrogated by competent legislative authority after the coming into force of the Constitution. **A 1956 SC 142 (145) : 1956 Cri LJ 315.**

(15) The Acts, which are repugnant to each other, need not necessarily be of different Legislatures; one may be the main Act and the other, an amending one. 1955 All LJ 325 (326).

(16) The provisions of the two statutes should be so incompatible that obedience to one should necessarily mean the breach of the other. A 1956 Madh B 199 (206) (DB).

(17) There is a considerable difference between a case of an implied repeal and the contention that an existing State law shall not prevail because it is repugnant to the law made by the Parliament. What is repealed ceases to exist, and is, excepting for certain limited purposes, as if it was never enacted. But that is not so with the latter case. A 1956 Madh B 199 (206) (DB).

(18) Bombay City Land Revenue Act (2 of 1876), was in force in India immediately before the commencement of the Constitution and it must continue in force until altered or repealed or amended. A 1955 Bom 305 (313) (DB).

(19) Coal Production Fund Ordinance (1944) was permanent — Repealing Ordinance (6 of 1947) after its expiry could not have any effect on Ordinance of 1944 to the extent saved. **A 1962 SC 1281 (1286).**

(20) The "Mulki Rules" in force in former Hyderabad State to the extent they were not inconsistent with the constituional provisions were good law even after the Constitution came into force until they were repealed by a Parliament Act 44 of 1957. ILR (1968) Andh Pra 101 (109) (DB).

(21) The protection to earlier law given by Article 372 is available only so long there is no amendment of the law itself. Besides express amendment of a statute it may be modified by necessary implication by competent Legislature and it can be done by separate enactment. To the extent the Bihar and Orissa Municipal Act, 1922 stands impliedly repealed by the Bihar Agricultural Produce Markets Act (16 of 1960) the Municipal Act does not continue in force. A 1979 Pat 234 (239).

8. President's power to make adaptations and modifications of any law in force — Clause (2). — (1) This clause empowers the President to make such adaptations and modifications of any law in force as may be necessary or expedient and provides that thereafter that law will have effect subject to the adaptations and modifications so made. **A 1950 Nag 203 (206) : 51 Cri LJ 1372 (DB).**

(2) The power to make adaptations and modifications was given to the President to suit the new circumstances brought about by the Constitution. **A 1951 Cal 120 (122) : 52 Cri LJ 934 (FB).**

(3) By the expression "any law in force" in this clause must, of course, be understood as existing law as defined by Art. 366 Clause (10).

Article 372 — Note 8 (contd.)
for non-statutory law, cannot obviously be subject to any adaptation or modificaation. A 1952 Bom 84 (89) : 1952 Cri LJ 354 (DB).

(4) The general intent of the Constitution is that existing laws are to operate after the Constitution only so far as they are consistent with the Constitution and that so far as they are not so consistent, they are to cease to operate. A 1955 Cal 451 (455) (DB).

(5) The governing direction in this clause is that the dealing by the President with existing laws must be for the purpose of bringing such laws "into accord with the provisions of this Constitution". A 1956 All 321 (323) (DB) °° A 1955 Cal 451 (455) (DB).

(6) As the President has only power to make adaptations and modifications for the purpose of bringing an Act into conformity with the provisions of the Constitution, it follows that an adaptation which is inconsistent with any provision of the Constitution will be invalid. **A 1958 SC 468 (488)** °° A 1956 All 321 (323) (DB) °° A 1955 Cal 451 (455, 456) (DB).

(7) An adaptation actually made must be construed as if the President had not intended to exceed his powers unless the words used make it wholly impossible to do so. A 1955 Cal 451 (455) (DB).

(8) The mere fact that an Act has been made the subject of an Adaptation Order will not make the Act valid if it is otherwise invalid as offending any provision of the Constitution. **A 1941 Lah 182 (184) (FB)** °° **A 1950 Cal 274 (276) : 51 Cri LJ 1110 (SB)** °° A 1953 Mad 729 (732) : 1953 Cri LJ 1364 (DB) °° A 1950 Pat 265 (270) : 51 Cri LJ 1081 (DB).

(9) The President cannot, by an Adaptation Order direct the continuance of an Act repealed by the Constitution. A 1954 Mad 543 (547) (DB).

(10) Clause (2) is strictly limited to bringing an Act into accord with the provisions of the Constitution. **A 1951 Cal 120 (122) : 52 Cri LJ 934 (FB).**

(11) The fact that an Act has not been adapted by the President does not affect the question whether it continued in force after the commencement of the Constitution. A 1953 Mad 729 (732) : 1953 Cri LJ 1364 (DB).

(12) There is nothing in the clause to prevent the President from repealing the whole or a part of any existing law. **A 1951 SC 128 (129) : 52 Cri LJ 860** °° A 1954 Bom 505 (507) (DB).

(13) Where the President, under Article 373, exercises the powers of Parliament conferred by Art. 22 (7) it is not tantamount to exercising his power of adaptation under Clause (2). A 1950 Nag 203 (206) : 51 Cri LJ 1372 (DB).

(14) After the imposition of the Presidents' Rule in Pepsu under Article 356 the President was competent to promulgate under Article 309 read with Arts. 313 and 372, the Bank of Patiala Regulation and Management Order, 1954 superseding the commands of the Ruler of erstwhile Patiala State dated 8-4-1941 which had the force of law. A 1963 Punj 345 (349, 350) (DB).

9. Adaptation of Laws Order, 1950.— (1) Clause 3 of the Order does not in any way confer, recognise or continue the power of the High Court to prescribe court-fees for the Original Side of the High Court, nor does Cl. 22 thereof save such power. A 1954 Mad 543 (547) (DB).

(2) Clause 19 of the Order cannot be so construed as if it purported to keep in force even laws which might be inconsistent with the Constitution. A 1955 Cal 451 (457) (DB).

(3) Clause 23 of the Order cannot be said to substitute the Supreme Court in the place of the State Judicial Committee of the former Hyderabad State. A 1956 Hyd 136 (138) (DB).

(4) It has been held that Clause 28 of the Order which directs a Court to construe the law with all such adaptations as are necessary for the purpose of bringing it into accord with the provisions of the Constitution, notwithstanding that the Order makes no provision is contrary to the express provisions of Cl. (2) of this article. **A 1950 Cal 274 (285, 286) : 51 Cri LJ 1110 (SB).**

(5) It has been held that the adaptation or modification made by way of amending Section 1 (3) of the Essential Supplies (Temporary Powers) Act, 1946, so as to substitute "the 1st day of April 1951" for the period originally mentioned in the sub-section was neither illegal nor beyond the competency of the President within the meaning of this clause. **A 1952 Pat 185 (191, 192) : 1952 Cri LJ 493 (FB).**

(6) Article 225 in terms preserves the powers of the High Court derived under the Letters Patent and the rules already made by the High Court are continued under this article. Even assuming that the Order by implication revoked the powers of the High Court conferred by the Letters Patent, the rules already made are saved under the express provisions of Clause 17 of this Order. **A 1956 Andhra 161 (165) : 1956 Cri LJ 1049 (FB).**

(7) The Fugitive Offenders Act, 1881 (44 & 45 Vict., c. 69), has been left severely alone in the Adaptation Order. It has, therefore, ceased to be in force after the Constitution. **A 1954 SC 517 (519) : 1954 Cri LJ 1337.**

(8) The definition of 'State' in S. 3 (58) (b) of the General Clauses Act, adapted under Article 372 by the Adaptation of Laws Order 1950 can be used to interpret the word 'State' used in the Constitution only when a State is Part A, B or C. A 1969 Delhi 246 (252, 253) : 1969 Lab IC 974 (DB).

10. "Any such adaptation or modification shall not be questioned in a Court of law" — Clause (2).— (1) In spite of these words in Clause (2), it is the established view that an adaptation, which is inconsistent with any provisions of the Constitution, is invalid and its validity can be questioned in a Court of law. **A 1958 SC 468 (488)** °° A 1955 Cal 451 (456) (DB).

(2) The last words of Clause (2) only precluded the action of the President in making the adaptation from being questioned in a Court of law. A 1955 Cal 451 (455) (DB).

(3) Under Clause (2) the President cannot legislate except for the purposes of bringing the provisions of any law in force into accord with the provisions of the Constitution and so, he cannot, by an Adaptation Order extend the life of an Act. **A 1951 Cal 120 (122) : 52 Cri LJ 934 (FB).**

(4) A provision made by the President by virtue of his special power under Clause (2) is, nonetheless, a "law" although under the last

[a][372A. **Power of the President to adapt laws.**— (1) For the purposes of bringing the provisions of any law in force in India or in any part thereof, immediately before the commencement of the Constitution (Seventh Amendment) Act, 1956, into accord with the provisions of this Constitution as amended by that Act, the President may by order made before the 1st day of November, 1957, make such adaptations and modifications of the law, whether by way of repeal or amendment, as may be necessary or expedient, and provide that the law shall, as from such date as may be specified in the order, have effect subject to the adaptations and modifications so made, and any such adaptation or modification shall not be questioned in any court of law.

(2) Nothing in clause (1) shall be deemed to prevent a competent legislature or other competent authority from repealing or amending any law adapted or modified by the President under the said clause.]

(a) Inserted after article 372 by the Constitution (Seventh Amendment) Act, 1956, S. 23 (1-11-1956).

NOTE:— See the following Adaptation Orders so made—

(1) Adaptation of Laws (No. 1) Order, 1956, Gaz. Ind., 1-11-1956, Pt. II, S. 3, Ext., p. 2261.

(2) Adaptation of Laws (No. 2) Order, 1956, ibid, p. 2263.

(3) Adaptation of Laws (No. 3) Order, 1956, Gaz. Ind., 31-12-1956, Pt. II, S. 3, Ext., p. 2775.

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Article 372A shall be omitted—See the Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (16) (a) (as amended by C. O. 56).

Article 372 — Note 10 (contd.)

words of Clause (2), such provision, unlike legislative provisions in general, is specially made exempt from being questioned in a Court of law. **A 1958 SC 468 (487, 488).**

11. Explanation III.— (1) The Explanation III does not apply to the Indian Independence Act, and hence, notwithstanding the repeal of the Act, the Indian Independence (Legal Proceedings) Order, 1947, continues in force under Clause (1) of this article. **A 1956 Cal 222 (223) (DB).**

(2) The expression "temporary law" in Explanation III was held to include an Ordinance promulgated by the Rajpramukh of a Part B State. **A 1951 Madh B 149 (153) : 52 Cri LJ 1467 (FB).**

(3) The Explanation merely provides that temporary statutes will not have their lives automatically extended by virtue of the provisions of Clause (1). **A 1952 Cal 118 (120).**

(4) If as a result of the operation of any other article, a legal position, which was brought about by a temporary law, is perpetuated and continued after the Constitution, the result cannot be avoided by invoking Explanation III. **A 1951 Madh B 149 (152) : 52 Cri LJ 1467 (FB).**

(5) Where a temporary Act mentions a certain period for its duration and the President's Adaptation Order, purely as a matter of adaptation under Clause (2) of this article, replaces the words used in the temporary Act relating to its duration by words which specify a certain date for the expiration of the Act, there is no question of the temporary Act being continued in force beyond the date on which it would have expired and hence, Explanation III does not come into play in such a case at all. **A 1952 Pat 185 (192) : 52 Cri LJ 493 (FB).**

(6) Where a temporary Act expires, it should be regarded as having never existed except as to matters and transactions past and closed. **A 1957 Punj 265 (268) (DB).**

Article 372-A

(1) Definition of 'State' in Sec. 3 (58) (b) General Clauses Act as adopted under Article 372-A not applicable for interpreting constitution. A 1969 Delhi 246 (252, 253) : 1969 Lab IC 974 (DB) °° **1975 Lab IC 1265 (1271, 1272) (FB) (Delhi)**

(2) Adaptation of Laws (No. 1) Order 1956 substituting a new Clause (58) in Section 3 of the General Clauses Act was issued by the President under the power conferred on him by Art. 372-A of the Constitution. The Cl. (58) provided that the expression "State shall" as respects any period after the commencement of the Constitution (7th Amendment) Act, 1956 shall include a "Union territory". Consequently 'Union Territories' are 'States' for purposes of Article 312 of the Constitution. **A 1976 SC 1856 : 1976 Lab IC 1194 (1197).** (ILR (1969) Delhi 1214, Reversed.)

(3) Delhi Special Police Establishment Act (1946), Section 2 — Substitution of words "Union Territories" for words "Part C States" by Adaptation of Laws Order (3 of 1956) — Does not bring Act of (1946), into conflict with Entry 80. **A 1970 SC 1126 (1131).** (A 1969 Delhi 330 (342, 344) (DB), Affirmed.)

(4) Delhi Special Police Establishment Act, 1946, which has been enacted validly prior to the Constitution cannot become unconstitutional merely because of the adaptation made into it by the President under Art. 372-A. A 1969 Delhi 330 (344) (DB).

373. Power of President to make order in respect of persons under preventive detention in certain cases.— Until provision is made by Parliament under clause (7) of article 22, or until the expiration of one year from the commencement of this Constitution, whichever is earlier, the said article shall have effect as if for any reference to Parliament in clauses (4) and (7) thereof there were substituted a reference to the President and for any reference to any law made by Parliament in those clauses there were substituted a reference to an order made by the President.

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Article 373 shall be omitted—See the Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (16) (a).

374. Provisions as to Judges of the Federal Court and proceedings pending in the Federal Court or before His Majesty in Council.— (1) The Judges of the Federal Court holding office immediately before the commencement of this Constitution shall, unless they have elected otherwise, become on such commencement the Judges of the Supreme Court and shall thereupon be entitled to such salaries and allowances and to such rights in respect of leave of absence and pension as are provided for under article 125 in respect of the Judges of the Supreme Court.

Article 373

(1) Neither the Parliament nor the President acting under Article 373 can prescribe what it or he is empowered to do under Art. 22 (7) (a) and (b) in respect of detention made under a law in force prior to the commencement of the Constitution. A 1951 Mad 1015 (1041) : 1952 Cri LJ 170 (DB).

(2) Powers of President under Article 373 are not wider than those conferred on Parliament by Art. 22 (7) and therefore he cannot order the continuance of detention of a person even in a case not covered by that clause. A 1950 Nag 203 (207) : 51 Cri LJ 1372 (DB).

(3) Section 2 (1) (a) being still extant is 'any law' within the meaning of expression used in sub-clause (a) of Clause (7) of Art. 22 and hence the President can by virtue of powers conferred on him, by order, prescribe the circumstances under which the period of detention may extend beyond three months without obtaining the opinion of the Advisory Board. A 1950 Nag 203 (207, 208) (DB)

(4) The Preventive Detention (Extension of Duration) Order dated 26th January, 1950 and purported to be signed by Governor-General is of no value at all for purposes of adaptation of the Constitution Act; nor can it be of any value for purpose of Article 373 because under that Article, it is only the President who can act after the commencement of the Constitution. A 1950 Pat 265 (280) : 51 Cri LJ 1081 (DB).

Article 374

(1) Where a suit in respect of a dispute concerning a document of the description referred to in Article 363 was filed in the Federal Court before the Constitution came into force and stood transferred to the Supreme Court under Clause (2) of this article after the Constitution came into force, the Supreme Court will have no jurisdiction to hear and determine those matters by virtue of Article 363. A 1951 SC 253 (258).

(2) The latter part of Clause (2) has not the effect of endowing the judgments of the Federal Court delivered before the commencement of the Constitution with the same authority as judicial precedents as the decisions of the Supreme Court. A 1954 Bom 351 (357) (DB) ••A 1951 Mys 72 (75) : 52 Cri LJ 992 (FB) •• A 1953 Punj 118 (120, 122) •• A 1952 Bom 37 (46) (DB) •• A 1951 All 205 (221) (DB).

[But see A 1951 Mad 115 (119) : 52 Cri LJ 396 (DB).]

(3) The High Courts in the former Indian States were not bound immediately before the commencement of the Constitution by the judgments of the Federal Court or the Privy Council. Under Article 372, the position will continue to be the same even after the coming into force of the Constitution. A 1951 Mys 72 (75) : 52 Cri LJ 992 (FB).

(4) By virtue of combined operation of Sections 2, 4 (b), 5 and 8, Abolition of Privy Council Jurisdiction Act, 1949 and Arts. 135 and 374 (2) of the Constitution, Supreme Court must be deemed in law to be the Court which passed the decree and therefore competent to entertain an application for cancellation of decree under S. 10, Bombay Hereditary Offices Act. A 1960 SC 808 (809, 810).

(5) Drawing up of decrees passed by the Judicial Committee of Hyderabad having been vested in the High Court of Hyderabad under a statutory Regulation, such proceeding was not pending before the Judicial Committee and hence was not liable to be transferred to the Supreme Court. A 1959 Andh Pra 159 (164, 165) (DB).

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(2) All suits, appeals and proceedings, civil or criminal, pending in the Federal Court at the commencement of this Constitution shall stand removed to the Supreme Court, and the Supreme Court shall have jurisdiction to hear and determine the same, and the judgments and orders of the Federal Court delivered or made before the commencement of this Constitution shall have the same force and effect as if they had been delivered or made by the Supreme Court.

(3) Nothing in this Constitution shall operate to invalidate the exercise of jurisdiction by His Majesty in Council to dispose of appeals and petitions from, or in respect of, any judgment, decree or order of any court within the territory of India in so far as the exercise of such jurisdiction is authorised by law, and any order of His Majesty in Council made on any such appeal or petition after the commencement of this Constitution shall for all purposes have effect as if it were an order or decree made by the Supreme Court in the exercise of the jurisdiction conferred on such Court by this Constitution.

(4) On and from the commencement of this Constitution the jurisdiction of the authority functioning as the Privy Council in a State specified in Part B of the First Schedule to entertain and dispose of appeals and petitions from or in respect of any judgment, decree or order of any court within that State shall cease, and all appeals and other proceedings pending before the said authority at such commencement shall be transferred to, and disposed of by the Supreme Court.

(5) Further provision may be made by Parliament by law to give effect to the provisions of this article.

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In its application to the State of Jammu and Kashmir, in Art. 374,—

(i) in clause (4), the reference to the authority functioning as the Privy Council of a State shall be construed as a reference to the Advisory Board constituted under Jammu and Kashmir Constitution Act, 1996, and references to the commencement of the Constitution shall be construed as references to the commencement of this Order;

(ii) Clauses (1), (2), (3) and (5) shall be omitted—See Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (16) (a), (c).

375. Courts, authorities and officers to continue to function subject to the provisions of the Constitution.— All courts of civil, criminal and revenue jurisdiction, all authorities and all officers, judicial, executive and ministerial, throughout the territory of India, shall continue to exercise their respective functions subject to the provisions of this Constitution.

Article 374 (contd.)

(6) Law settled by the Federal Court will continue to be applicable even after the advent of the Constitution till it is altered by the Supreme Court or by a competent authority. A 1959 Andh Pra 359 (360) °° A 1961 Cal 125 (133) (SB) °° A 1955 Orissa 160 (162) (DB).

Article 375

(1) Where a Magistrate in Hyderabad territory had become duly vested with jurisdiction to try a criminal case pending before him, the subsequent transfer of the territory where the offence was committed, to the State of Bombay under the India and Hyderabad Exchange of Enclaves Order, 1950, will not affect the vested jurisdiction. A 1950 Hyd 71 (72) : 52 Cri LJ 1398 (DB).

(2) The Speaker though an officer of the Legislature will not come within the category of officers contemplated by this article. A 1952 Trav-Co 66 (69) : 1950 Trav-Co LR 215.

(3) A village Munsif who claims to be in office at the commencement of this Constitution in spite of an order of dismissal passed against him long before, does not continue to function as such by virtue of this article. A 1952 Mad 865 (871) (DB).

(4) The General Manager of the East Indian Railway Administration who was ex-officio authorised to act for the Dominion of India in respect of all judicial proceedings involving East Indian Railway Administration will continue to function as such even after the commencement of the Constitution by virtue of this article. A 1956 Pat 511 (517) (DB).

376. Provisions as to Judges of High Courts.— (1) Notwithstanding anything in clause (2) of article 217, the Judges of a High Court in any Province holding office immediately before the commencement of this Constitution shall, unless they have elected otherwise, become on such commencement the Judges of the High Court in the corresponding State, and shall thereupon be entitled to such salaries and allowances and to such rights in respect of leave of absence and pension as are provided for under article 221 in respect of the Judges of such High Court.

[a][Any such Judge shall, notwithstanding that he is not a citizen of India, be eligible for appointment as Chief Justice of such High Court, or as Chief Justice or other Judge of any other High Court.]

(2) The Judges of a High Court in any Indian State corresponding to any State specified in Part B of the First Schedule holding office immediately before the commencement of this Constitution shall, unless they have elected otherwise, become on such commencement the Judges of the High Court in the State so specified and shall, notwithstanding anything in clauses (1) and (2) of article 217 but subject to the proviso to clause (1) of that article, continue to hold office until the expiration of such period as the President may by order determine.

(3) In this article, the expression "Judge" does not include an acting Judge or an additional Judge.

(a) Added by the Constitution (First Amendment) Act, 1951, S. 13 (18-6-1951).

JAMMU AND KASHMIR

Article 376 shall be omitted—See Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (16) (a) (14-5-1954).

377. Provisions as to Comptroller and Auditor-General of India.— The Auditor-General of India holding office immediately before the commencement of this Constitution shall, unless he has elected otherwise, become on such commencement the Comptroller and Auditor-General of India and shall thereupon be entitled to such salaries and to such rights in respect of leave of absence and pension as are provided for under clause (3) of article 148 in respect of the Comptroller and Auditor-General of India and be entitled to continue to hold office until the expiration of his term of office as determined under the provisions which were applicable to him immediately before such commencement.

JAMMU AND KASHMIR

Article 377 shall be omitted—See Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (16) (a) (14-5-1954).

378. Provisions as to Public Service Commissions.— (1) The members of the Public Service Commission for the Dominion of India holding office immediately before the commencement of this Constitution shall, unless they have elected otherwise, become on such commencement the members of the Public Service Commission for the Union and shall, notwithstanding anything in clauses (1) and (2) of article 316 but subject to the proviso to clause (2) of that article, continue to hold office until the expiration of their term of of-

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Article 375 (contd.)

(5) On coming into force of the Constitution, the laws prevailing in different parts of the country and the Courts which administered them were continued by virtue of the express provisions in Articles 372 and 375. **A 1955 Madh Bha 1 (11) (FB).**

Article 376

(1) Clause 2 provides for the continuance in office of the Judges of the High Courts in the former Indian States which were incorporated as Part B States under the Constitution. In the case of such Judges, the clause provides that they can continue in office for such time as the President may by order determine, notwithstanding that they may have passed the age limit of sixty years for retirement of High Court Judges, under Article 217. **A 1951 Trav-Co 45 (46, 53) (DB).**

fice as determined under the rules which were applicable immediately before such commencement to such members.

(2) The members of a Public Service Commission of a Province or of a Public Service Commission serving the needs of a group of Provinces holding office immediately before the commencement of this Constitution shall, unless they have elected otherwise, become on such commencement the members of the Public Service Commission for the corresponding State or the members of the Joint State Public Service Commission serving the needs of the corresponding States, as the case may be, and shall notwithstanding anything in clauses (1) and (2) of article 316 but subject to the proviso to cl. (2) of that article, continue to hold office until the expiration of their term of office as determined under the rules which were applicable immediately before such commencement to such members.

JAMMU AND KASHMIR

Article 378 shall be omitted—See Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (16) (a) (14-5-1954).

[a][**378A. Special provision as to duration of Andhra Pradesh Legislative Assembly.**— Notwithstanding anything contained in article 172, the Legislative Assembly of the State of Andhra Pradesh as constituted under the provisions of Sections 28 and 29 of the States Reorganisation Act, 1956, unless sooner dissolved, continue for a period of five years from the date referred to in the said Section 29 and no longer and the expiration of the said period shall operate as a dissolution of that Legislative Assembly.]

(a) Inserted by the Constitution (Seventh Amendment) Act, 1956, S. 24 (1-11-1956).

JAMMU AND KASHMIR

Article 378A shall be omitted—See Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (16) (a) (as amended by C. O. 56.)

379—391. [Omitted by the Constitution (Seventh Amendment) Act, 1956, S. 29 and Sch. (1-11-1956).]

392. Power of the President to remove difficulties.— (1) The President may, for the purpose of removing any difficulties, particularly in relation to the transition from the provisions of the Government of India Act, 1935, to

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Article 378-A

(1) After the passing of the States Reorganisation Act, 1956, the new State of Andhra Pradesh was formed by addition of some districts of Hyderabad to Andhra. The number of the sitting members of Hyderabad Assembly who would become members of Andhra Pradesh on 1-11-1956 was, however, only a little more than half the number of the then existing Andhra Assembly. It was, therefore, decided that general elections for the Hyderabad area only should be held and not for the whole of the Andhra Pradesh. Section 29 of the States Reorganisation Act 1956, gives effect to this decision. The present article which was inserted by the Constitution (Seventh Amendment) Act, 1956, provides for the duration of the period of five years of the Legislative Assembly of Andhra Pradesh formed under the above conditions. Gazette of India, Dated 18-4-1956, Part II, Section 2, Extra. p. 223 (282).

Article 392

(1) The Constituent Assembly being invested by British Parliament with all powers of the Dominion Legislature to frame the Constitution decided to bring the Constitution into being in two instalments and enacted this Article so that this Article and certain others should come into force "at once" i. e., on 26-11-1949 when the Constitution was enacted, while remaining Articles were to come into force on 26-1-1950. **A 1953 SC 63 (64, 65) : 1953 Cri LJ 515 : A 1952 Madh Bha 31 (36) (DB). (Overruled on another point in A 1959 SC 395).**

(2) It was not necessary in the exercise of the power under this article that, at the time of such exercise, the occasion for the removal of such difficulties must have actually arisen. **A 1951 SC 458 (462).**

(3) This Article is widely expressed and so also the nature of adaptation to be made. Whether adaptation should be by modification, addition or omission is left to the opinion of the President and if he makes adaptation by omission of certain words in the Article he does not exceed his power. **A 1959 SC 512 (516).**

(4) This Article has a limited scope as it is intended only for the purpose of removing diffi-

the provisions of the Constitution by order direct that this Constitution shall, during such period as may be specified in the order, have effect subject to such adaptations, whether by way of modification, addition or omission, as he may deem to be necessary or expedient:

Provided that no such order shall be made after the first meeting of Parliament duly constituted under Chapter II of Part V.

(2) Every order made under clause (1) shall be laid before Parliament.

(3) The powers conferred on the President by this article, by article 324, by clause (3) of article 367 and by article 391 shall, before the commencement of this Constitution, be exercisable by the Governor-General of the Dominion of India.

JAMMU AND KASHMIR

Article 392 shall be omitted—See Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (16) (a). (14-5-1954).

PART XXII

SHORT TITLE, COMMENCEMENT AND REPEALS

393. Short title.— This Constitution may be called the Constitution of India.

JAMMU AND KASHMIR

Article 393 applies to the State of Jammu and Kashmir.— The Constitution (Application to Jammu and Kashmir) Order 1954, (14-5-1954).

394. Commencement.— This article and articles 5, 6, 7, 8, 9, 60, 324, 366, 367, [a][379, 380, 388, 391,] 392 and 393 shall come into force at once, and the

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Article 392 (contd.)

culties and for bringing about a smoother transition. Hence order made by the President cannot attract Article 368 as the Article envisages introduction of a bill in the Parliament for contemplated amendment. **A 1967 SC 1643 (1659).**

(5) Since Article 392 gives power to the President to remove the difficulties, the President has to decide whether there is a difficulty or not. Hence it is the subjective test and not the objective test that is to be applied. A 1952 Madh Bha 31 (36) (DB). **(Overruled on another point in A 1959 SC 395.)**

(6) Per Dixit, J. — The words "whether by way of modification, addition, or omission" in Article 392 (2) are sufficiently comprehensive to include an adaptation by way of substitution. Substitution of one Article of the Constitution by another is in substance nothing but an omission of one Article and the addition in its place of another. A 1952 Madh Bha 31 (40) (DB). **(Overruled on another point in A 1959 SC 395.)**

(7) The word 'modify' conveys the sense of a partial change and not complete change when under the Constitution. (Removal of Difficulties) Order No. 2, Article 178 was substituted by new Article by deleting the first part and retaining the latter it amounts to modification. A 1952 Madh Bha 31 (36) (DB). **(Overruled on another point in A 1959 SC 395.)**

(8) Constitution (Declaration as to Foreign State) Order, 1950 was made by the Governor-General-of-India under Article 392 (3) read with Article 367 (3). Although Pakistan is not a Foreign State for the purposes of the Constitution it is a Foreign power for the purpose of Section 3 of Preventive Detention Act (4 of 1950). **A 1960 SC 625 (627, 628) : 1960 Cri LJ 764.**

(9) Preventive Detention (Extension of Duration) Order, 1950 made on 26th January 1950 and purported to be signed by Governor-General — It is of no value for purposes of Adaptation of the Constitution Act — Governor-General could not sign after commencement of Constitution. A 1950 Pat 265 (270) : 1951 Cri LJ 1081 (DB).

(10) This Article does not confer upon the President any power to abridge any of the fundamental rights conferred upon a citizen of India under Part III of the Constitution. A 1950 Nag 203 (204) : 1951 Cri LJ 1372 (DB).

(11) The sovereignty of Indian States having been, by their accession to the Dominion of India, considerably impaired and wholly transformed they became subject to the provisions of the Government of India Act, 1935 to the extent specified in their instruments of Accession. Thus there was transition from the provisions of the said Act to the provision of the Constitution in respect of Indian States. A 1952 Madh B 31 (40) (DB). **(Overruled on another point in A 1959 SC 395.)**

Article 394

(1) Any person who migrates to Pakistan in the period between 1-3-1947 and 26-1-1950 i. e. the date of commencement of the Constitution,

remaining provisions of this Constitution shall come into force on the twenty-sixth day of January, 1950, which day is referred to in this Constitution as the commencement of this Constitution.

(a) Now omitted by Constitution (Seventh Amendment) Act, 1956 (1-11-56).

JAMMU AND KASHMIR

Article 394 shall be omitted—See the Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (17) (14-5-1954).

395. Repeals.— The Indian Independence Act, 1947, and the Government of India Act, 1935, together with all enactments amending or supplementing the latter Act, but not including the Abolition of Privy Council Jurisdiction Act, 1949, are hereby repealed.

JAMMU AND KASHMIR

Article 395 shall be omitted—See Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (17) (14-5-1954).

[a]FIRST SCHEDULE

[Articles 1 and 4]

I. THE STATES

Name	Territories
1. ANDHRA PRADESH —	[b]The territories specified in sub-section (1) of Section 3 of the Andhra State Act, 1953, sub-section (1) of Section 3 of the States Reorganisation Act, 1956, the First Schedule to the Andhra

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Article 394 (contd.)

Article 7 is attracted to the case and he cannot be deemed to be a citizen of India under Article 5. Only because Art. 394 of the Constitution says that Arts. 5, 6, 7, etc. would come into effect at once i. e. on 26-11-1949 it cannot be held that the consequence of deprivation of citizenship will not arise before the date of coming into force of the Article and if a person stays in India up to 26-11-1949 he will be deemed as Indian citizen under Art. 5. A 1973 All 44 (46, 47) (DB).

(2) The expression "at the commencement of this Constitution" in Article 5 means only the 26th January, 1950 and not the 26th November, 1949 on which date Arts. 5, 7, 394 and some other Articles mentioned in Art. 394 came into force. A 1973 All 364 (367) (DB).

Schedule 1

(1) Though constitutionality of the Constitution Ninth Amendment Act, 1960 transferring part of Berubari Union cannot be challenged, the executive act of demarcation can be restrained by a person who continues to be a citizen of India till the demarcation is effected until Art. 31 (2) has been complied with. A 1967 Cal 216 (221).

(2) Mere passing of the Constitution Ninth Amendment Act to effect transfer of Berubari to Pakistan does not operate as pro tanto abrogation of Article 31 (2). (1968) 72 Cal WN 349 (371) ** A 1967 Cal 216 (221).

(3) Sale from dealer in U. P. to dealers in J. and K. State — Would be Inter-State sale liable to tax under Central Sales Tax Act A 1969 All 516 (517) (DB).

(4) (Before Amendment in 1956) — Hyderabad was part of India as the Constitution had placed it in Part B of Sch. 1. A 1955 Nag 160 (162) : 1955 Cri LJ 974.

(5) Entry 3 — By virtue of the States Merger (Governor's Provinces) Order, 1949 State of Seraikella was administered by the Province of Bihar before commencement of Constitution on the ground as if it formed part of Province. A 1963 Pat 475 (477) (DB).

(6) Entry 13 — Clause commencing with "as if" in the entry, now renumbered as 14 does not include territories which are administered with full knowledge that they had to be transferred to Pakistan under Radcliffe award — The clause refers only to territories which originally did not belong to West Bengal but became a part thereof by reason of merger agreements. A 1966 SC 644 (653).

(7) Entry 15 Art. 1 read with this entry indicates that Jammu and Kashmir is one of the States in the Union of India. (1965) 67 Pun LR 891.

(8) By virtue of the Constitution (Twelfth Amendment) Act, 1962 Goa, Daman & Diu became constitutionally part of India. A 1968 Goa 17, (19, 20) : 1968 Cri LJ 316.

Pradesh and Madras (Alteration of Boundaries) Act, 1959, and the Schedule to the Andhra Pradesh and Mysore (Transfer of Territory) Act, 1968, but excluding the territories specified in the Second Schedule to the Andhra Pradesh and Madras (Alteration of Boundaries) Act, 1959.]

2. **ASSAM** — The territories which immediately before the commencement of this Constitution were comprised in the Province of Assam, the Khasi States and the Assam Tribal Areas, but excluding the territories specified in the Schedule to the Assam (Alteration of Boundaries) Act, 1951, [c][and the territories specified in sub-section (1) of Section 3 of the State of Nagaland Act, 1962] [d][and the territories specified in Sections 5, 6 and 7 of the North-Eastern Areas (Reorganisation) Act, 1971.]

3. **BIHAR** — [e][The territories which immediately before the commencement of this Constitution were either comprised in the Province of Bihar or were being administered as if they formed part of that Province and the territories specified in clause (a) of sub-section (1) of Section 3 of the Bihar and Uttar Pradesh (Alteration of Boundaries) Act, 1968, but excluding the territories specified in sub-section (1) of Section 3 of the Bihar and West Bengal (Transfer of Territories) Act, 1956, and the territories specified in clause (b) of sub-section (1) of Section 3 of the first mentioned Act.]

[f][4. **GUJARAT** — The territories referred to in sub-section (1) of Section 3 of the Bombay Reorganisation Act, 1960.]

5. **KERALA** — The territories specified in sub-s. (1) of Section 5 of the States Reorganisation Act, 1956.

6. **MADHYA PRADESH** — The territories specified in sub-section (1) of Section 9 of the States Reorganisation Act, 1956 [g][and the First Schedule to the Rajasthan and Madhya Pradesh (Transfer of Territories) Act, 1959.]

[h][7. **TAMIL NADU**] — The territories which immediately before the commencement of this Constitution were either comprised in the Province of Madras or were being administered as if they formed part of that Province and the territories specified in Section 4 of the States Reorganisation Act, 1956 [i][and the Second Schedule to the Andhra Pradesh and Madras (Alteration of Boundaries) Act, 1959], but excluding the territories specified in sub-section (1) of Section 3 and sub-section (1) of Section 4 of the Andhra State Act, 1953, and [j][the territories specified in clause (b) of sub-section (1) of Section 5, Section 6 and clause (d) of sub-section (1) of Section 7 of the States Reorganisation Act, 1956 and the territories specified in the First Schedule to the Andhra Pradesh and Madras (Alteration of Boundaries) Act, 1959.]

[k][8. **MAHARASHTRA** — The territories specified in sub-section (1) of Section 8 of the States Reorganisation Act, 1956, but excluding the territories referred to in sub-section (1) of Section 3 of the Bombay Reorganisation Act, 1960.]

[l][9. **KARNATAKA**] — The territories specified in sub-section (1) of S. 7 of of the States Reorganisation Act, 1956 [m][but excluding the territory specified in the Schedule to the Andhra Pradesh and Mysore (Transfer of Territory) Act, 1968.]

[n][10.] **ORISSA** — The territories which immediately before the commencement of this Constitution were either comprised in the Province of Orissa or were being administered as if they formed part of that province.

[n][11.]**PUNJAB** — The territories specified in Section 11 of the States Reorganisation Act, 1956 [o][and the territories referred to in Part II of the

First Schedule to the Acquired Territories (Merger) Act, 1960] [p][but excluding the territories referred to in Part II of the First Schedule to the Constitution (Ninth Amendment) Act, 1960] [q][and the territories specified in sub-section (1) of Section 3, Section 4 and sub-section (1) of Section 5 of the Punjab Reorganisation Act, 1966.]

[r][12.] **RAJASTHAN** — The territories specified in S. 10 of the States Reorganisation Act, 1956 [r][but excluding the territories specified in the First Schedule to the Rajasthan and Madhya Pradesh (Transfer of Territories Act, 1959.]

[s][13.] **UTTAR PRADESH** — [s][The territories which immediately before the commencement of this Constitution were either comprised in the Province known as the United Provinces or were being administered as if they formed part of that Province and the territories specified in clause (b) of sub-section (1) of Section 3 of the Bihar and Uttar Pradesh (Alteration of Boundaries) Act, 1968, but excluding the territories specified in clause (a) of sub-section (1) of Section 3 of that Act.]

[t][14.] **WEST BENGAL** — The territories which immediately before the commencement of this Constitution were either comprised in the Province of West Bengal or were being administered as if they formed part of that Province and the territory of Chandernagore as defined in clause (c) of Section 2 of the Chandernagore (Merger) Act, 1954 and also the territories specified in sub-section (1) of Section 3 of the Bihar and West Bengal (Transfer of Territories) Act, 1956.

[u][15.] **JAMMU AND KASHMIR** — The territory which immediately before the commencement of this Constitution was comprised in the Indian State of Jammu and Kashmir.

[v][16. **NAGALAND** — The territories specified in sub-section (1) of Section 3 of the State of Nagaland Act, 1962.]

[w][17. **HARYANA** — The territories specified in sub-section (1) of S. 3 of the Punjab Reorganisation Act, 1966.]

[x][18. **HIMACHAL PRADESH** — The territories which immediately before the commencement of this Constitution were being administered as if they were Chief Commissioners' Provinces under the names of Himachal Pradesh and Bilaspur and the territories specified in sub-sec. (1) of Section 5 of the Punjab Reorganisation Act, 1966.]

[y][19. **MANIPUR** — The territory which immediately before the commencement of this Constitution was being administered as if it were a Chief Commissioner's Province under the name of Manipur.

20. **TRIPURA** — The territory which immediately before the commencement of this Constitution was being administered as if it were a Chief Commissioner's Province under the name of Tripura.

21. **MEGHALAYA** — The territories specified in Section 5 of the North-Eastern Areas (Reorganisation) Act, 1971.]

[z][22. **SIKKIM** — The territories which immediately before the commencement of the Constitution (Thirty-sixth Amendment) Act, 1975, were comprised in Sikkim.]

II. THE UNION TERRITORIES

Name	Extent
1. **DELHI** — The territory which immediately before the commencement of this Constitution was comprised in the Chief Commissioner's Province of Delhi.	
[za][* *]	
[zb][* *]	

[c][2.] **THE ANDAMAN AND NICOBAR ISLANDS** — The territory which immediately before the commencement of this Constitution was comprised in the Chief Commissioner's Province of the Andaman and Nicobar Islands.

[c][3.] [d][**LAKSHADWEEP**] — The territory specified in Section 6 of the States Reorganisation Act, 1956.

[c][4.] **DADRA AND NAGAR HAVELI** — The territory which immediately before the eleventh day of August, 1961 was comprised in Free Dadra and Nagar Haveli.

[c][5.] **GOA, DAMAN AND DIU** — The territories which immediately before the twentieth day of December, 1961 were comprised in Goa, Daman and Diu.

[c][6.] **PONDICHERRY** — The territories which immediately before the sixteenth day of August, 1962, were comprised in the French Establishments in India known as Pondicherry, Karikal, Mahe and Yanam.

[c][7.] **CHANDIGARH** — The territories specified in Section 4 of the Punjab Reorganisation Act, 1966.

[e][8. **MIZORAM** — The territories specified in Section 6 of the North-Eastern Areas (Reorganisation) Act, 1971.

9. ARUNACHAL PRADESH — The territories specified in Section 7 of the North-Eastern Areas (Reorganisation) Act, 1971.]]

[a] Substituted for the First Schedule, as amended by the States Reorganisation Act, 1956 (37 of 1956) and the Bihar and West Bengal (Transfer of Territories) Act, 1956 (40 of 1956), by the Constitution (Seventh Amendment) Act, 1956, Section 2 (1-11-1956).

[b] Substituted by the Andhra Pradesh and Mysore (Transfer of Territory) Act, 1968 (36 of 1968), Section 4 (a) (1-10-1968).

[c] Added by State of Nagaland Act, 27 of 1962, S. 4 (1-12-63).

[d] Added by Act 81 of 1971, S. 9 (21-1-72).

[e] Substituted by the Bihar and Uttar Pradesh (Alteration of Boundaries) Act, 1968 (24 of 1968), Section 4 (a) (10-6-70).

[f] Substituted for entry 4 by the Bombay Reorganisation Act, 1960 (11 of 1960) (1-5-1960).

[g] Inserted by Section 4 of the Rajasthan and Madhya Pradesh (Transfer of Territories) Act, 1959 (47 of 1959) (w.e.f. 1-10-1959).

[h] Substituted for 'Madras' by the Madras State (Alteration of Name) Act, 1968 (53 of 1968), Section 5 (w.e.f. 14-1-1969).

[i] Inserted by Andhra Pradesh, and Madras (Alteration of Boundaries) Act, 1959 (56 of 1959). Section 6 (w.e.f. 1-4-1960).

[j] Substituted, ibid.

[k] Inserted by the Bombay Reorganisation Act, 1960 (11 of 1960), Section 4 (w.e.f. 1-5-1960).

[l] Substituted for "Mysore" by the Mysore State (Alteration of Name) Act, 1973 (31 of 1973), S. 5 (1) (1-11-73).

[m] Inserted by the Andhra Pradesh and Mysore (Transfer of Territories) Act, 1968 (36 of 1968), Section 4 (b) (w.e.f. 1-10-1968).

[n] Original entries 8 to 14, renumbered as 9 to 15 by Act 11 of 1960, S. 4 (1-5-60).

[o] Inserted by the Acquired Territories (Merger) Act, 1960 (64 of 1960). Section 4 (w.e.f. 17-1-1961).

[p] Added by the Constitution (Ninth Amendment) Act, 1960, Section 3 (w.e.f. 17-1-1961).

[q] Inserted by the Punjab Reorganisation Act, 1966 (31 of 1966), S. 7 (1-11-1966).

[r] Inserted by the Rajasthan and Madhya Pradesh (Transfer of Territories) Act, 1959 (47 of 1959), Section 4 (w.e.f. 1-10-1959).

[s] Substituted by the Bihar and Uttar Pradesh (Alteration of Boundaries) Act, 1968 (24 of 1968), Section 4 (b).
[t] Original entries 8 to 14, renumbered as 9 to 15 by Act 11 of 1960, Section 4 (1-5-60).
[u] Ibid.
[v] Inserted by the State of Nagaland Act, 1962 (27 of 1962), Section 4 (w.e.f. 1-12-1963).
[w] Inserted by the Punjab Reorganisation Act, 1966 (31 of 1966), S. 7 (1-11-1966).
[x] Inserted by the State of Himachal Pradesh Act, 53 of 1970, S. 4 (25-1-71).
[y] Inserted by Act 81 of 1971, S. 9 (21-1-72).
[z] Inserted by Constitution (Thirty-sixth Amendment) Act, 1975, S. 2 (26-4-75).
[za] Entry relating to HP deleted by Act 53 of 1970, S. 4 (25-1-71).
[zb] Entries Nos. 3 and 4 relating to Manipur and Tripura deleted by Act 81 of 1971, S. 9 (21-1-72).
[zc] Original entries 4 to 9 were successively renumbered as 2 to 7 by Acts 53 of 1970. S. 4 (b) and 81 of 1971, S. 9 (b) (i) (21-1-1972).
[zd] Substituted for "Laccadive, Minicoy and Aminidivi Islands" by Act 34 of 1973, S. 5 (1-11-73).
[ze] Inserted by Act 81 of 1971, S. 9 (b) (ii) (21-1-72).

SECOND SCHEDULE

[Articles 59 (3), 65 (3), 75 (6), 97, 125, 148 (3), 158 (3), 164 (5), 186 and 221]

PART A

Provisions as to the President and the Governors of States [a][* * * *]

1. There shall be paid to the President and to the Governors of the State [a][* * *] the following emoluments per mensem, that is to say:—

The President	10,000 rupees.
The Governor of a State	5,500 rupees

2. There shall also be paid to the President and to the Governors of the States [b][* * *] such allowances as were payable respectively to the Governor-General of the Dominion of India and to the Governors of the corresponding Provinces immediately before the commencement of this Constitution.

3. The President and the Governors of [c][the States] throughout their respective terms of office shall be entitled to the same privileges to which the Governor-General and the Governors of the corresponding Provinces were respectively entitled immediately before the commencement of this Constitution.

4. While the Vice-President or any other person is discharging the functions of, or is acting as, President, or any person is discharging the functions of the Governor, he shall be entitled to the same emoluments, allowances and privileges as the President or the Governor whose functions he discharges or for whom he acts, as the case may be.

[a] The words 'specified in Part A of the First Schedule' were omitted by the Constitution (Seventh Amendment) Act, 1956, S. 29 and Schedule (1-11-1956).
[b] The words 'so specified', omitted, ibid.
[c] Substituted for the words 'such States', ibid.

PART B

[Part B was omitted by the Constitution (Seventh Amendment) Act, 1956, S. 29 and Schedule (1-11-1956).]

PART C

PROVISIONS AS TO THE SPEAKER AND THE DEPUTY SPEAKER OF THE HOUSE OF THE PEOPLE AND THE CHAIRMAN AND THE DEPUTY CHAIRMAN OF THE COUNCIL OF STATES AND THE SPEAKER AND THE DEPUTY SPEAKER OF THE LEGISLATIVE ASSEMBLY [a][* * *] AND THE CHAIRMAN AND THE DEPUTY CHAIRMAN OF THE LEGISLATIVE COUNCIL OF [b][A STATE].

7. There shall be paid to the Speaker of the House of the People and the Chairman of the Council of States such salaries and allowances as were pay-

able to the Speaker of the Constituent Assembly of the Dominion of India immediately before the commencement of this Constitution, and there shall be paid to the Deputy Speaker of the House of the People and to the Deputy Chairman of the Council of States such salaries and allowances as were payable to the Deputy Speaker of the Constituent Assembly of the Dominion of India immediately before such commencement.

8. There shall be paid to the Speaker and the Deputy Speaker of the Legislative Assembly [a][* * *] and to the Chairman and the Deputy Chairman of the Legislative Council [c][of a State] such salaries and allowances as were payable respectively to the Speaker and the Deputy Speaker of the Legislative Assembly and the President and the Deputy President of the Legislative Council of the corresponding Province immediately before the commencement of this Constitution and, where the corresponding Province had no Legislative Council immediately before such commencement, there shall be paid to the Chairman and the Deputy Chairman of the Legislative Council of the State such salaries and allowances as the Governor of the State may determine.

[a] The words 'of a State specified in Part A of the First Schedule' were omitted by the Constitution (Seventh Amendment) Act, 1956, S. 29 and Schedule (1-11-1956).

[b] Substituted for 'any such State', ibid.

[c] Substituted for the words "of such State", ibid.

PART D

PROVISIONS AS TO THE JUDGES OF THE SUPREME COURT AND OF THE HIGH COURTS [* * * * *]

9. (1) There shall be paid to the Judges of the Supreme Court, in respect of time spent on actual service, salary at the following rates per mensem, that is to say:—

The Chief Justice	.....	.....	.....	5,000 rupees.
Any other Judge	.....	.....	.....	4,000 rupees:

Provided that if a Judge of the Supreme Court at the time of his appointment is in receipt of a pension (other than a disability or wound pension) in respect of any previous service under the Government of India or any of its predecessor Governments or under the Government of a State or any of its predecessor Governments, his salary in respect of service in the Supreme Court [b][shall be reduced—

(a) by the amount of that pension, and

(b) if he has, before such appointment, received in lieu of a portion of the pension due to him in respect of such previous service the commuted value thereof, by the amount of that portion of the pension, and

(c) if he has, before such appointment, received a retirement gratuity in respect of such previous service, by the pension equivalent of that gratuity.]

(2) Every Judge of the Supreme Court shall be entitled without payment of rent to the use of an official residence.

(3) Nothing in sub-paragraph (2) of this paragraph shall apply to a Judge who, immediately before the commencement of this Constitution,—

(a) was holding office as the Chief Justice of the Federal Court and has become on such commencement the Chief Justice of the Supreme Court under clause (1) of Article 374, or

(b) was holding office as any other Judge of the Federal Court and has on such commencement become a Judge (other than the Chief Justice) of the Supreme Court under the said clause,

during the period he holds office as such Chief Justice or other Judge, and every Judge who so becomes the Chief Justice or other Judge of the Supreme Court shall, in respect of time spent on actual service as such Chief Justice or other Judge, as the case may be, be entitled to receive in addition to the salary specified in sub-paragraph (1) of this paragraph as special pay an

amount equivalent to the difference between the salary so specified and the salary which he was drawing immediately before such commencement.

(4) Every Judge of the Supreme Court shall receive such reasonable allowances to reimburse him for expenses incurred in travelling on duty within the territory of India and shall be afforded such reasonable facilities in connection with travelling as the President may from time to time prescribe.

(5) The rights in respect of leave of absence (including leave allowances) and pension of the Judges of the Supreme Court shall be governed by the provisions which, immediately before the commencement of this Constitution, were applicable to the Judges of the Federal Court.

10. [c][(1) There shall be paid to the Judges of High Courts, in respect of time spent on actual service, salary at the following rates per mensem, that is to say,—

The Chief Justice	.....	.....	.....	4,000 rupees.
Any other Judge	.....	.....	.....	3,500 rupees:

Provided that if a Judge of a High Court at the time of his appointment is in receipt of a pension (other than a disability or wound pension) in respect of any previous service under the Government of India or any of its predecessor Governments or under the Government of a State or any of its predecessor Governments, his salary in respect of service in the High Court shall be reduced—

(a) by the amount of that pension, and

(b) if he has, before such appointment received in lieu of a portion of the pension due to him in respect of such previous service the commuted value thereof, by the amount of that portion of the pension, and

(c) if he has before such appointment, received a retirement gratuity in respect of such previous service, by the pension equivalent of that gratuity.]

(2) Every person who immediately before the commencement of this Constitution—

(a) was holding office as the Chief Justice of a High Court in any Province and has on such commencement become the Chief Justice of the High Court in the corresponding State under clause (1) of Article 376, or

(b) was holding office as any other Judge of a High Court in any Province and has on such commencement become a Judge (other than the Chief Justice) of the High Court in the corresponding State under the said clause,

shall, if he was immediately before such commencement drawing a salary at a rate higher than that specified in sub-paragraph (1) of this paragraph, be entitled to receive in respect of time spent on actual service as such Chief Justice or other Judge, as the case may be, in addition to the salary specified in the said sub-paragraph as special pay an amount equivalent to the difference between the salary so specified and the salary which he was drawing immediately before such commencement.

[d][(3) Any person who, immediately before the commencement of the Constitution (Seventh Amendment) Act, 1956, was holding office as the Chief Justice of the High Court of a State specified in Part B of the First Schedule and has on such commencement become the Chief Justice of the High Court of a State specified in the said Schedule as amended by the said Act, shall, if he was immediately before such commencement drawing any amount as allowance in addition to his salary, be entitled to receive in respect of time spent on actual service as such Chief Justice, the same amount as allowance in addition to the salary specified in sub-paragraph (1) of this paragraph.]

11. In this Part, unless the context otherwise requires,—

(a) the expression "Chief Justice" includes an acting Chief Justice, and a "Judge" includes an ad hoc Judge;

Schedule 2, Part D, Paras 10 and 11

(1) Constitutionally the Judge of a High Court is not prohibited from undertaking to perform functions other than those of a Judge in the absence of the President's permission and at the request of a State.

(b) "actual service" includes—

(i) time spent by a Judge on duty as a Judge or in the performance of such other functions as he may at the request of the President undertake to discharge;

(ii) vacations, excluding any time during which the Judge is absent on leave; and

(iii) joining time on transfer from a High Court to the Supreme Court or from one High Court to another.

[a] Paragraph 9—The words 'in States in Part A of the First Schedule' were omitted by the Constitution (Seventh Amendment) Act, 1956, S. 25 (1-11-1956).

[b] Paragraph 9—Substituted for the words 'shall be reduced by the amount of that pension', ibid.

[c] Paragraph 10—Substituted for sub-paragraph (1) by the Constitution (Seventh Amendment) Act, 1956, S. 25 (1-11-1956).

[d] Paragraph 10—Substituted for sub-paragraphs (3) and (4), ibid.

REMOVAL OF DIFFICULTIES

Paragraph 2 of the Constitution (Removal of Difficulties) Order, No. IV provides that as from 26-1-1950, the Second Schedule to the Constitution of India shall have effect subject to the following adaptation, namely:—

"(2) In sub-para. (2) of Paragraph 10, for all words after clause (b), the following shall be substituted—

"shall, in respect of time spent on actual service as such Chief Justice or other Judge, as the case may be, be entitled to receive in addition to the salary specified in sub-paragraph (1) of this paragraph as special pay the amount, if any, by which that salary falls short of the salary payable to the Chief Justice, or as the case may be, any other Judge, of the High Court, in the Province immediately before the commencement."

OBJECTS AND REASONS

"Sometimes it becomes necessary to appoint a retired district Judge as a Judge of the High Court. In the absence of a legal provision for withholding the pension due to such a Judge, it has been the practice to obtain from him an undertaking that he would not claim the pension for the period for which he serves as a High Court Judge. Since this is obviously unsatisfactory, it is proposed to add a Proviso to Paragraph 10 (1) of the Second Schedule on the same lines as the Proviso to Paragraph 9 (1) thereof regulating the salary of a Judge of the Supreme Court in similar circumstances"—Gaz. of Ind., 1956, Pt. II, S. 2, Ext., p. 222.

PART E

PROVISIONS AS TO THE COMPTROLLER AND AUDITOR-GENERAL OF INDIA

12. (1) There shall be paid to the Comptroller and Auditor-General of India a salary at the rate of four thousand rupees per mensem.

(2) The person who was holding office immediately before the commencement of this Constitution as Auditor-General of India and has become on such

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Sch. 2 Part D Paras 10 and 11 (contd.)
A 1953 Nag 331 (332) (DB).

(2) The operation of the definition of 'actual service' in sub-para (b) is confined to the purposes of Part D and is relevant only to the question of the remuneration payable to him as a Judge for the period he is engaged in the performance of such other functions. A 1953 Nag 331 (332, 333) (DB) ** A 1956 Punj 58 (70) (DB).

(3) The absence of President's permission may result in the period spent by the Judge of a High Court in the performance of other functions not being counted for the purpose of payment to him of the salary of a Judge. A 1953 Nag 331 (332) (DB) ** A 1956 Punj 58 (70) (DB).

(4) A Commission appointed by the Nizam of Hyderabad to go into the question of succession to the estate of a deceased nobleman was incompetent because of the inclusion therein of a Judge of the High Court without obtaining the permission of the President. **A 1953 Hyd 105 (110a) (FB).**

(5) Judicial Commissioner can act as arbitrator without President's permission. A 1958 Manipur 38 (40).

(6) High Court Judges (Conditions of Service) Act is not violative of proviso to Art. 221 of the Constitution inasmuch as it does not vary the rights of the pre-Constitution Judges continuing in office at the time of the Act. **A 1970 All 268 (277, 288) (FB).**

commencement the Comptroller and Auditor-General of India under Art. 377 shall in addition to the salary specified in sub-paragraph (1) of this paragraph be entitled to receive as special pay an amount equivalent to the difference between the salary so specified and the salary which he was drawing as Auditor-General of India immediately before such commencement.

(3) The rights in respect of leave of absence and pension and the other conditions of service of the Comptroller and Auditor-General of India shall be governed or shall continue to be governed, as the case may be, by the provisions which were applicable to the Auditor-General of India immediately before the commencement of this Constitution and all references in those provisions to the Governor-General shall be construed as reference to the President.

THIRD SCHEDULE

[Articles 75 (4), 99, 124 (6), 148 (2), 164 (3), 188 and 219.]

FORMS OF OATHS OR AFFIRMATIONS

I

Form of oath of office for a Minister for the Union:—

I, A.B., do $\frac{\text{swear in the name of God}}{\text{solemnly affirm}}$ that I will bear true faith and allegiance to the Constitution of India as by law established, [a][that I will uphold the sovereignty and integrity of India,] that I will faithfully and conscientiously discharge my duties as a Minister for the Union and that I will do right to all manner of people in accordance with the Constitution and the law, without fear or favour, affection or illwill."

[a] Inserted by the Constitution (Sixteenth Amendment) Act, 1963, S. 5 (a) (5-10-1963).

JAMMU AND KASHMIR

Third Schedule applies to the State of Jammu and Kashmir subject to the exceptions, namely, that Forms V VI, VII and VIII shall be omitted.—See Constitution (Application to J and K.) Order, 1954, Para. 2, sub-para. (20).

II

Form of oath of secrecy for a Minister for the Union:—

"I, A.B., do $\frac{\text{swear in the name of God}}{\text{solemnly affirm}}$ that I will not directly or indirectly communicate or reveal to any person or persons any matter which shall be brought under my consideration or shall become known to me as a Minister for the Union except as may be required for the due discharge of my duties as such Minister."

Schedule 3

(1) Words 'having been nominated' in the form clearly show that oath or affirmation cannot be made by candidate before he is nominated — Word 'nominated' in form cannot be interpreted to mean validly nominated as provided in Section 36 (8), Representation of the People Act. **A 1968 SC 1064 (1068).**

(2) Form VII-A (As amended in 1963 by 16th Amendment) — Expression 'having been nominated' in Form VII-A means 'when nomination paper is duly delivered' A 1966 Madh Pra 255 (260) (DB).

(3) Form VIII of oath of allegiance by Judge does not warrant him in ignoring the rule relating to the binding nature of the precedents which is uniformly followed. **A 1968 SC 372 (377).**

(4) For becoming eligible for the election of a President a candidate has not to take any oath **A 1968 SC 904 (909, 910).**

(5) Where a candidate filed nomination paper for election to fill a seat in Gujarat Legislative Assembly and in the form of oath the word Legislative Assembly was translated as "Rajya Sabha", it could not be said that the oath was not in compliance with the form prescribed in Article 173 (a) of the Constitution. **A 1970 SC 765 (767, 769).**

[a][III

Form of oath or affirmation to be made by a candidate for election to Parliament:—

A

"I, A.B., having been nominated as a candidate to fill a seat in the Council of States (or the House of the People) do swear in the name of God ——— that I solemnly affirm will bear true faith and allegiance to the Constitution of India as by law established and that I will uphold the sovereignty and integrity of India."

B

Form of oath or affirmation to be made by a member of Parliament:—

"I, A.B., having been elected (or nominated) a member of the Council of States (or the House of the People) do swear in the name of God ——— that I will solemnly affirm bear true faith and allegiance to the Constitution of India as by law established, that I will uphold the sovereignty and integrity of India and that I will faithfully discharge the duty upon which I am about to enter."]

[a] Substituted for original Form III by the Constitution (Sixteenth Amendment) Act, 1963, S. 5 (b) (5-10-1963).

IV

Form of oath or affirmation to be made by the Judges of the Supreme Court and the Comptroller and Auditor-General of India:—

"I, A.B., having been appointed Chief Justice (or a Judge) of the Supreme Court of India (or Comptroller and Auditor-General of India) do swear in the name of God ——— that I will bear true faith and allegiance to the Constitution of India as by law established, [a][that I will uphold the sovereignty and integrity of India,] that I will duly and faithfully and to the best of my ability, knowledge and judgment perform the duties of my office without fear or favour, affection or illwill and that I will uphold the Constitution and the laws."

solemnly affirm

[a] Inserted by the Constitution (Sixteenth Amendment) Act, 1963, S. 5 (c) (5-10-1963).

V

Form of oath of office for a Minister for a State:—

"I, A.B., do swear in the name of God ——— that I will bear true faith and allegiance to the Constitution of India as by law established, [a][that I will uphold the sovereignty and integrity of India,] that I will faithfully and conscientiously discharge my duties as a Minister for the State of.....and that I will do right to all manner of people in accordance with the Constitution and the law without fear or favour, affection or illwill."

solemnly affirm

[a] Inserted by the Constitution (Sixteenth Amendment) Act, 1963, S. 5 (c) (5-10-1963).

JAMMU AND KASHMIR

Not applicable to the State of Jammu and Kashmir—See note under Form I.

VI

Form of oath of secrecy for a Minister for a State:—

"I, A.B., do swear in the name of God / solemnly affirm that I will not directly or indirectly communicate or reveal to any person or persons any matter which shall be brought under my consideration or shall become known to me as a Minister for the State of ..... except as may be required for the due discharge of my duties as such Minister."

JAMMU AND KASHMIR

Not applicable to the State of Jammu and Kashmir—See Note under Form I.

[VII

Form of oath or affirmation to be made by a candidate for election to the Legislature of a State:—

A

"I, A.B., having been nominated as a candidate to fill a seat in the Legislative Assembly (or Legislative Council), do swear in the name of God / solemnly affirm that I will bear true faith and allegiance to the Constitution of India as by law established and that I will uphold the sovereignty and integrity of India."

B

Form of oath or affirmation to be made by a member of the Legislature of a State:—

"I, A.B., having been elected (or nominated) a member of the Legislative Assembly (or Legislative Council), do swear in the name of God / solemnly affirm that I will bear true faith and allegiance to the Constitution of India as by law established, that I will uphold the sovereignty and integrity of India and that I will faithfully discharge the duty upon which I am about to enter."]

[a] Substituted by the Constitution (Sixteenth Amendment) Act, 1963, S. 5 (c) (5-10-63).

JAMMU AND KASHMIR

Not applicable to the State of Jammu and Kashmir—See note under Form I.

VIII

Form of oath or affirmation to be made by the Judges of a High Court:—

"I, A.B., having been appointed Chief Justice (or a Judge) of the High Court at (or of)..... do swear in the name of God / solemnly affirm that I will bear true faith and allegiance to the Constitution of India as by law established, [that I will uphold the sovereignty and integrity of India,] that I will duly and faithfully and to the best of my ability, knowledge and judgment perform the duties of my office without fear or favour, affection or illwill and that I will uphold the Constitution and the laws."

[a] Inserted by the Constitution (Sixteenth Amendment) Act, 1963, S. 5 (c) (5-10-1963).

JAMMU AND KASHMIR

Not applicable to the State of Jammu and Kashmir—See note under Form I.

[a][FOURTH SCHEDULE

[Articles 4 (1) and 80 (2)]

Allocation of seats in the Council of States

To each State or Union territory specified in the first column of the following table, there shall be allotted the number of seats specified in the second column thereof opposite to that State or that Union territory, as the case may be,

TABLE

1. Andhra Pradesh	18
2. Assam	7
3. Bihar	22
[b][4. Gujarat	11]
[c][5. Haryana	5]
[d][6.] Kerala	9
7. Madhya Pradesh	16
8. [e][Tamil Nadu]	[f][18]
[g][9. Maharashtra	19]
10. [h][Karnataka]	12
11. Orissa	10
12. Punjab	[i][7]
13. Rajasthan	10
14. Uttar Pradesh	34
15. West Bengal	16
16. Jammu and Kashmir	4
[j][17. Nagaland	1]
[k][18. Himachal Pradesh	[l][3]]
[m][19. Manipur	1
20. Tripura	1
21. Meghalaya	1
[n][22. Sikkim	1]
[o][23.] Delhi	3
[o][24.] Pondicherry	1
[o][25.] Mizoram	1
[o][26.] Arunachal Pradesh	1]
TOTAL	[p][232]]

[a] Substituted for the Fourth Schedule (as amended by the States Reorganisation Act, 1956 and the Bihar and W. B. (Transfer of Territories) Act, 1956) by the Constitution (Seventh Amendment) Act, 1956, S. 3 (2), (1-11-1956).

[b] Substituted for 'Bombay' by the Bombay Reorganisation Act, 1960 (11 of 1960), S. 6 (1-5-1960).

[c] Inserted by the Punjab Reorganisation Act. 1966 (31 of 1966), S. 9 (1-11-1966).

[d] Original entries 5 to 21 renumbered, as 6 to 22, ibid.

[e] Substituted for "Madras" by Act 53 of 1968, S. 5 (14-1-69).

[f] Substituted for '17' by Andh. Pra. and Madras (Alteration of Boundaries) Act, 1959 (56 of 1959), S. 8 (w.e.f. 1-4-1960).

[g] Added by the Bombay Reorganisation Act, 1960 (11 of 1960), S. 6 (1-5-1960).

[h] Substituted for "Mysore" by Act 31 of 1973, S. 5 (2) (1-11-73).

[i] Substituted for '11' w.e.f. 1-11-1966 by Act 31 of 1966, S. 9.

[j] Inserted by the State of Nagaland Act, 1962 (27 of 1962), S. 5 (w.e.f. 1-12-1963).

[k] Entry 18 renumbered as entry 19 and before entry so renumbered entry 18 inserted by Act 53 of 1970, S. 5 (25-1-71).

[l] Substituted for "2" by Act 31 of 1966, S. 9 (1-11-1966).

[m] Substituted for original entries 19 to 22 by Act 81 of 1971, S. 10 (21-1-72).
[n] Inserted by Constitution (Thirty-sixth Amendment) Act, 1975, S. 4 (26-4-75).
[o] Entries 22 to 25 re-numbered as 23 to 26, ibid.
[p] Substituted for "231", ibid.

FIFTH SCHEDULE

[Article 244 (1).]

PROVISIONS AS TO THE ADMINISTRATION AND CONTROL OF SCHEDULED AREAS AND SCHEDULED TRIBES

PART A

GENERAL

1. Interpretation.—In this Schedule, unless the context otherwise requires, the expression "State" [a][* * *] does not include the [c][States of Assam and Meghalaya].

2. Executive power of a State in Scheduled Areas.—Subject to the provisions of this Schedule, the executive power of a State extends to the Scheduled Areas therein.

3. Report by the Governor [b][* * *] to the President regarding the administration of Scheduled Areas.—The Governor [b][* * *] of each State having Scheduled Areas therein shall annually, or whenever so required by the President, make a report to the President regarding the administration of the Scheduled Areas in that State and the executive power of the Union shall extend to the giving of directions to the State as to the administration of the said areas.

[a] The words "means a State specified in Part A or Part B of the First Schedule but" were omitted by Constitution (Seventh Amendment) Act, 1956, Sec. 29 and Schedule (1-11-1956).
[b] The words 'or Rajpramukh', omitted, ibid.
[c] Substituted for words "State of Assam" by Act 81 of 1971, S. 71 (21-1-72).

JAMMU AND KASHMIR

Schedule V does not apply to the State of Jammu and Kashmir.

PART B

ADMINISTRATION AND CONTROL OF SCHEDULED AREAS AND SCHEDULED TRIBES

4. Tribes Advisory Council.— (1) There shall be established in each State having Scheduled Areas therein and, if the President so directs, also in any State having Scheduled Tribes but not Scheduled Areas therein, a Tribes Advisory Council consisting of not more than twenty members, of whom, as nearly as may be, three-fourths shall be the representatives of the Scheduled Tribes in the Legislative Assembly of the State:

Provided that if the number of representatives of the Scheduled Tribes in the Legislative Assembly of the State is less than the number of seats in the Tribes Advisory Council to be filled by such representatives, the remaining seats shall be filled by other members of those tribes.

(2) It shall be the duty of the Tribes Advisory Council to advise on such matters pertaining to the welfare and advancement of the Scheduled Tribes in the State as may be referred to them by the Governor [a][* * *].

(3) The Governor [b][* * *] may make rules[c] prescribing or regulating, as the case may be,—

(a) the number of members of the Council, the mode of their appointment and the appointment of the Chairman of the Council and of the officers

---

Schedule 5, Entry 2

(1) Power of Governor to terminate tenure of nominated members of District Council is to be exercised not in his discretion but as a constitutional head of the State acting with the aid and advice of his council of Ministers. A 1974 Gauhati 20.

(b) the conduct of its meetings and its procedure in general; and
(c) all other incidental matters.

5. Law applicable to Scheduled Areas.— (1) Notwithstanding anything in this Constitution the Governor, [a][* * *] may by public notification direct that any particular Act of Parliament or of the Legislature of the State shall not apply to a Scheduled Area or any part thereof in the State or shall apply to a Scheduled Area or any part thereof in the State subject to such exceptions and modifications as he may specify in the notification and any direction given under this sub-paragraph may be given so as to have retrospective effect.

Schedule 5, Part B, Para 5

1. Governor's power to issue notifications. — Clause (1).— (1) The power of making a notification under this clause is a legislative and not an administrative power. see **A 1947 FC 32 (34, 35).**

(2) This clause must be read in the context of Article 245 (1) under which the Parliament has power to make laws for the whole or any part of the territory of India, and the State Legislature has power to make laws for the whole or any part of the State. A 1954 Pat 159 (160) (DB).

(3) There is nothing in this clause to show that the Governor must issue a notification before any such Act can be enforced in a Scheduled Area. A 1955 Pat 317 (319, 320) : 1955 Cri LJ 1089.

(4) The clause expressly provides that any direction given in a notification under it may be made to have retrospective effect. A 1958 Pat 366 (369) (DB).

(5) The power is granted under sub-para (1) mainly to protect the interests of the scheduled area or the persons residing in the scheduled area in which no doubt the majority of the persons are scheduled tribes. A 1965 Andh Pra 332 (333) (DB). (A 1960 SC 1208, **Disting.**)

(6) Para 5 (1) envisages that post-Constitution Acts are applicable to Scheduled areas unless otherwise directed by the Governor. A 1966 Pat 375 (379) : 1966 Cri LJ 1183 (DB).

(7) Protection of interests of Scheduled Tribes residing in Scheduled areas — Any notification or regulation issued by the Governor under Entry 5 (1) even if it contravenes the fundamental rights of any citizens, is valid and intra vires of the powers vested in him. (1971) 2 Andh WR 261.

(8) Under the scheme of the Constitution Scheduled Areas are not excluded from the legislative competence of the Parliament and State Legislatures. The Acts passed by them apply to Scheduled Areas by their own force. The Governor however has been authorised by Para. 5 (1) of Sch. V to direct that not only that an Act shall apply subject to certain exceptions and modifications in its application to a Scheduled Area, but that it shall not apply to such an area. The Governor has further been expressly empowered to give retrospective effect to any such directions. (1968) 70 Bom LR 654.

(9) There is no justification to hold that the powers of the Governor are to be exercised only in cases of dire necessity or great peril. Scheduled Areas are tribal areas with problem of their own and the powers of the Governor are not meant to be exercised only in emergencies. (1968) 70 Bom LR 654.

(10) Wilkinson's Rules framed under the Regulation 13 of 1833 for guidance of officers appointed within scheduled district of Kolhan for administration of civil and criminal justice — Valid — Presumption is that they were made by authority of Governor-General although they purport to have been issued by Agent to Governor-General — They are operative even after repeal of Regulation as under special power conferred upon the State Government under Schedule V of the Constitution, the Code of Civil Procedure was made inapplicable to the Sadar sub-division of the District of Singbhum except areas of Chaibasa and Chakradharpur Municipalities. 1970 BLJR 855.

2. Governor's power to make regulations.— (1) Clause (2) gives the Governor plenary powers of legislation concerning a Scheduled Area by framing regulations for the peace and good government of that Area. see **A 1949 FC 175 (183) : 50 Cri LJ 897 ** A 1947 Pat 13 (14) (SB).**

(2) If the very tenor and subject of a Regulation makes it obvious that it is for the peace and good government of the area, it is wholly unnecessary to make statement in the preamble of the Regulation to indicate that it was for the peace and good government of the area. **A 1947 Pat 13 (14) (SB).**

(3) Madras Scheduled Areas Estates (Abolition and Conversion into Ryotwari) Regulation (IV of 1951) is valid. **A 1957 SC 71 (74).**

(4) Madras Scheduled Areas Estates (Abolition and Conversion into Ryotwari) (Regulation IV of 1951) — Governor was competent to make the Regulation bringing into effect retrospectively the Madras Act XXVI of 1948 — Regulation is valid. (1963) 2 Andh LT 106.

(5) M. P. Scheduled Tribes Debt Relief Regulations, 1962, are not unconstitutional on ground that they operate retrospectively. A 1967 Madh Pra 52 (53).

(6) Phrase 'peace and good government' in Para 5 (2) is wide enough to justify even total prohibition of any business provided it is for protection and promotion of welfare of scheduled tribes. A 1967 Madh Pra 52 (53).

(7) The power to make regulations embraces the utmost power to make laws and to apply laws. Applying law to an area is making regulations which are laws. Further the power to apply laws is inherent when there is a power to repeal or amend any Act or any existing

(2) The Governor [a][* * *] may make regulations for the peace and good government of any area in a State which is for the time being a Scheduled Area.

In particular and without prejudice to the generality of the foregoing power, such regulations may—

(a) prohibit or restrict the transfer of land by or among members of the Scheduled Tribes in such area;

(b) regulate the allotment of land to members of the Scheduled Tribes in such area;

(c) regulate the carrying on of business as money-lender by persons who lend money to members of the Scheduled Tribes in such area.

(3) In making any such regulation as is referred to in sub-paragraph (2) of this paragraph, the Governor [b][* *] may repeal or amend any Act of Parliament or of the Legislature of the State or any existing law which is for the time being applicable to the area in question.

(4) All regulations made under this paragraph shall be submitted forthwith to the President and, until assented to by him, shall have no effect.

(5) No regulation shall be made under this paragraph unless the Governor [b][* * *] making the regulation has, in the case where there is a Tribes Advisory Council for the State, consulted such Council.

[a] Words 'or Rajpramukh, as the case may be', omitted by the Constitution (Seventh Amendment) Act, 1956, S. 29 and Sch. (1-11-1956).

[b] Words 'or Rajpramukh' and 'or the Rajpramukh' omitted, ibid.

[c] See Para. 4 (3) and also see—

(1) The Bihar Tribes Advisory Council Rules, 1951—Bih. Gaz., 1951, Pt. II, p. 1721.

(2) M. P. Tribes Advisory Council Rules, 1950—M. P. Gaz., 1950, Pt. I, p. 733 and 1951, Pt. 1, p. 247.

(3) Gujarat Tribes Advisory Council Rules, 1960—Guj. Govt. Gaz., 1-9-1960, Pt. IV-A, p. 71.

(4) Maharashtra Tribes Advisory Council Rules, 1960—Maha. Govt. Gaz., 8-9-1960, Pt. IV-A, p. 71.

(5) Madras Tribes Advisory Council Rules, 1961—Ft. St. Geo. Gaz., 13-9-1961, Pt. V, p. 989.

(6) Advisory Council for Welfare of Scheduled Tribes Living in Plains Districts of Assam Rules, 1967—Assam Gaz., 21-6-1967, Pt. II-A, p. 1517.

(7) Manipur Tribal Advisory Council Rules—Manipur Gaz., 18-3-1964, Pt. II, p. 3.

Schedule 5, Part B, Para 5 — Note 2 (contd.)

law applicable to certain area. The power to apply laws is really to bring into legal effect sections of an Act as if the same Act had been enacted in its entirety. Application of laws is one of the recognised forms of legislation. Law can be made by referring to a statute or by citing a statute or by incorporating a statute or provisions or parts thereof in a piece of legislation as the law which shall apply. **A 1970 SC 951 (958) : 1970 Cri LJ 875.**

(8) The Governor had full power to make regulations which are laws and just as Parliament can enact that a piece of legislation will apply to a particular State, similarly, the Governor under Paragraph 5 of the Fifth Schedule can apply specified laws to a Scheduled area. **A 1970 SC 951 (958) : 1970 Cri LJ 875.**

(9) Andhra Pradesh Mahals (Abolition and Conversion into Ryotwari) Regulation (1969). Sec. 1 — Validity — Even in the absence of a specific grant of power under Para 5 (2) of Sch. 5 of the Constitution providing for abolition of the Mahals and Muttes, the Regulation is within the competence of the Governor. A 1973 Andh Pra 236 (238 to 241).

(10) The non-obstante clause in para. 5 (1) has no reference to fundamental rights guaranteed by the provision in Part III of the Constitution. The powers conferred on the Governor by para. 5 (1) and (2) do not empower him to amend laws or make regulations that violate fundamental rights. (1968) 70 Bom LR 654.

(11) The provisions of Madhya Pradesh Scheduled Tribes Debt Relief Regulations (1962) cannot be held to be void on the ground that they totally prohibit carrying on of business of private money-lenders and go far beyond regulating it. 1970 MPLJ (Notes) 72.

PART C
SCHEDULED AREAS

6. Scheduled Areas.— (1) In this Constitution, the expression "Scheduled Areas" means such areas as the President may by order declare to be Scheduled Areas.

(2) The President may at any time by order—

(a) direct that the whole or any specified part of a Scheduled Area shall cease to be a Scheduled Area or a part of such an area;

[a][(aa) increase the area of any Scheduled Area in a State after consultation with the Governor of that State];

(b) alter, but only by way of rectification of boundaries, any Scheduled Area;

(c) on any alteration of the boundaries of a State or on the admission into the Union or the establishment of a new State, declare any territory not previously included in any State to be, or to form part of, a Scheduled Area;

[a][(d) rescind, in relation to any State or States, any order or orders made under this paragraph, and in consultation with the Governor of the State concerned, make fresh orders redefining the areas which are to be Scheduled Areas];

and any such order may contain such incidental and consequential provisions as appear to the President to be necessary and proper, but save as aforesaid, the order made under sub-paragraph (1) of this paragraph shall not be varied by any subsequent order.

[a] Inserted by the Fifth Schedule to the Constitution (Amendment) Act, 101 of of 1976, S. 2 (7-9-76).

Note:— See (1) the Scheduled Areas (Part A States) Order, 1950 (C. O. 9) published in Gaz. of Ind., 1950, Ext., p. 670 and (2) The Scheduled Areas (Part B States) Order, 1950, published in Gaz. of Ind.. 1950, Ext., Pt. II, S. 3, p. 975.

See the Madras Scheduled Areas (Cessor) Order, 1951 (C. O. 30)—Gaz. of Ind., 1951, Pt. II, S. 3, Ext., p. 843 and the Andhra Scheduled Areas (Cessor) Order, 1955, (C. O. 50) published in Gaz. of Ind., 12-9-1955, Pt. II, S. 3, Ext., p. 1997.

Scheduled Areas (H. P.) Order, 1975 (C. O. 102)—Gaz. of Ind., 1975 Pt. II, S. 3 (i), Ext., p. 2295: Scheduled Areas (States of Bihar, Gujarat, M. P. and Orissa) Order, 1977 (C. O. 109)—Gaz. Ind., 1977, Pt. II, S. 3 (i), Ext., p. 2464.

PART D
AMENDMENT OF THE SCHEDULE

7. Amendment of the Schedule.— (1) Parliament may from time to time by law amend by way of addition, variation or repeal any of the provisions of this Schedule and, when the Schedule is so amended, any reference to this Schedule in this Constitution shall be construed as a reference to such Schedule as so amended.

(2) No such law as is mentioned in sub-paragraph (1) of this paragraph shall be deemed to be an amendment of this Constitution for the purposes of Article 368.

SIXTH SCHEDULE

[Articles 244 (2) and 275 (1)]

PROVISIONS AS TO THE ADMINISTRATION OF TRIBAL AREAS IN [a][THE STATES OF ASSAM AND MEGHALAYA AND IN THE UNION TERRITORY OF MIZORAM]

1. Autonomous districts and autonomous regions.— (1) Subject to the provisions of this paragraph, the tribal areas in each item of [b][Parts I and II and in Part III] of the table appended to paragraph 20 of this Schedule shall

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Schedule 6, Para 1

(1) Administration of Tribal areas in Assam is governed by provisions of Schedule VI and not by other relevant provisions of the Constitution. This schedule purports to provide a self-contained Code and deals with all relevant topics in that behalf. **A 1966 SC 1220 (1224).**

(2) Scheme of Sixth Schedule shows that District Council is both administrative and

be an autonomous district.

(2) If there are different Scheduled Tribes in an autonomous district, the Governor may, by public notification, divide the area or areas inhabited by them into autonomous regions.

(3) The Governor may, by public notification,—

(a) include any area in [b][any of the Parts] of the said table,

(b) exclude any area from [b][any of the Parts] of the said table,

(c) create a new autonomous district,

(d) increase the area of any autonomous district,

(e) diminish the area of any autonomous district,

(f) unite two or more autonomous districts or parts thereof so as to form one autonomous district,

[c][(ff) alter the name of any autonomous district,]

(g) define the boundaries of any autonomous district:

Provided that no order shall be made by the Governor under clauses (c), (d), (e) and (f) of this sub-paragraph except after consideration of the report of a Commission appointed under sub-paragraph (1) of paragraph 14 of this Schedule.

[d][Provided further that any order made by the Governor under this sub-paragraph may contain such incidental or consequential provisions (including any amendment of paragraph 20 and of any item in any of the Parts of the said table) as appear to the Governor to be necessary for giving effect to the provisions of the order.]

[a] Substituted for the word "Assam" by Act 81 of 1971, S. 71 (i) and Eighth Sch. (21-1-72).

[b] Substituted for words "Part A", ibid.

[c] Inserted by the Assam Reorganisation (Meghalaya) Act, 1969 (55 of 1969), S. 74 and Sch. IV.

[d] Inserted by Act 81 of 1971, S. 7 (i) and Eighth Schedule (21-1-72).

JAMMU AND KASHMIR

Schedule VI is not applicable to the State.

2. Constitution of District Councils and Regional Councils.— [a][(1) There shall be a District Council for each autonomous district consisting of not more than thirty members, of whom not more than four persons shall be nominated by the Governor and the rest shall be elected on the basis of adult suffrage.]

[a] Substituted by Act 55 of 1969, S. 74 and Sch. IV.

Schedule 6, Para 1 (contd.)

legislative body and that all administrative and legislative powers were vested in Governor by para 19 till District Councils were constituted. **A 1961 SC 276 (279).**

(3) Governor's Notification creating new autonomous District is intra vires of para. 1 (3) and does not require Parliamentary legislation to make it effective. **A 1966 SC 1220 (1228).**

Schedule 6, Para 2

(1) Siem or Chief appointed by Governor, and later confirmed by District Council, being administrative officer under the control of District Council is removable by Executive Committee of the District Council. **A 1961 SC 276 (279, 280, 281, 282, 283).**

(2) Village surveyor under Garo Hills District Council in Assam is not member of Civil service under the State of Assam. Art. 311 does not apply. **A 1961 Assam 69 (70) (DB).**

(3) Appointment and removal of Myntri and declaration of his election as void is within jurisdiction of District Council. A 1969 Assam 139 (143) (DB).

(4) The scheme of the Sixth Schedule shows that the State Legislature has a sort of overall superintendence over the District Councils and that the executive authority of the State extends to the autonomous districts and regions. Consequently the Governor exercises his functions under the Sixth Schedule, as respects these areas with the aid and advice of his Council of Ministers, unless he is expressly or by necessary implication required to act in his discretion. A 1974 Gauhati 20 (22 to 25).

(5) It cannot be said that the executive power of the State of Assam does not extend to the autonomous districts or regions with regard to the matters specified in paragraphs 2 (6) and (7) and 3 (1) on the ground that the State Legislature has no competence to make laws on those matters. No doubt under paragraph 3 (1) of the Schedule, the Regional Council or the District Council, as the case may be, has been vested with the competence to make laws with regard to matters specified therein. But, from this it does not follow that the State Legislature is debarred from making laws on those matters, as regards any autonomous area

(2) There shall be a separate Regional Council for each area constituted an autonomous region under sub-paragraph (2) of paragraph 1 of this Schedule.

(3) Each District Council and each Regional Council shall be a body corporate by the name respectively of "the District Council of (name of district)" and "the Regional Council of (name of region)", shall have perpetual succession and a common seal and shall by the said name sue and be sued.

(4) Subject to the provisions of this Schedule, the administration of an autonomous district shall, in so far as it is not vested under this Schedule in any Regional Council within such district, be vested in the District Council for such district and the administration of an autonomous region shall be vested in the Regional Council for such region.

(5) In an autonomous district with Regional Councils, the District Council shall have only such powers with respect to the areas under the authority of the Regional Council as may be delegated to it by the Regional Council in addition to the powers conferred on it by this Schedule with respect to such areas.

(6) The Governor shall make rules for the first constitution of District Councils and Regional Councils in consultation with the existing tribal Councils or other representative tribal organisations within the autonomous districts or regions concerned, and such rules shall provide for—

(a) the composition of the District Councils and Regional Councils and the allocation of seats therein;

(b) the delimitation of territorial constituencies for the purpose of elections to those Councils;

(c) the qualifications for voting at such elections and the preparation of electoral rolls therefor;

(d) the qualifications for being elected at such elections as members of such Councils;

(e) the term of office of members of [a][Regional Councils;]

[a] Substituted by Act 55 of 1969, S. 74 and Sch. IV.

(f) any other matter relating to or connected with elections or nominations to such Councils;

(g) the procedure and the conduct of business [a][(including the power to act notwithstanding any vacancy)] in the District and Regional Councils;

[a] Inserted by Act 55 of 1969, S. 74 and Sch. IV.

(h) the appointment of officers and staff of the District and Regional Councils.

Schedule 6. Para 2 (contd.)

within the State of Assam. A 1974 Gauhati 20 (22 to 25).

(6) Merely because there is no provision in the Sixth Schedule on the lines of para. 2 of the Fifth Schedule which extends the executive power of the State to the Scheduled area it cannot be said that the executive power of the State is not intended to extend to the autonomous districts and regions. The fathers of the Constitution most probably thought that since under paragraph 3 of the Fifth Schedule, the executive power of the Union has been extended to the giving of directions to a State as to the administration of the Scheduled areas therein, a provision, in clear terms, saving the executive power of the State with regard to the scheduled areas therein should be incorporated and, that is possibly why paragraph 2 was required to be inserted in the Fifth Schedule. Even if it is assumed that the powers exercisable by the Governor under the 6th Schedule with regard to the autonomous districts and regions are not in discharge of his executive functions of the State, but the executive functions of the Governor such functions, subject to the exceptions of paras. 9 (2) and 14 (2) must, in view of Article 163 (1) of the Constitution, be exercised with the aid and advice of the Council of Ministers. A 1974 Gauhati 20 (22 to 25).

(7) Pleasure of Governor to terminate tenure of District Council members — Exercise of, by Minister empowered under Rules of business, in Governor's name — It is not invalid even if order of termination is not placed before Governor for his order. A 1974 Gauhati 20 (26, 27).

(8) There is no requirement of a hearing of the person concerned, before his tenure of service can be terminated by withdrawal of the Governor's pleasure. A 1974 Gauhati 20 (27).

[a][(6A) The elected members of the District Council shall hold office for a term of five years from the date appointed for the first meeting of the Council after general elections to the Council, unless the District Council is sooner dissolved under paragraph 16 and a nominated member shall hold office at the pleasure of the Governor:

Provided that the said period of five years may, while a Proclamation of Emergency is in operation or if circumstances exist which, in the opinion of the Governor, render the holding of elections impracticable, be extended by the Governor for a period not exceeding one year at a time and in any case where a Proclamation of Emergency is in operation not extending beyond a period of six months after the Proclamation has ceased to operate:

Provided further that a member elected to fill a casual vacancy shall hold office only for the remainder of the term of office of the member whom he replaces.]

[a] Inserted by the Assam Reorganisation (Meghalaya) Act, 1969 (55 of 1969), S. 74 and Sch. IV.

(7) The District or the Regional Council may after its first constitution make rules [a][with the approval of the Governor] with regard to the matters specified in sub-paragraph (6) of this paragraph and may also make rules [a][with like approval] regulating—

(a) the formation of subordinate local Councils or Boards and their procedure and the conduct of their business; and

(b) generally all matters relating to the transaction of business pertaining to the administration of the district or region, as the case may be:

Provided that until rules are made by the District or the Regional Council under this sub-paragraph the rules made by the Governor under sub-paragraph (6) of this paragraph shall have effect in respect of elections to, the officers and staff of, and the procedure and the conduct of business in, each such Council:

[b][* * * * *].

[a] Inserted by Act 55 of 1969, S. 74 and Sch. IV.

[b] Second proviso omitted, ibid.

3. Powers of the District Councils and Regional Councils to make laws.— (1) The Regional Council for an autonomous region in respect of all areas within such region and the District Council for an autonomous district in respect of all areas within the district except those which are under the auth-

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Schedule 6, Para 3

(1) Any purpose likely to promote the interest of the inhabitants could include the holding of markets. Hence, the United Khasi-Jaintia Hills Autonomous District (Management and Control of Markets) Act (5 of 1953) passed by the District Council was within its legislative competence. A 1956 Assam 162 (163) (DB) ** ILR (1960) 12 Assam 26.

(2) The Lushai Hills District (Reduction of Fathang) Act (3 of 1953), which relates to reduction of rent payable for "Jhumming" or for purpose of shifting cultivation was within the legal competence of the District Council. A 1956 Assam 5 (6) (DB).

(3) The District Council has alone jurisdiction to appoint elected Syiem and on such appointment he becomes administrative officer under its control. A 1969 Assam 94 (98, 99) (DB).

(4) The provisions of the Sixth Schedule do not make the District Council the owner of the entire land of the United Khasi and Jaintia Hills. A 1960 Assam 131 (132) (DB).

(5) The Constitution does not forbid repeal by District Council of existing laws relating to matters within the scope of its legislative authority. Garo Hills Act (I of 1952) is not ultra vires the District Council. ILR (1957) 9 Assam 57.

(6) United Khasi-Jaintia Hills District (Transfer of Land) Act, 1953, is ultra vires the powers of the District Council under Para 3 (1) (a) of Sch. VI to the Constitution. A 1968 Assam 43 (47).

(7) Para 3 (1) is in fact something like a legislative list and enumarates the subjects on which District Council is competent to make laws. **A 1961 SC 276 (281).**

(8) United Khasi Jaintia Hills Autonomous District (Appointment and Succession of Chiefs and Headmen) Act (Assam Act 2 of 1959) is passed under Para 3 (1) (g), Sch. 6 and is valid and is applicable to the case of removal of Myntri by District Council, even though his election took place prior to commencement of the Act. A 1969 Assam 139 (143) (DB).

(9) The District Councils unlike the Parliament and the State Legislatures are not intended to be clothed with plenary power of legislation. Their power to make laws is

ority of Regional Councils, if any, within the district shall have power to make laws with respect to—

(a) the allotment, occupation or use, or the setting apart, of land, other than any land which is a reserved forest, for the purposes of agriculture or grazing or for residential or other non-agricultural purposes or for any other purpose likely to promote the interests of the inhabitants of any village or town:

Provided that nothing in such laws shall prevent the compulsory acquisition of any land, whether occupied or unoccupied, for public purposes by the [a][Government of the State concerned] in accordance with the law for the time being in force authorising such acquisition;

(b) the managament of any forest not being a reserved forest;
(c) the use of any canal or water-course for the purpose of agriculture;
(d) the regulation of the practice of jhum or other forms of shifting cultivation;
(e) the establishment of village or town committees or councils and their powers;
(f) any other matter relating to village or town administration, including village or town police and public health and sanitation;
(g) the appointment or succession of Chiefs or Headmen;
(h) the inheritance of property;
[b][(i) marriage and divorce];
(j) social customs.

[a] Substituted by Act 81 of 1971, S. 71 (i) and Eighth Sch. (21-1-72).
[b] Substituted by Act 55 of 1969, S. 74 and Sch. IV.

(2) In this paragraph, a "reserved forest" means any area which is a "reserved forest" under the Assam Forest Regulation, 1891, or under any other law for the time being in force in the area in question.

(3) All laws made under this paragraph shall be submitted forthwith to the Governor and, until assented to by him, shall have no effect.

4. Administration of justice in autonomous districts and autonomous regions.— (1) The Regional Council for an autonomous region in respect of areas within such region and the District Council for an autonomous district in respect of areas within the district other than those which are under the authority of the Regional Councils, if any, within the district may constitute

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Schedule 6, Para 3 (contd.)

expressly limited by the provisions of the Sixth Schedule which has created them and they can do nothing beyond the limits which circumscribe their power. It is beyond the domain of the Courts to enlarge constructively their power to make laws. **A 1972 SC 787 (792).**

(10) Dispute between two Siems relating to territorial boundaries — Not a dispute of civil nature — Court has no jurisdiction to entertain suit. 1970 Assam LR 242 (DB).

(11) Garo Hills Autonomous District Cattle Taxation Regulation (1 of 1966) is not invalid. 1971 Tax LR 715 (Assam).

Schedule 6, Para 4

(1) The Rules framed by the District Council of the United Khasi and Jaintia Hills District for the administration of justice in the autonomous District have no application, because of Paragraph 20 (2), to the administered area or the area of the State of Myliem falling within the Shillong Municipality. **A 1956 Assam 129 (136) (SB).**

(2) United Khasi-Jaintia Hills Autonomous District (Aministration of Justice) Rules (1953) were framed under Para 4 (4). A 1956 Assam 51 (52): 1965 (2) Cri LJ 72 (DB).

(3) The power to frame rules regarding administration of justice includes within its ambit the power to provide for trial of suits and cases by existing Courts for such time as the District Council provides under the rules. A 1963 Assam 31 (35, 36): 1961 (1) Cri LJ 417.

(4) District Councils can constitute Courts for trial of suits and cases between parties, only when all parties belong to Scheduled Tribes. 1973 Assam LR 312 (Assam).

(5) Where District Council Court is constituted under the provision for trial of suit and cases of specified description to the exclusion of any court in the State, other courts in the State will not automatically be excluded in absence of any notification to that effect.

Rule 24 of the rules moreover saves power of the existing courts for the time being for trial of suit and cases referred to in Rule 23, which expressly puts a bar to the trial of these matters by the subordinate District Council Court. Hence where the case is in the nature of Sec. 145, Criminal P. C. a sub-

village councils or courts for the trial of suits and cases between the parties all of whom belong to Scheduled Tribes within such areas, other than suits and cases to which the provisions of sub-paragraph (1) of paragraph 5 of this Schedule apply, to the exclusion of any Court in the State, and may appoint suitable persons to be members of such village councils or presiding officers of such Courts, and may also appoint such officers as may be necessary for the administration of the laws made under paragraph 3 of this Schedule.

(2) Notwithstanding anything in this Constitution, the Regional Council for an autonomous region or any Court constituted in that behalf by the Regional Council or, if in respect of any area within an autonomous district there is no Regional Council, the District Council for such district or any Court constituted in that behalf by the District Council, shall exercise the powers of a Court of appeal in respect of all suits and cases triable by a village council or Court constituted under sub-paragraph (1) of this paragraph within such region or area, as the case may be, other than those to which the provisions of sub-paragraph (1) of paragraph 5 of this Schedule apply, and no other Court except the High Court and the Supreme Court shall have jurisdiction over such suits or cases.

(3) The High Court [a][* *] shall have and exercise such jurisdiction over the suits and cases to which the provisions of sub-paragraph (2) of this paragraph apply as the Governor may from time to time by order specify.

[a] Words "of Assam" omitted by Act 55 of 1969, S. 74 and Sch. IV.

(4) A Regional Council or District Council, as the case may be, may with the previous approval of the Governor make rules regulating—

(a) the constitution of village councils and Courts and the powers to be exercised by them under this paragraph;
(b) the procedure to be followed by village councils or Courts in the trial of suits and cases under sub-paragraph (1) of this paragraph;
(c) the procedure to be followed by the Regional or District Council or any Court constituted by such Council in appeals and other proceedings under sub-paragraph (2) of this paragraph;
(d) the enforcement of decisions and orders of such Councils and Courts;
(e) all other ancillary matters for the carrying out of the provisions of sub-paragraphs (1) and (2) of this paragraph.

[a][(5) On and from such date as the President may, [b][after consulting the Government of the State concerned], by notification appoint in this behalf, this paragraph shall have effect in relation to such autonomous district or region as may be specified in the notification, as if—

(i) in sub-paragrph (1), for the words "between the parties all of whom belong to Scheduled Tribes within such areas, other than suits and cases to which the provisions of sub-paragraph (1) of paragraph 5 of this Schedule apply," the words "not being suits and cases of the nature referred to in sub-paragraph (1) of paragraph 5 of this Schedule, which the Governor may specify in this behalf," had been substituted;
(ii) sub-paragraphs (2) and (3) had been omitted;
(iii) in sub-paragraph (4)—
(a) for the words "A Regional Council or District Council, as the case may be, may with the previous approval of the Governor make

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Schedule 6, Para 4 (contd.)

ordinate District Council Court is not competent to try the same unless specifically empowered by Governor by an appropriate notification. **1972 Cri LJ 68 (70, 71) (Assam) (FB).**

(6) Rules 23 and 24 of Garo Hills Autonomous District (Administration of Justice) Rules, 1953 are intra vires the rule-making power of the District Council under Para. 4 (4) (a) of the 6th Schedule to the Constitution. **1972 Cri LJ 68 (FB) (Assam).**

(7) Court-fees Act 1870, does not apply to cases filed in District Council Courts. Notification D/- 1-6-49 under Sec. 4 of the Extra Provincial Jurisdiction Act applying the Act to Khasi States excepts the courts establised under Sch. VI to the Constitution. A 1971 Assam 89 (90).

(8) Jurisdiction of District Council Court — It can try a suit triable by subordinate District Council Court. A 1979 NOC 118 (Gauhati).

rules regulating," the words "The Governor may make rules regulating" had been substituted; and

(b) for clause (a) the following clause had been substituted, namely:—

"(a) the constitution of village councils and Courts, the powers to be exercised by them under this paragraph and the Courts to which appeals from decisions of village councils and Courts shall lie;"

(c) for clause (c), the following had been substituted, namely:—

"(c) the transfer of appeals and other proceedings pending before the Regional or District Council or any Court constituted by such Council immediately before the date appointed by the President under sub-paragraph (5);" and

(d) in clause (e), for the words brackets, and figures "sub-paragraphs (1) and (2)," the word, brackets and figure "sub-paragraph (1)" had been substituted."]

[a] Inserted by the Assam Reorganisation (Meghalaya) Act, 1969 (55 of 1969), S. 74 and Sch. IV, Item 4.

[b] Substituted by Act 81 of 1971, S. 71 (i) and Eighth Sch. (21-1-72).

5. Conferment of powers under the Code of Civil Procedure, 1908, and the Code of Criminal Procedure, 1898, on the Regional and District Councils and on certain courts and officers for the trial of certain suits, cases and offences.— (1) The Governor may, for the trial of suits or cases arising out of any law in force in any autonomous district or region being a law specified in that behalf by the Governor, or for the trial of offences punishable with death, transportation for life, or imprisonment for a term of not less than five years under the Indian Penal Code or under any other law for the time being applicable to such district or region, confer on the District Council or the Regional Council having authority over such district or region or on Courts constituted by such District Council or on any officer appointed in that behalf by the Governor, such powers under the Code of Civil Procedure, 1908, or, as the case may be, the Code of Criminal Procedure, 1898, as he deems appropriate, and thereupon the said Council, Court or officer shall try the suits, cases or offences in exercise of the powers so conferred.

(2) The Governor may withdraw or modify any of the powers conferred on a District Council, Regional Council, Court or officer under sub-para. (1) of this paragraph.

(3) Save as expressly provided in this paragraph, the Code of Civil Procedure, 1908, and the Code of Criminal Procedure, 1898, shall not apply to the trial of any suits, cases or offences in an autonomous district or in any autonomous region to which the provisions of this paragraph apply.

[a][(4) On and from the date appointed by the President under sub-paragraph (5) of paragraph 4 in relation to any autonomous district or autonomous region, nothing contained in this paragraph shall, in its application to that district or region, be deemed to authorise the Governor to confer on the District Council or Regional Council or on Courts constituted by the District Council any of the powers referred to in sub-paragraph (1) of this paragraph.]

[a] Inserted by the Assam Reorganisation (Meghalaya) Act, 1969 (55 of 1969), S. 74 and Sch. IV, Item 5.

[a][**6. Powers of the District Council to establish primary schools, etc.**— (1) The District Council for an autonomous district may establish, construct, or

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Schedule 6, Para 5

(1) Garo Hills Autonomous District (Administration of Justice) Rules, 1953 — Cases mentioned in Para 5 (1) are cases referred to in Rule 23 (1) (a) and provision of R. 24 (2) will be attracted to such cases. A 1962 Assam 62 (64, 65): 1962 (1) Cri LJ 560.

(2) Offence of adultery falls under Para 5 (1) — District Council Courts not authorised to try such offences under Rule 23 (1) of Rules framed relating to Mizo Hills Administration under Para 4 — Magistrate could try the offence. 1961 (2) Cri LJ 459 (460) (DB) (Assam).

manage primary schools, dispensaries, markets, cattle pounds, ferries, fisheries, roads, road transport and waterways in the district and may, with the previous approval of the Governor, make regulations for the regulation and control thereof and, in particular may prescribe the language and the manner in which primary education shall be imparted in the primary schools in the district.

(2) The Governor may, with the consent of any District Council, entrust either conditionally or unconditionally to that Council or to its officers functions in relation to agriculture, animal husbandry, community projects, co-operative societies, social welfare, village planning or any other matter to which the executive power of the State [b][* * * * * *] extends.]

[a] Substituted for the original paragraph 6 by the Assam Reorganisation (Meghalaya) Act, 1969 (55 of 1969), S. 74 and Sch. IV, Item 6.

[b] Words "of Assam or Meghalaya, as the case may be," omitted by Act 81 of 1971, S. 71 (i) and Eighth Sch. (21-1-72).

7. District and Regional Funds.— (1) There shall be constituted for each autonomous district, a District Fund and for each autonomous region, a Regional Fund to which shall be credited all moneys received respectively by the District Council for that District and the Regional Council for that region in the course of the administration of such district or region, as the case may be, in accordance with the provisions of this Constitution.

[a][(2) The Governor may make rules for the management of the District Fund, or, as the case may be, the Regional Fund and for the procedure to be followed in respect of payment of money into the said Fund, the withdrawal of moneys therefrom, the custody of moneys therein and any other matter connected with or ancillary to the matters aforesaid.

(3) The accounts of the District Council or, as the case may be, the Regional Council shall be kept in such form as the Comptroller and Auditor-General of India may, with the approval of the President, prescribe.

(4) The Comptroller and Auditor-General shall cause the accounts of the District and Regional Councils to be audited in such manner as he may think fit, and the reports of the Comptroller and Auditor-General relating to such accounts shall be submitted to the Governor who shall cause them to be laid before the Council.]

[a] Substituted for original sub-paragraph (2) by the Assam Reorganisation (Meghalaya) Act, 1969 (55 of 1969), S. 74 and Sch. IV, Item 7.

8. Powers to assess and collect land revenue and to impose taxes.— (1) The Regional Council for an autonomous region in respect of all lands within such region and the District Council for an autonomous district in respect of all lands within the district except those which are in the areas under the authority of Regional Councils, if any, within the district, shall have the power to assess and collect revenue in respect of such lands in accordance with the principles for the time being followed [b][by the Government of the State in assessing lands for the purpose of land revenue in the State generally.]

Schedule 6, Para 8

(1) After the constitution of a District Council according to the provisions of this Schedule it is only that body and not the Lyngdoh which has the power of levying taxes or fees. Lyngdoh cannot enhance the licence fee or direct the cancellation of the licence or settle the business on some oher person. A 1958 Assam 33 (33).

(2) The District Council under paragraph 3 read with this paragraph had the authority to enact the United Khasi-Jaintia Hills Autonomous District (Management and Control of Markets) Act (5 of 1953). A 1956 Assam 162 (163) (DB). ** ILR (1960) 12 Assam 26.

(3) District Council and not village Durbar was competent to levy and collect compulsory contribution which is a tax. See A 1967 Assam 8 (9).

(4) Regulation made by Garo Hills Autonomous District Council prior to amendment of Para 8 (4) of Sch. VI (by Act 55 of 1969) — Not invalid for absence of Governor's sanction. 1971 Tax LR 715 (Assam).

(2) The Regional Council for an autonomous region in respect of areas within such region and the District Council for an autonomous district in respect of all areas in the district except those which are under the authority of Regional Councils, if any, within the district, shall have power to levy and collect taxes on lands and buildings, and tolls on persons resident within such areas.

(3) The District Council for an autonomous district shall have the power to levy and collect all or any of the following taxes within such district, that is to say—

(a) taxes on professions, trades, callings and employments;
(b) taxes on animals, vehicles and boats;
(c) taxes on the entry of goods into a market for sale therein, and tolls on passengers and goods carried in ferries; and
(d) taxes for the maintenance of schools, dispensaries or roads.

(4) A Regional Council or District Council, as the case may be, may make regulations to provide for the levy and collection of any of the taxes specified in sub-paragraphs (2) and (3) of this paragraph [a][and every such regulation shall be submitted forthwith to the Governor and, until assented to by him, shall have no effect.]

[a] Inserted by Act 55 of 1969, S. 74 and Sch. IV, Item 8.

[b] Substituted by Act 81 of 1971, S. 71 (i) and Eighth Sch. (21-1-72).

9. Licences or leases for the purpose of prospecting for, or extraction of, minerals.— (1) Such share of the royalties accruing each year from licences or leases for the purpose of prospecting for, or the extraction of, minerals granted by [a][the Government of the State] in respect of any area within an autonomous district as may be agreed upon between [a][the Government of the State] and the District Council of such district shall be made over to that District Council.

(2) If any dispute arises as to the share of such royalties to be made over to a District Council, it shall be referred to the Governor for determination and the amount determined by the Governor in his discretion shall be deemed to be the amount payable under sub-paragraph (1) of this paragraph to the District Council and the decision of the Governor shall be final.

[a] Substituted by Act 81 of 1971, S. 71 (i) and Eighth Sch. (21-1-72).

10. Power of District Council to make regulations for the control of money-lending and trading by non tribals.— (1) The District Council of an autonomous district may make regulations for the regulation and control of money-lending or trading within the district by persons other than Scheduled Tribes resident in the district.

(2) In particular and without prejudice to the generality of the foregoing power, such regulations may—

(a) prescribe that no one except the holder of a licence issued in that behalf shall carry on the business of money-lending;
(b) prescribe the maximum rate of interest which may be charged or be recovered by a money-lender;
(c) provide for the maintenance of accounts by money-lenders and for the inspection of such accounts by officers appointed in that behalf by the District Council;
(d) prescribe that no person who is not a member of the Scheduled Tribes resident in the district shall carry on wholesale or retail business in any commodity except under a licence issued in that behalf by the District Council:

Schedule 6, Para 10

(1) (Per Bachawat J. Dissenting) Sec. 3 of Lushai Hills District (Trading by non-Tribals) Regulation which is in strict conformity with it. cannot be regarded as violative of Arts. 14 and 19 (1) (g). **A 1967 SC 829 (835).**

Provided that no regulations may be made under this paragraph unless they are passed by a majority of not less than three-fourths of the total membership of the District Council:

Provided further that it shall not be competent under any such regulations to refuse the grant of a licence to a money-lender or a trader who has been carrying on business within the district since before the time of the making of such regulations.

(3) All regulations made under this paragraph shall be submitted forthwith to the Governor and, until assented to by him, shall have no effect.

11. Publication of laws, rules and regulations made under the Schedule.— All laws, rules and regulations made under this Schedule by a District Council or a Regional Council shall be published forthwith in the Official Gazette of the State and shall on such publication have the force of law.

12. [a][Applciation of Acts of Parliament and of the Legislature of the State of Assam to autonomous districts and autonomous regions in the State of Assam].— (1) Notwithstanding anything in this Constitution—

(a) no Act of the [b][Legislature of the State of Assam] in respect of any of the matters specified in paragraph 3 of this Schedule as matters with respect to which a District Council or a Regional Council may make laws, and no Act of the [b][Legislature of the State of Assam] prohibiting or restricting the consumption of any non-distilled alcoholic liquor shall apply to any autonomous district or autonomous region [c][in that State] unless in either case the District Council for such district or having jurisdiction over such region by public notification so directs, and the District Council in giving such direction with respect to any Act may direct that the Act shall in its application to such district or region or any part thereof have effect subject to such exceptions or modifications as it thinks fit;

(b) the Governor may, by public notification, direct that any Act of Parliament or of the [b][Legislature of the State of Assam] to which the provisions of clause (a) of this sub-paragraph do not apply shall not apply to an autonomous district or an autonomous region, or shall apply to such district or region [c][in that State] or any part thereof subject to such exceptions or modifications as he may specify in the notification.

(2) Any direction given under sub-paragraph (1) of this paragraph may be given so as to have retrospective effect.

[a] Original heading substituted by Act 81 of 1971, S. 71 (i) and Eighth Sch. (21-1-72).

[b] Substituted for words "Legislature of that State", ibid.

[c] Inserted, ibid.

[a][**12A. Application of Acts of Parliament and of the Legislature of the State of Meghalaya to autonomous districts and autonomous regions in the State of Meghalaya.**— Notwithstanding anything in this Constitution,—

(a) if any provision of a law made by a District or Regional Council in the State of Meghalaya with respect to any matter specified in sub-paragraph (1) of paragraph 3 of this Schedule or if any provision of any regulation made by a District Council or a Regional Council in that State under paragraph 8 or paragraph 10 of this Schedule, is repugnant to any provision of a law made by the Legislature of the State of Meghalaya with respect to that matter, then, the law or regulation made by the District Council or, as the case may be, the Regional Council whether made before or after the law made by the Legislature of the State of Meghalaya, shall, to the extent of repugnancy, be void and the law made by the Legislature of the State of Meghalaya shall prevail;

(b) the President may, with respect to any Act of Parliament, by notification, direct that it shall not apply to an autonomous district or an autonomous region in the State of Meghalaya, or shall apply to such dis-

trict or region or any part thereof subject to such exceptions or modifications as he may specify in the notification and any such direction may be given so as to have retrospective effect.]

[a] Substituted by Act 81 of 1971, S. 71 (i) and Eighth Sch. (21-1-72).

[a][12B. **Application of Acts of Parliament and of the Legislature of the Union territory of Mizoram to autonomous districts and autonomous regions in the Union territory of Mizoram.**— Notwithstanding anything in this Constitution,—

(a) if any provision of a law made by a District Council or a Regional Council in the Union territory of Mizoram with respect to any matter specified in sub-paragraph (1) of paragraph 3 of this Schedule or if any provision of any regulation made by a District Council or a Regional Council in that Union territory under paragraph 8 or paragraph 10 of this Schedule, is repugnant to any provision of a law made by the Legislature of the Union territory of Mizoram with respect to that matter, then, the law or regulation made by the District Council or, as the case may be, the Regional Council, whether made before or after the law made by the Legislature of the Union territory of Mizoram, shall, to the extent of repugnancy, be void and the law made by the Legislature of the Union territory of Mizoram shall prevail;

(b) the President may with respect to any Act of Parliament, by notification, direct that it shall not apply to an autonomous district or an autonomous region in the Union territory of Mizoram, or shall apply to such district or region or any part thereof subject to such exceptions or modifications as he may specify in the notification and any such direction may be given so as to have retrospective effect.]

[a] Substituted by Act 83 of 1971, S. 13 (29-4-72).

13. Estimated receipts and expenditure pertaining to autonomous districts to be shown separately in the annual financial statement.— The estimated receipts and expenditure pertaining to an autonomous district which are to be credited to, or is to be made from, the Consolidated Fund of the State [a][* * *] shall be first placed before the District Council for discussion and then after such discussion be shown separately in the annual financial statement of the State to be laid before the Legislature of the State under Article 202.

[a] Words "of Assam" omitted by Act 81 of 1971, S. 71 (i) and Eight Sch. (21-1-72).

14. Appointment of Commission to inquire into and report on the administration of autonomous districts and autonomous regions.— (1) The Governor may at any time appoint a Commission to examine and report on any matter specified by him relating to the administration of the autonomous districts and autonomous regions in the State, including matters specified in clauses (c), (d), (e) and (f) of sub-paragraph (3) of paragraph 1 of this Schedule, or may appoint a Commission to inquire into and report from time to time on the administration of autonomous districts and autonomous regions in the State generally and in particular on—

(a) the provision of educational and medical facilities and communications in such districts and regions;

(b) the need for any new or special legislation in respect of such districts

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Schedule 6, Para 14

(1) What Para 14 (2) requires is that before the report of the Commission goes to the Legislature of the State, the Governor must apply his mind to it and make his recommendations on it. **A 1966 SC 1220 (1230).** (Notification No. TAD/R/50/64. D/- 23-11-64 creating new autonomous district Jowai is valid. A 1966 Assam 1, Affirmed.)

(2) Submission of memorandum to Legislature with report of Commission — Is substantial compliance with Para 14 (2). **A 1966 Assam 1 (8) (FB).**

(c) the administration of the laws, rules and regulations made by the District and Regional Councils;

and define the procedure to be followed by such Commission.

(2) The report of every such Commission with the recommendations of the Governor with respect thereto shall be laid before the Legislature of the State by the Minister concerned together with an explanatory memorandum regarding the action proposed to be taken thereon by the [a][Government of the State].

(3) In allocating the business of the Government of the State among his Ministers the Governor may place one of his Ministers specially in charge of the welfare of the autonomous districts and autonomous regions in the State.

[a] Substituted for words "Government of Assam" by Act 81 of 1971, S. 71 (i) and Eight Sch. (21-1-72).

15. Annulment or suspension of acts and resolutions of District and Regional Councils.— (1) If at any time the Governor is satisfied that an act or resolution of a District or a Regional Council is likely to endanger the safety of India [a][or is likely to be prejudicial to public order], he may annul or suspend such act or resolution and take such steps as he may consider necessary (including the suspension of the Council and the assumption to himself of all or any of the powers vested in or exercisable by the Council) to prevent the Commission or continuance of such act, or the giving of effect to such resolution.

(2) Any order made by the Governor under sub-para. (1) of this paragraph together with the reasons therefor shall be laid before the Legislature of the State as soon as possible and the order shall, unless revoked by the Legislature of the State, continue in force for a period of twelve months from the date on which it was so made:

Provided that if and so often as a resolution approving the continuance in force of such order is passed by the Legislature of the State, the order shall, unless cancelled by the Governor, continue in force for a further period of twelve months from the date on which under this paragraph it would otherwise have ceased to operate.

[a] Inserted by the Assam Reoragnisation (Meghalaya) Act, 1969 (55 of 1969), Section 74 and Sch. IV, Item 10.

16. Dissolution of a District or a Regional Council.— [a][(1)] The Governor may, on the recommendation of a Commission appointed under Paragraph 14 of this Schedule by public notification, order the dissolution of a District or a Regional Council and—

(a) direct that a fresh general election shall be held immediately for the reconstitution of the Council, or

(b) subject to the previous approval of the Legislature of the State assume the administration of the area under the authority of such Council himself or place the administration of such area under the Commission appointed under the said paragraph or any other body considered suitable by him for a period not exceeding twelve months:

Provided that when an order under clause (a) of this paragraph has been made, the Governor may take the action referred to in clause (b) of this paragraph with regard to the administration of the area in question pending the reconstitution of the Council on fresh general election:

Provided further that no action shall be taken under clause (b) of this paragraph without giving the District or Regional Council, as the case may be, an opportunity of placing its views before the Legislature of the State.

[a][(2) If at any time the Governor is satisfied that a situation has arisen in which the administration of an autonomous district or region cannot be carried on in accordance with the provisions of this Schedule, he may, by public notification, assume to himself all or any of the functions or powers vested in or exercisable by the District Council or, as the case may be, the Regional Council and declare that such functions or powers shall be exercis-

able by such person or authority as he may specify in this behalf, for a period not exceeding six months:

Provided that the Governor may, by a further order or orders, extend the operation of the initial order by a period not exceeding six months on each occasion.

(3) Every order made under sub-paragraph (2) of this paragraph with the reasons therefor shall be laid before the Legislature of the State and shall cease to operate at the expiration of thirty days from the date on which the State Legislature first sits after the issue of the order, unless before the expiry of that period it has been approved by the State Legislature.]

[a] Original paragraph 16 renumbered as sub-paragraph (1) and sub-paragraphs (2) and (3) thereafter inserted by the Assam Reorganisation (Meghalaya) Act, 1969 (55 of 1969), Section 74 and Schedule IV, Item 11.

17. Exclusion of areas from autonomous districts in forming constituencies in such districts.— For the purposes of elections to [a][the Legislative Assembly of Assam or Meghalaya], the Governor may by order declare that any area within an autonomous district [b][in the State of Assam or Meghalaya, as the case may be,] shall not form part of any constituency to fill a seat or seats in the Assembly reserved for any such district but shall form part of a constituency to fill a seat or seats in the Assembly not so reserved to be specified in the order.

[a] Substituted for words "the Legislative Assembly of Assam" by Act 81 of 1971, S. 71 (i) and Eighth Sch. (21-1-72).

[b] Inserted, ibid.

18. [a][* * *]

[a] Paragraph 18 omitted by Act 81 of 1971, S. 71 (i) and Eighth Sch. (21-1-72).

19. Transitional provisions.— (1) As soon as possible after the commencement of this Constitution the Governor shall take steps for the constitution of a District Council for each autonomous district in the State under this Schedule and, until a District Council is so constituted for an autonomous district, the administration of such district shall be vested in the Governor and the following provisions shall apply to the administration of the areas within such district instead of the foregoing provisions of this Schedule, namely:—

(a) no Act of Parliament or of the Legislature of the State shall apply to any such area unless the Governor by public notification so directs; and the Governor in giving such a direction with respect to any Act may direct that the Act shall, in its application to the area or to any speci-

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Schedule 6, Para 19

(1) The order passed by the Governor of Assam on 25-1-1950 for the administration of justice in the Khasi States would govern the administration of criminal justice in those States as existing law even after the Constitution until it is repealed or amended by the Governor of Assam. A 1952 Assam 3 (4): 1952 Cri LJ 104.

(2) The administrative powers of the Chief of Khasi-States as they existed before 26-1-1950 came to an end with coming into force of the Constitution and during the transitional period all administrative powers vested in the Governor which could be exercised by those appointed by him under his powers under Para 19. **A 1961 SC 276 (278, 279, 280).**

(3) United Khasi-Jaintia Hills District (Application of Laws) Regulation (5 of 1952), was passed by Governor under Para 19 (1) (b) — Notification of 8-9-1961 issued by Governor under Section 2 of the Regulation extending Excise Act of 1910 to United Khasi-Jaintia Hills District is not valid. A 1966 Assam 29 (33).

(4) Governor's power to promulgate regulation does not automatically cease to have effect on District Council being constituted. The laws specified in the schedule to the regulation issued by the Governor can be brought into force even after the District Council is constituted and the power of the Governor to bring into force the laws set out in the schedule will cease to have effect only when the regulation is removed from statute. A 1966 Assam and Naga 29, **Reversed;** A 1972 SC 223 (226, 227).

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fied part thereof, have effect subject to such exceptions or modifications as he thinks fit;

(b) the Governor may make regulations for the peace and good government of any such area and any regulations so made may repeal or amend any Act of Parliament or of the Legislature of the State or any existing law which is for the time being applicable to such area.

(2) Any direction given by the Governor under clause (a) of sub-paragraph (1) of this paragraph may be given so as to have retrospective effect.

(3) All regulations made under clause (b) of sub-paragraph (1) of this paragraph shall be submitted forthwith to the President and, until assented to by him, shall have no effect.

[a][**20. Tribal areas.**— (1) The areas specified in Parts I, II and III of the table below shall respectively be the tribal areas within the State of Assam, the State of Meghalaya and the Union territory of Mizoram.

(2) Any reference in the table below to any district shall be construed as a reference to the territories comprised within the autonomous district of that name existing immediately before the day appointed under clause (b) of section 2 of the North-Eastern Areas (Reorganisation) Act, 1971:

Provided that for the purposes of clauses (e) and (f) of sub-paragraph (1) of paragraph 3, paragraph 4, paragraph 5, paragraph 6, sub-paragraph (2), clauses (a), (b) and (d) of sub-paragraph (3) and sub-paragraph (4) of paragraph 8 and clause (d) of sub-paragraph (2) of paragraph 10 of this Schedule, no part of the area comprised within the municipality of Shillong shall be deemed to be within the [b][Khasi Hills District].

TABLE

PART I

1. The North Cachar Hills District.
2. The Mikir Hills District.

PART II

[b][1. Khasi Hills District.
2. Jaintia Hills District.]
3. The Garo Hills District.

PART III

[c][* * *]

[d][1. The Chakma District.
2. The Lakher District.
3. The Pawi District.]

[a] Substituted by Act 81 of 1971, S. 71 (i) and Eighth Sch. (21-1-72).

Schedule 6, Para 19 (contd.)

(5) The power conferred on the Governor under Para. 19 (b) is manifestly a legislative power and is without any limitations even in regard to matters in respect of which he can promulgate a regulation. **A 1972 SC 223 (226, 227).**

(6) It is true that the power is to be exercised "until a District Council is so constituted for an autonomous district." But that only places a limit to the period until which it is exercisable, and not any limitation upon the extent of the power or the period during which a regulation made by him would be in force once it is validly made. In the absence of any such limitation there is no warrant for saying that a regulation ceases to have effect once the District Council is constituted. Like every other piece of legislation, the regulation continues to operate and remains effective until it is either annulled or repealed under some legislative power. Thus, a notification issued by Governor of Assam under United Khasi-Jaintia Hills District (Application of Laws) Regulation (5 of 1952) extending the Eastern Bengal and Assam Excise Act (1910) to the United Khasi-Jaintia Hills District even though issued after a District Council is constituted i.e. after Governor ceased to have power under Para. 19 (b), is perfectly valid. **A 1972 SC 223 (226, 227).**

(7) Jurisdiction of District Council of the United Khasi-Jaintia Hills — Extends to Bara Bazar in village Mawkhar in Shillong — Finding that village Mawkhar which includes Bara Bazar was part of Shillong Municipality was not justified in view of notification, D/- 16-1-34. **A 1975 SC 1022 (1025).**

Schedule 6, Para 20

(1) The provisions contained in this paragraph may be altered by action taken by the Governor under Para 1 of the Schedule. That alternation is valid notwithstanding the provisions of Para 21. **A 1954 Assam 97 (98) : 1954 Cri LJ 836 (DB).**

[b] Substituted by Notfn. No. D.C.A. 31/72/11 dt. 14-6-73, published in Meghalaya Gaz. 23-6-73, Pt. V-A, p. 200.

[c] Words "The Mizo District" omitted by Act 83 of 1971, S. 13 (ii) (21-1-72).

[d] Inserted by Mizoram District Councils (Miscellaneous Provisions) Order, 1972 —See Mizoram Gaz., 5-5-72, Pt. II, p. 17 (29-4-72).

[20A. Dissolution of the Mizo District Council.— (1) Notwithstanding anything in this Schedule, the District Council of the Mizo District existing immediately before the prescribed date (hereinafter referred to as the Mizo District Council) shall stand dissolved and cease to exist.

(2) The Administrator of the Union territory of Mizoram may, by one or more orders, provide for all or any of the following matters, namely:—

(a) the transfer, in whole or in part, of the assets, rights and liabilities of the Mizo District Council (including the rights and liabilities under any contract made by it) to the Union or to any other authority;

(b) the substitution of the Union or any other authority for the Mizo District Council, or the addition of the Union or any other authority, as a party to any legal proceedings to which the Mizo District Council is a party;

(c) the transfer or re-employment of any employees of the Mizo District Council to or by the Union or any other authority, the terms and conditions of service applicable to such employees after such transfer or re-employment;

(d) the continuance of any laws, made by the Mizo District Council and in force immediately before its dissolution, subject to such adaptations and modifications, whether by way of repeal or amendment, as the Administrator may make in this behalf, until such laws are altered, repealed or amended by a competent Legislature or other competent authority;

(e) such incidental, consequential and supplementary matters as the Administrator considers necessary.

Explanation.— In this paragraph and in paragraph 20B of this Schedule, the expression "prescribed date" means the date on which the Legislative Assembly of the Union territory of Mizoram is duly constituted under and in accordance with the provisions of the Government of Union Territories Act, 1963.

20B. Autonomous regions in the Union territory of Mizoram to be autonomous districts and transitory provisions consequent thereto.— (1) Notwithstanding anything in this Schedule,—

(a) every autonomous region existing immediately before the prescribed date in the Union territory of Mizoram shall, on and from that date, be an autonomous district in that Union territory (hereafter referred to as the corresponding new district) and the Administrator thereof may, by one or more orders, direct that such consequential amendments as are necessary to give effect to the provisions of this clause shall be made in paragraph 20 of this Schedule (including Part III of the table appended to that paragraph) and thereupon the said paragraph and the said Part III shall be deemed to have been amended accordingly;

(b) every Regional Council of an autonomous region in the Union territory of Mizoram existing immediately before the prescribed date (hereafter referred to as the existing Regional Council) shall, on and from that date and until a District Council is duly constituted for the correspond-

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Schedule 6, Para 20 (contd.)

(2) The effect of the proviso to cl. (2) of this Paragraph is to deny jurisdiction to the District Council over that part of the Khasi State of Mylliem falling within the Municipality of Shillong for the purposes specified under Para 4 although that area remained a part of the United Khasi and Jaintia Hills District. **A 1956 Assam 129 (135, 136) (SB).**

(3) Notification No. TAD/R/50/64 D/-23-11-1964 creating new autonomous district of Jowai is intra vires of Governor's power under Para 1 (3) and parliamentary legislation not necessary to make it effective. **A 1966 SC 1220 (1230).**

ing new district, be deemed to be the District Council of that district (hereafter referred to as the corresponding new District Council).

(2) Every member whether elected or nominated of an existing Regional Council shall be deemed to have been elected or, as the case may be, nominated to the corresponding new District Council and shall hold office until a District Council is duly constituted for the corresponding new district under this Schedule.

(3) Until rules are made under sub-paragraph (7) of paragraph 2 and sub-paragraph (4) of paragraph 4 of this Schedule by the corresponding new District Council, the rules made under the said provisions by the existing Regional Council and in force immediately before the prescribed date shall have effect in relation to the corresponding new District Council subject to such adaptations and modifications as may be made therein by the Administrator of the Union territory of Mizoram.

(4) The Administrator of the Union territory of Mizoram may, by one or more orders, provide for all or any of the following matters, namely:—

(a) the transfer in whole or in part of the assets, rights and liabilities of the existing Regional Council (including the rights and liabilities under any contract made by it) to the corresponding new District Council;

(b) the substitution of the corresponding new District Council for the existing Regional Council as a party to the legal proceedings to which the existing Regional Council is a party;

(c) the transfer or re-employment of any employees of the existing Regional Council to or by the corresponding new District Council, the terms and conditions of service applicable to such employees after such transfer or re-employment;

(d) the continuance of any laws made by the existing Regional Council and in force immediately before the prescribed date, subject to such adaptations and modifications, whether by way of repeal or amendment, as the Administrator may make in this behalf until such laws are altered, repealed or amended by a competent Legislature or other competent authority;

(e) such incidental, consequential and supplementary matters as the Administrator considers necessary.

20C. Interpretation.— Subject to any provision made in this behalf, the provisions of this Schedule shall, in their application to the Union territory of Mizoram, have effect—

(1) as if references to the Governor and Government of the State were references to the Administrator of the Union territory appointed under article 239, references to State (except in the expression "Government of the State") were references to the Union territory of Mizoram and references to the State Legislature were references to the Legislative Assembly of the Union territory of Mizoram;

(2) as if—

(a) in sub-paragraph (5) of paragraph 4, the provision for consultation with the Government of the State concerned had been omitted;

(b) in sub-paragraph (2) of paragraph 6, for the words "to which the executive power of the State extends", the words "with respect to which the Legislative Assembly of the Union territory of Mizoram has power to make laws" had been substituted;

(c) in paragraph 13, the words and figures "under article 202" had been omitted.]

[a] Paragraphs 20A to 20C substituted for former paragraphs 20A and 20B by Act 83 of 1971, S. 13 (iii) (16-2-72).

21. Amendment of the Schedule.— (1) Parliament may from time to time by law amend by way of addition, variation or repeal any of the provi-

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Schedule 6, Para 21

(1) Parliament is clothed with legislative competence of the widest amplitude in relation to any changes it likes to make in Sixth Schedule. **A 1966 SC 1220 (1225, 1228).**

sions of this Schedule and, when the Schedule is so amended, any reference to this Schedule in this Constitution shall be construed as a reference to such Schedule as so amended.

(2) No such law as is mentioned in sub-paragraph (1) of this paragraph shall be deemed to be an amendment of this Constitution for the purposes of Article 368.

SEVENTH SCHEDULE

(Article 246)

LIST I — UNION LIST

1. Defence of India and every part thereof including preparation for defence and all such acts as may be conducive in times of war to its prosecution and after its termination to effective demobilisation.

Schedule 7 (General)

(1) In the interpretation of the scope of items in the legislative lists in Sch. VII widest possible amplitude must be given to the words used and each general word must be held to extend to ancillary and subsidiary matters which can fairly be said to be comprehended in it. **A 1960 SC 424 (429) ** A 1963 SC 90 (95) ** A 1961 SC 652 (655) ** A 1959 Assam 221 (225) (SB) ** A 1962 Punj 337 (342) (FB)** A 1969 Mys 23 (35) (DB) ** (1968) 1 Mys LJ 524 ** A 1965 Guj 60 (64) (DB) ** A 1964 Punj 513 (517) (DB) ** A 1961 Andh Pra 75 (77) ** A 1960 Assam 76 (83) (DB) ** A 1960 Punj 462 (463) ** A 1957 Cal 326 (329, 330, 331).**

(2) The task of interpretation being to ascertain the limits of the powers granted by the Constitution, the Courts cannot extend these limits by way of interpretation. **A 1961 SC 652 (655, 658) ** A 1964 SC 925 (935).**

(3) The entries in the Lists in the Seventh Schedule should be so construed as to give effect to all of them and a construction which will result in any of them being rendered futile or otiose must be avoided. **A 1963 SC 90 (95).**

(4) The principles governing the interpretation of the entries in the three lists are :— (1) Liberal construction with widest amplitude. (2) Broad interpretation to ambit of an express legislative power at the expense of unspecified residuary powers. (3) Reconciliation to avoid conflict. (4) In considering validity doctrine of "pith and substance" should be followed. A 1962 Bom 12 (15) ** (1968) 1 Mys LJ 524 (DB).

(5) The various entries in the Lists in the Seventh Schedule of the Constitution are not powers of legislation but fields of legislation. A 1952 All 88 (89) (DB).

(6) The Constitution makers purposely used general and comprehensive words having a wide import without trying to particularise. **A 1961 All 487 (499, 500) (FB).**

(7) Where the three lists in Sch. VII come in conflict, the precedence is in the following order No. 1, No. 3 and No. 2. A 1958 Cal 373 (376).

(8) Courts can look into Constituent Assembly debates only to find out circumstances under which the Constitution and organisation of High Court was taken out of the State list and vested in the Parliament. No further aid in its construction can be received. A 1957 Cal 534 (541).

(9) The resort to residuary power should be the very last refuge and it is only when all the categories in the three lists are absolutely exhausted that one can think of falling back upon a non-descript. A 1962 Ker 97 (100) (DB).

(10) Articles in the Constitution are not controlled by the various items in the list of Sch. VII. A 1950 Madh-B 46 (50) (DB). **(Overruled** on another point in A 1950 Madh B 60.)

(11) Entries cannot be restricted by legislative history. (1968) 1 Mys LJ 524 (DB).

(12) Allocation of the subject in the three lists is not on basis of scientific definition but is by way of simple enumeration of broad categories. A 1953 Trav Co. 540 (540): 1953 Cri LJ 1786.

(13) Article 246 has nothing to do with the question of interpreting the Union and State entries. A 1968 Guj 124 (139) (DB).

(14) The powers of State Legislature under the State list are as large as they are in a sovereign Parliament. (1967) 33 Cut LT 263 (DB).

(15) Function of the lists. It is merely to demarcate legislative field between Parliament and State and not to confer any power. **A 1972 SC 1061 (1069): 1972 Tax LR 449.**

(16) The principles according to which entries in the different lists have to be interpreted are :—

(1) The pith and substance of the impugned enactment and its true nature and character should be found out. If it relates to a topic within the competence of the legislature, it should be held to be intra vires, even though incidentally it might trench upon a topic not within its legislative competence.

(2) The extent of the encroachment on matters beyond its competence may be an element in determining whether the legislation is colourable.

(3) To ascertain the true character of the legislation regard must be had to the enactment as a whole, to its objects and to the scope and effect of its provisions.

(4) If any apparent conflict between entries in the lists is felt in testing constitutional validity the courts should try to effect a fair reconciliation between the overlapping or conflicting entries. ILR (1974) Andh Pra 405.

Note:— Unless mentioned otherwise, the item number under these headings refers to the item number of List I of Schedule VII of Government of India Act, 1935.

JAMMU AND KASHMIR

Seventh Schedule of the Constitution applies by virtue of the Constitution (Application to Jammu and Kashmir) Order, 1954, to the State of Jammu and Kashmir. Of the three lists, Union List applies to that State, subject to certain exceptions and modifications. These exceptions and modifications are mentioned under the respective entries. The State List shall be omitted.

Entry I applies to Jammu and Kashmir — Constitution (Application to Jammu and Kashmir) Order, 1954 (14-5-1954).

2. Naval, military and air forces; any other armed forces of the Union. [Government of India Act, 1935 — Item 1.]

[a][2A. Deployment of any armed force of the Union or any other force subject to the control of the Union or any contingent or unit thereof in any State in aid of the civil power; powers, jurisdiction, privileges and liabilities of the members of such forces while on such deployment.]

[a] Inserted by Constitution (Forty-second Amendment) Act, 1976, S. 57 (3-1-77).

3. Delimitation of cantonment areas, local self-government in such areas, the constitution and powers within such areas of cantonment authorities and

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Schedule 7 (General) (contd.)

(17) Legislative entries should not be interpreted in a narrow, pedantic sense. Entries comprehend ancillary and subsidiary matter. A 1970 Andh Pra 126.

(18) The entries in the Lists should be given a large and liberal interpretation, because the allocation of the subjects in the Lists is not by way of scientific definition but by way of a mere simplex enumeratio of particular categories. 1974 Lab IC 667 (679, 680) (Mad).

(19) When the question arises whether the legislation is covered by one of the items in the State Lists or whether the legislature is in the garb of legislating under a particular item, in respects whereto it has power to legislate, legislating in a forbidden field, in determining its validity the pith and substance of the legislation has to be taken into account. Incidental encroachment or overlapping has to be ignored. The present Act is thus admittedly covered by Item 54 of List II of Sch. 7 to the Constitution, and as the stage at which the tax is levied is the stage prior to export the question of incidental encroachment or overlapping does not arise. 1975 Tax LR 1277 (1281, 1282) (Pat).

Schedule 7, List 1, Entry 1

(1) Merely because the Bihar Land Reforms Act, 30 of 1950, affects the lands comprised in Ghatwali tenures or merely because the Act has the indirect effect of abolishing semi-military tenures, it cannot be argued that the Act is a legislation with respect to Entries 1 and 2 of the Union List. A 1957 Pat 270 (274) (DB).

Schedule 7, List 1, Entry 2

(1) From the mere fact that the Bihar Land Reforms Act, 30 of 1950, affects the land comprised in Ghatwali tenure or has indirect effect of abolishing semi-military tenures of Handa Ghatwalis, it cannot be held that the legislation falls under this entry. A 1957 Pat 270 (274) (DB).

(2) The Bihar Land Reforms Act (30 of 1950) has no connection whatsoever with the defence of India or armed forces of Union. It has no relation with Entries 1 and 2 of List 1. **A 1961 SC 189 (195).**

(3) The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping. A 1969 USSC 7 (13).

(4) The pith and substance of the Railway Property (Unlawful Possession) Act, 1966 is to create an adequate machinery for preserving and protecting railway property. The Force was primarily intended to watch and prevent the pilfering of railway property all over India. The officers of the force have no general duty to maintain law and order even in areas of places where Railway property is situated. Their duties are connected with the preservation or protection of railway property. It is therefore impossible to hold them as Police-officers so as to bar admission in evidence of confessions made to them. (1975) 77 Bom LR 295 (308).

(5) Central Reserve Police Force Act is enacted by competent Legislature and is validly extended to the State of Jammu and Kashmir. 1971 Cri LJ 1489 (1490) (J & K).

Schedule 7, List 1, Entry 3

(1) Administration of justice is a State subject falling under Entry 3 of List 2 and would also include administration of justice in cantonment areas in view of the absence of that subject from List 1, Entry 3. **A 1939 FC 58 (69): 40 Cri LJ 403.**

(2) The power of Parliament to regulate the house accommodation by law extends to all houses in cantonment area irrespective of its being owned by or in possession of the civilians. **A 1970 SC 228.**

(3) Entry 3 in List 1 empowers Parliament to regulate eviction matters in private houses in Cantonment area. **A 1970 SC 228.** (A 1954 Bom 204; A 1954 Bom 254; A 1956 Nag 268; A 1961 Pat 207, **Overruled.**) ** A 1967 Madh Pra 265 (266) (DB) ** A 1962 Raj 190 (194, 195) (DB). **(A 1954 Bom 254, Diss. from.)**

the regulation of house accommodation (including the control of rents) in such areas.

[Government of India Act, 1935 — Item 2.]

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For entry 3, substitute the following entry:
"3. Administration of cantonments."

4. Naval, military and air force works.
[Government of India Act, 1935 — Item 2.]

5. Arms, firearms, ammunition and explosives.
[Government of India Act, 1935 — Items 29, 30.]

6. Atomic energy and mineral resources necessary for its production.

Schedule 7, List 1, Entry 3 (contd.)

(4) The State Legislature has no power to include cantonment areas within the ambit of accommodation requisitioning statute. A 1951 All 830 (831) (DB).

(5) The State Legislature has power to extend the provisions of an Act dealing with house accommodation and control of rents to an area which has ceased to be a cantonment area. A 1953 Madh B 5 (6, 7) (DB) ** A 1955 Madh B 76 (78).

(6) Where Rent Control legislation was extended by State Legislature to an area after it ceased to be a cantonment area, even if such area is subsequently declared to be a canonment area, the statute would continue to apply to such area until the Act is repealed by the Parliament or the Parliament makes some other legislation on the subject or the Act is spent up. A 1955 Madh B 76 (78).

(7) State Legislature has no power either to enact for or to extend to cantonment areas Accommodation or Rent Control Acts. Only Parliament can do it. Notification extending provisions of West Bengal Premises Tenancy Act (1956) to Barrackpore Cantonment Area is thus ultra vires. A 1967 Cal 355 (358, 359) (DB) ** A 1961 Pat 207 (208, 209) (DB).

(8) The Legislature by enacting the East Punjab Urban Rent Restriction Act (3 of 1949) has not impinged upon the powers of the Union as there is no provision in the Act which has the effect of regulating house accommodation in cantonment areas. (1960) 62 Pun LR 143 (144) (DB).

(9) In the Constitution, the effect of Entry 3 of List I is that Parliament has exclusive power to make laws with respect to the matters contained in that Entry, notwithstanding the fact that a similar power may also be found in any Entry in List II or List III. Article 246 of the Constitution confers exclusive power on Parliament to make laws with respect to any of the matters enumerated in List I, notwithstanding the concurrent power of Parliament and the State Legislature or the exclusive power of the State Legislature in Lists III and II respectively. The general power of legislating in respect of relationship between landlord and tenant exercisable by a State Legislature either under Entry 18 of List II or Entries 6 and 7 of List III is subject to the overriding power of Parliament in respect of matters in List I, so that the effect of Entry 3 of List I is that, on the subject of relationship between landlord and tenant insofar as it arises in respect of house accommodation situated in cantonment areas, Parliament alone can legislate and not the State Legislatures. **A 1970 SC 228 (231, 232, 234).** (A 1954 Bom 204 and A 1954 Bom 254 and A 1956 Nag 268 and A 1961 Pat 207, **Overruled.**)

(10) A reference to Items 2, 3 and 5 of head D to the Schedule to the Government of India Act, 1935, would show that the Dominion Legislature was also authorised to make laws regarding offences against laws with respect to any of the matters set out in the Schedule as also in regard to inquiries for the purposes of jurisdiction and powers of all courts with respect to any of the said matters. It was in exercise of these legislative powers that the Dominion Legislatures seem to have made the Act in 1949. Even under the present constitutional arrangement the Central Legislature continues to enjoy the power to legislate regarding the forces. Reference in this connection may be made to Articles 370 and 246 and Entries 93, 94 and 95 of List I of the 7th Schedule as applied to the State of J. & K. Thus there is no hesitation in holding that the Central Reserve Police Force Act was enacted by competent Legislature and was validly extended to J. & K. State. 1971 Cr LJ 1489 (1491) (J & K).

(11) Taxes on lands and buildings — Imposition by the State Legislature within cantonment areas by M. P. Act 14 of 1964 — Is valid — Not barred by Entry 3 of List I of Sch. VII to the Constitution and Section 60 of the Cantonments Act, 1924. A 1979 Madh Pra 188 (190).

(12) The Parliament has exclusive power under Entry 3. List I of Sch. VII to the Constitution of India to legislate in respect of house accommodation in cantonment areas, for regulating accommodation in all its aspects. The State Legislature is not competent to make law in respect of Cantonment Area. A 1971 Mys 275 (276).

(13) Notification extending East Punjab Urban Rent Restriction Act 1949 to Cantonment area in Haryana and Punjab — Extension held valid. 1972 Ren CJ 913 (Punj).

7. Industries declared by Parliament by law to be necessary for the purpose of defence or for the prosecution of war.

8. Central Bureau of Intelligence and Investigation.
[Government of India Act, 1935 — Item 1.]

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Omit Item 8.

9. Preventive detention for reasons connected with Defence, Foreign Affairs, or the security of India; persons subjected to such detention.
[Government of India Act, 1935 — Item 1.]

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Omit Item 9.

Schedule 7, List I, Entry 7

(1) The establishment, growth and development of industries in the State of Maharashtra do not fall within Entry 7 and Entry 52 of the Union List. They are within the State List of 'industries'. In order to achieve the growth of industries it is necessary not only to acquire land but also to implement the purposes of the M. I. D. Act, 3 of 1962. The powers and functions of the Corporation established under that Act clearly show that they are all in aid of the principal and predominant purpose of growth and development of industries established under it. The Act is thus a valid, piece of legislation. **A 1970 SC 1771 (1775, 1777).**

Schedule 7, List 1, Entry 9

(1) The Constitution requires a line to be drawn in the field of public order or tranquillity making off, more or less roughly, the boundary between those serious and aggravated forms of public disorder which are calculated to endanger the security of the State and the relatively minor breaches of the peace of purely local significance, treating for this purpose differences in degree as if they were differences in kind. Therefore the personal liberty of the individual was only meant to be curtailed for grave reasons and any and every disturbance of public tranquillity, would not come within the ambit of the disturbance of public order. A 1955 Raj 6 (9): 1955 Cri LJ 95 (DB).

(2) If preventive detention is desirable for any other reasons besides those enumerated in this entry and Entry 3 of List 3, recourse must be had to the residuary power vesting in the Parliament under Article 248, Clause (1). **A 1949 All 513 (516): 50 Cri LJ 798 (FB).**

(3) Legislation that deals with the right of a State to keep foreigners under preventive detention without trial, such as Section 3 (1) (b) of the Preventive Detention Act, 1950, and Foreigners Act, 1946, brings the Union of India into relation with a foreign country within Entry 10 of this List. **A 1955 SC 367 (371) : 1955 Cri LJ 876.**

(4) It is only the Parliament that can make laws for preventive detention for reasons connected with defence, and other matters mentioned in this entry. A 1949 All 158 (159) : 50 Cri LJ 224.

(5) The expression "reasons connected with defence" has been held to be wide enough to include "public safety or interest." **A 1943 FC 75 (83) : 45 Cri LJ 341.**

(6) Efficient prosecution of war is directly connected with defence of India and as the effective prosecution of war depends on the maintenance of public safety, or public order, or the maintenance of relations with foreign powers, etc., these matters are also connected with Defence. **A 1943 Cal 377 (383) (SB).**

(7) There is no authoritative definition of the term 'preventive detention' in Indian law. The word 'preventive' is used in contradistinction to the word 'punitive'. The object is not to punish a man for having done something but to intercept him before he does it and to prevent him from doing it. **A 1950 SC 27 (91, 92): 51 Cri LJ 1383.**

(8) Constitution (Declaration as to Foreign States) Order (1950) read with Art. 367 (3) does not take Pakistan outside the category of foreign power. **A 1960 SC 625 (628): 1960 Cri LJ 764.**

(9) Preventive Detention Act (1950) has a bearing not only on List I, Entry 9 but also on List III, Entry 3 (1). A 1951 Pat 47 (51) : 1952 Cri LJ 406 (DB).

(10) Provision of Section 3 (1) (b) of Preventive Detention Act 1950 is not ultra vires the legislature being well within Entry 9 List I. **A 1969 Delhi 45 (54) : 1969 Cri LJ 186 (FB).**

(11) West Bengal (Prevention of Violent Activities) Act (President's Act 19 of 1970), Sections 10 to 13 do not violate Art. 22 (7) of the Constitution. **A 1972 SC 1660 : 1972 Cri LJ 1010.**

(12) Word "preventive" occurring in List I, Entry 9 and List III Entry 3, is clearly used in antithesis to the concept of "punitive" detention. (1975) 77 Bom LR 506 (DB). **(Reversed** on another point in A 1977 SC 1027 : 1977 Cri LJ 785.)

(13) Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (1974) — Validity — Not beyond legislative competence of Parliament. ILR (1975) 2 Delhi 820 (DB).

(14) The Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, is not unconstitutional or ultra vires as beyond the legislative competence of the Parliament on the ground that Entry 9 in List I and Entry 3 in

10. Foreign affairs; all matters which bring the Union into relation with any foreign country.

[Government of India Act, 1935 — Item 3.]

11. Diplomatic, consular and trade representation.

12. United Nations Organisation.

13. Participation in international conferences, associations and other bodies and implementing of decisions made thereat.

14. Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries.

Schedule 7, List 1, Entry 9 (contd.)

List III do not mention a legislation of this kind. 1976 Mad LW (Cri) 179.

(15) Parliament was competent in enacting the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, even in exercise of its powers under Art. 246 (1) of the Constitution read with Entry 9 of List I. The connection of the smuggling activities and dissipation of foreign exchange with the security of India is real and proximate and not problematical or remote. ILR (1976) 55 Pat 473 (488, 489).

Schedule 7, List I, Entry 10

(1) Legislation that deals with the right of a State to keep foreigners under preventive detention without trial brings the Union into relation with a foreign country. **A 1955 SC 367 (370) : 1955 Cri LJ 876.**

(2) The power to legislate in respect of treaties lies with the Parliament under Entries 10 and 14 of List I. **A 1969 SC 783 (807).**

(3) Government of India Memo dated 7-1-1963 of Ministry of External Affairs — Validity — Invitation of Indian Citizen by foreign diplomatic mission in India on behalf of foreign Government — Requirement as to clearance by Government of India of such invitation — Not invalid. A 1973 Delhi 178.

Schedule 7, List I, Entry 13

(1) International Covenants on Civil and Political Rights Article 11 — Execution of decree by arrest and detention of J. D. — Immunity from, on humanistic grounds — Citizen in a world of sovereign States has only inchoate rights in the domestic courts under International Covenants — S. 59 of C. P. C. seasons justice with mercy and justice is a coefficient of law. 1969 Ker LT 927 (930, 933).

Schedule 7, List I, Entry 14

(1) Making a treaty is an executive act and not a legislative act and the entry leaves untouched the power of the Executive to enter into treaties. A 1954 Cal 615 (616) (DB).

(2) Treaties which are part of the international law do not form part of the law of the land unless expressly made so by the legislative authority. A 1951 Raj 127 (129) : 52 Cri LJ 1021 (DB) ** A 1969 Delhi 64 (74) (DB).

(3) The words "agreements with foreign countries and implementing of treaties" have to be read in their broadest sense and so read the Parliament has power not only to make rules as to the mode in which treaties and agreements with foreign countries should be regulated but also to make laws on the subject-matters of the treaties and agreements. A 1953 All 613 (615) : 1953 Cri LJ 1384 (DB).

(4) The Abducted Persons (Recovery and Restoration) Act, 1949, does not merely deal with any consequential result of the subject-matter of the agreement between India and Pakistan but it deals with the implementing of the agreement itself. A 1953 All 613 (615) : 1953 Cri LJ 1384 (DB).

(5) Entry 19 read with this entry would also indicate that the Parliament is competent to pass laws by which the citizens of India may be expelled from this country in accordance with treaties and agreements with foreign countries. **A 1952 Punj 309 (334) : 1952 Cri LJ 1313 (FB).**

(6) (Per Shah, J.) The power to legislate in respect of treaties lies with the Parliament under Entries 10 and 14 of List I of Seventh Schedule. **A 1969 SC 783 (807).**

(7) The treaty-making power would have to be exercised in the manner contemplated by the Constitution and subject to the limitations imposed by it. **A 1960 SC 845 (857)** ** A 1959 Cal 506 (515, 516).

(8) The question as to how treaties can be made by a sovereign State in regard to cession of national territory and how treaties when made can be implemented would be governed by the provisions in the Constitution of the country. **A 1960 SC 845 (857)** ** A 1959 Cal 506 (516, 517).

(9) The making and performance of treaties are acts of State vide Entry 14 of the Union list. **A 1966 Goa 38 (43) (FB).**

(10) A municipal Court might have interpreted the agreement between India and Pakistan (1947) for avoidance of double taxation if Parliament had made a law for its implementation. In absence of such law the Courts are helpless in face of the error in the agreements. (1965) 69 Cal WN 640.

(11) Treaty made by Indian Government with Pakistan to abide by decision of Tribunal respecting boundary dispute — Implementation of award of Executive is valid. A 1969 Delhi 64 (73, 74) (DB).

(12) Treaty making and implementation of treaties is a subject which falls under this Entry. Implementation of every treaty does not require legislative sanction. A 1969 Delhi 64 (73, 74) (DB).

(13) Government of India Memo dated 7-1-1963 of Ministry of External Affairs —

15. War and peace.

16. Foreign jurisdiction.

17. Citizenship, naturalisation and aliens.
[Government of India Act, 1935 — Item 49.]

18. Extradition.
[Government of India Act, 1935 — Item 3.]

Schedule 7, List 1, Entry 14 (contd.)
Validity — Invitation of Indian Citizen by foreign diplomatic mission in India on behalf of foreign Government — Requirement as to clearance by Government of India of such invitation — Not invalid. A 1973 Delhi 178.

Schedule 7, List I, Entry 15

(1) Seizure or annexation of land or goods in right of conquest or the declaration of war or blockade are acts of State. **A 1966 Goa 38 (43) (FB).**

(2) Conquest by military action over territory of Goa, Daman and Diu was an act of State — True view of an act of State is that it is a catastrophic change constituting a new departure. **A 1966 Goa 38 (43) (FB).**

(3) The Constitution makes no provision making legislation a condition of the entry into an international treaty in time of war or peace. **A 1969 SC 783 (807).**

Schedule 7, List I, Entry 17

(1) It was held that the Bombay District Police Act (4 of 1890) did not deal with citizenship and, as such, did not fall under this entry. **A 1950 Bom 374 (375): 52 Cri LJ 1059 (FB).**

(2) The West Bengal Land Development and Planning Act (21 of 1948) which purported to acquire lands for settlement of refugees from East Pakistan does not purport to legislate with regard to aliens and is not, therefore, hit by this entry. A 1952 Cal 679 (682).

(3) The executive power of the Union extends to matters relating to aliens as per Entry 17 in List I. A 1963 Cal 369 (373) : 1963 (2) Cri LJ 9 ** A 1968 Goa 17 (28) : 1968 Cri LJ 316.

(4) The Rules of evidence framed in Cl. 3 of Schedule III of the Citizenship Rules 1956 are not violative of Article 19 and the Central Government has power to determine the question of citizenship in accordance with those rules. A 1962 All 383 (390) : 1962 (2) Cri LJ 166 (DB).

(5) Parliament was competent to enact Section 9 of the Citizenship Act and to make rules of evidence. A 1962 All 383 (386) : 1966 (2) Cri LJ 166 (DB) ** **A 1969 SC 1234 (1237).**

(6) Question whether person is citizen of India is outside scope of Article 19 and is dependent upon the relevant law which Parliament can make under Article 11 and Entry 17 of the Union list. A 1961 Mad 129 (136) (DB).

(7) Acquisition of territory by State by military action — Acquiring State not bound to recognize liability of former State towards its citizens — Rights under import licences — Obtained by citizen of former Portuguese territories before their acquisition by military action were not recognised by the Government of India. **A 1966 SC 442 (444, 446).**

(8) Law not relating to political status of citizens or acquisition, continuance or termination of citizenship falls outside the scope of Article 11 and List I Entry 17. A 1976 Kant 174 (183).

(9) The Goa Administration of Evacuee Property Act does not deal with granting or divesting any person of citizenship of India and does not infringe the provisions in Entry 17 of List I of the Seventh Schedule to Constitution of India. The Act in pith and substance falls within the Entry 41 in List III of the Seventh Schedule and if there is an incidental encroachment on Entry 17 of List I, this encroachment will not affect its validity. A 1976 Goa 28 (32).

Schedule 7, List I, Entry 18

(1) Entry 18 empowers the Parliament to make laws in regard to extradition even of aliens. **A 1955 SC 367 (374) : 1955 Cri LJ 876 ** A 1952 Punj 309 (319) : 1952 Cri LJ 1313 (FB). (Reversed on another point in A 1953 SC 10.)**

(2) "Extradition" is a different and distinct subject from "expulsion" although both may overlap in certain aspects. **A 1955 SC 367 (374) : 1955 Cri LJ 876.**

(3) The Bombay District Police Act, 1890, has nothing to do with either citizenship or extradition or admission into and emigration and expulsion from India. Hence the Act is not ultra vires the powers of the State Legislature. **A 1950 Bom 374 (375) : 52 Cri LJ 1059 (FB).**

(4) A treaty between two Governments confers on the contracting parties the right to ask from each other the surrender of an offender. **A 1955 SC 367 (374) : 1955 Cri LJ 876.**

(5) The absence of a treaty will not mean that the Government cannot grant extradition under its own municipal laws which provide for the surrender. **A 1950 SC 155 (157) : 51 Cri LJ 1153.**

(6) Where an extradition treaty remained a treaty only, the detention of a person under its provisions was not one according to procedure established by law within the meaning of Article 21 of the Constitution. A 1951 Raj 127 (129) : 52 Cri LJ 1021 (DB).

(7) Courts must before they grant extradition insist upon strict compliance with the provisions of the Extradition Act, 1903. **A 1955 SC 367 (375) : 1955 Cri LJ 876 ** A** 1948 All 129 (130, 131) (DB).

(8) Extradition was legally permissible under Section 7 or Section 9 of Extradition Act, though the provisions of the Fugitive Offenders Act, 1881, invoked by Ceylon Government were no longer in force in India. **A 1960 Mad 548 (559, 564) : 1960 Cri LJ 1625 (FB).**

19. Admission into, and emigration and expulsion from India; passports and visas.

[Government of India Act, 1935 — Item 17.]

20. Pilgrimages to places outside India.

[Government of India Act, 1935 — Item 17.]

21. Piracies and crimes committed on the high seas or in the air; offences against the law of nations committed on land or the high seas or in the air.

22. Railways.

[Government of India Act, 1935 — Item 20.]

Schedule 7, List 1, Entry 18 (contd.)

(9) The executive powers of the Union extend to matters relating to extradition and may be entrusted by the Central Government to the State Government. A 1963 Cal 369 (373) : 1963 (2) Cri LJ 9.

(10) Extradition — Validity of committal — Legality of committal warrants — Conditions for extradition — Function of court — Surrender a matter for the Minister — Procedure to be followed by court in committal proceedings — Prima facie case — Evidence of accomplice and of agent provocateur — Form of warrant — Mistake in form of warrant curable. (1979) 2 Malayan LJ 70.

Schedule 7, List I, Entry 19

(1) The right to expel a foreigner includes a right to make arrangement for preventing any evasion or breach of the order. **A 1955 SC 367 (371, 372): 1955 Cri LJ 876.**

(2) Extradition and expulsion from a State are different and distinct subjects though they may overlap. They form different entries in List I. The Union Government is vested with absolute power to expel foreigners from India. There is no provision in the Constitution fettering this discretion. The law of extradition is quite different. **A 1955 SC 367 (374) : 1955 Cri LJ 876.**

(3) The introduction of permit system by Section 7 of the Influx from Pakistan (Control) Act, 1949, for entry of an Indian citizen into the Union territory was held to amount to imposition of restrictions on the exercise of rights conferred by Art. 19 (1) (d). A 1951 Nag 185 (187) : 52 Cri LJ 74 (DB).

(4) There is no provision in the Constitution against a citizen being sent out of India and Entry 19 read with Entry 14 of List I of Schedule VII of the Constitution indicates that the Union Parliament is competent to pass laws whereby a citizen of India might be expelled from the country in accordance with treaties and agreements with foreign countries. **A 1952 Punj 309 (334) : 1952 Cri LJ 1313 (FB). (Reversed** on another point in A 1953 SC 10.)

(5) By its terms, a passport requests and requires in the name of the Government of the issung country, all whom it may concern to allow the bearer to pass freely without let or hindrance and to afford him every assistance and protection of which he may stand in need. A 1957 Andh Pra 1047 (1052) (DB) ** A 1954 Mad 240 (244) (DB).

(6) A citizen cannot compel the State in the absence of legislation to make a request to a foreign Government on his behalf. A 1954 Mad 240 (244) (DB).

(7) A passport is not the basis of legal evidence to establish the fact of citizenship. A 1957 Andh Pra 1047 (1052) (DB).

(8) The function of issuing passports is vested in the Union, by virtue of Entry 19 List 1. A 1966 Bom 54 (57).

(9) The executive power of the Union extends to matters relating to admissions into and emigration and expulsion from India and Passport and visas. A 1963 Cal 369 (373) : 1963 (2) Cri LJ 9.

(10) The function of issuing passports vests in the Government of India by virtue of Art. 73 read with List I Entry 19 of the seventh Schedule. The Legislature, however, has not provided any guideline for the discharge of that function. No administrative rules for the regulation of its function of issuing passports have also been framed by the Government of India. In the absence of any regulation justifying a classification between those who are and those who are not entitled to Passports facilities, Govt. of India must grant passports to all Indian Citizens applying for them. A 1966 Bom 54 (58, 64).

Schedule 7, List I, Entry 21

(1) Actual robbery is not an essential element in the crime of piracy jure gentium (by the law of nations). A frustrated attempt to commit a Piratical robbery is equally piracy jure gentium. **A 1934 PC 220 (221).**

(2) According to International Law, the criminal jurisdiction of Municipal law is recognised as extending to piracy committed on the high seas by any national on any ship, because a person guilty of such piracy has placed himself beyond the protection of any State. He is no longer a national but nostis humani generis (an enemy of the human race) and as such he is justiciable by any State anywhere. **A 1934 PC 220 (221).**

Schedule 7, List I, Entry 22

(1) The Beedi and Cigar Workers (Conditions of Employment) Act, 1966, does not seek to regulate the Beedi and Cigar Industry as such. The pith and substance test would immediately show that the Act is a labour welfare measure which is enacted for the benefit of workers working in the said industry. Its impact, if at all any, on the Beedi industry as such is not direct and substantial but only indirect and incidental. (1971) 12 Guj LR 690 (710).

23. Highways declared by or under law made by Parliament to be national highways.

24. Shipping and navigation on inland waterways, declared by Parliament by law to be national waterways, as regards mechanically propelled vessels; the rule of the road on such waterways.

25. Maritime shipping and navigation, including shipping and navigation on tidal waters; provision of education and training for the mercantile marine and regulation of such education and training provided by States and other agencies.

[Government of India Act, 1935 — Item 21.]

26. Lighthouses, including lightships, beacons and other provision for the safety of shipping and aircraft.

[Government of India Act, 1935 — Item 25.]

27. Ports declared by or under law made by Parliament or existing law to be major ports, including their delimitation, and the constitution and powers of port authorities therein.

[Government of India Act, 1935 — Item 22.]

28. Port quarantine, including hospitals connected therewith; seamen's and marine hospitals.

[Government of India Act, 1935 — Item 18.]

29. Airways; aircraft and air navigation; provision of aerodromes; regulation and organisation of air traffic and of aerodromes; provision for aeronautical education and training and regulation of such education and training provided by States and other agencies.

[Government of India Act, 1935 — Item 24.]

30. Carriage of passengers and goods by railways, sea or air, or by national waterways in mechanically propelled vessels.

[Government of India Act, 1935 — Item 26.]

31. Posts and telegraphs; telephones, wireless, broadcasting and other like forms of communication.

[Government of India Act, 1935 — Item 7.]

Schedule 7, List I, Entry 23

(1) This Entry entitles Parliament to make any law in respect of national highways. There is no conflict between this Entry and Entry No. 59 of State List. **A 1969 J and K 113 (115) (FB).**

(2) Power to enact regarding National Highways does not include power of taxation. 1973 UPTC 376.

(3) The Beedi and Cigar Workers (Conditions of Employment) Act, 1966, does not seek to regulate the Beedi and Cigar industry as such. It is a labour welfare measure. And judging from the pith and substance doctrine, it is an Act passed with legislative competence. (1971) 12 Guj LR 690 (710).

(4) Levy of tax on public carrier permit holders for carriage of goods on National Highway falling in the territory of Haryana — Constitutional validity — Not beyond competence of State Legislature. **ILR (1971) 1 Punj 720 (FB).**

Schedule 7, List I, Entry 24

(1) It is well settled that the legislative competence has always to be judged on the doctrine of pith and substance and not by the test of incidental encroachment. The pith and substance of the Beedi and Cigar Workers (Conditions of Employment) Act 1966, indicates that it is a labour welfare measure prescribing conditions of employment in the beedi and Cigar industry, regulating terms of employment etc. and the Act nowhere seeks to regulate the beedi industry as such such a legislation could never be beyond the legislative competence of the Parliament. (1971) 12 Guj LR 690 (710, 711).

Schedule 7, List I, Entry 27

(1) Entry 27 does not cover matters of Local Administration — Kerala Municipal Corporations Act (30 of 1961) made under Entry 5, List II, Sch. 7 of Constitution does not even incidentally trench upon Major Port Trust Act, 1974 Tax LR 1929 (Ker).

Schedule 7, List 1, Entry 30

(1) Levy of Sales Tax on incorporeal moveable property (copyright) is not ultra vires Article 366 (12). **A 1969 Mad 284 (290) (DB).**

(2) Imposition of terminal tax on passengers carried by road under Cl. (e) — State Legislature is competent to legislate and impose tax. ILR (1973) Cut 1174.

Schedule 7, List I, Entry 31

(1) The substance of the Ajmer (Sound Amplifiers Control) Act (3 of 1956), does not purport to encroach upon the field of Entry 31 of the Union List, though it incidentally touches upon a matter provided there. **A 1959 SC 544 (547): 1959 Cri LJ 660.**

32. Property of the Union and the revenue therefrom, but as regards property situated in a State [a][* * *] subject to legislation by the State, save in so far as Parliament by law otherwise provides.

[Government of India Act, 1935 — Item 10.]

[a] The words "specified in Part A or Part B of the First Schedule" omitted by the Constitution (Seventh Amendment) Act, 1956, S. 29 and Schedule.

33. [Omitted by the Constitution (Seventh Amendment) Act, 1956, S. 26 (1-11-1956).]

34. Courts of wards for the estates of Rulers of Indian States.

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Omit Entry 34.

Schedule 7, List I, Entry 31 (contd.)

(2) Whatever liability might have fastened on the Bharatpur State or the Rajasthan State in connection with the maintenance of the transmitter pertaining to the period prior to coming into force of the Constitution became the 'liability of the Indian Union, because the purpose in connection with which this liability fell to be incurred was a purpose related to a matter within Item No. 31 of List 1. A 1964 Raj 205 (214, 215, 216) (DB).

(3) Acquisition of land for putting up Telephone Exchange — President cannot authorise the Union territory of Pondicherry to make the acquisition under Land Acquisition Act (1894). A 1975 Mad 345.

Schedule 7, List I, Entry 32

(1) Competence of State Legislature to pass Act — Fact that rights are subject to overriding power of the President to resume ownership does not render the property Union property under Entry 32, List 1 — Punjab Consolidation of Land Proceedings (Validation) Act (VI of 1957) Section 3. **A 1959 Punj 8 (13) (FB). (Overruled** on another point in A 1959 SC 519).

(2) Legislation in respect of property which has ceased to be evacuee property having been acquired by the Central Government under the Displaced Persons (Compensation and Rehabilitation) Act 1954, made by the State legislature does not fall under Entry 32 of List I. **A 1959 Punj 8 (12) (FB).**

(3) The Legislative power of the Parliament in Entry 32 of List I cannot be taken as abridged by the legislative power under Entry 18 in List II in favour of the State. (1967) 69 Pun LR 76 (DB).

(4) It is not correct to say that public Premises (Eviction of Unauthorised Occupants) Act 1971 in so far as it relates to premises belonging to a Govt. company is ultra vires for want of legislative competence. A 1980 MP 106 (109): 1980 Jab LJ 183.

Schedule 7, List 1, Entry 33

(Cases before amendment)

(1) This entry has been omitted by the 7th Amendment of the Constitution. The corresponding matter is now included in Entry 42 of List III (concurrent List.)

(2) The obligation to pay compensation is not implicit in the legislative Entry 33 of List 1. **A 1969 SC 453 (459).**

(3) Entry 33 in List 1, Entry 36 in List 2 and Entry 42 in List 3 of the Seventh Schedule (as they stood before the passing of the Constitution) (Seventh Amendment) Act (1956), indicate that the Constitution recognised a trichotomy of public purpose, viz., a purpose of the Union, a purpose of the State and any other public purpose. A 1961 All 520 (521).

(4) Legislation relating to acquisition of property falls within Entry 33 of List 1. The Iron and Steel Companies Amalgamation Act, 1952, was validly enacted by the Parliament. A 1953 Cal 695 (699, 700).

(5) Requisitioning of premises under Section 75-A, Defence of India Rules, 1939 — Government is not tenant of premises — House Controller's authority to make order of allotment after derequisitioning was held to be without jurisdiction. A 1957 Pat 637 (638) (DB).

(6) "Any other public purpose" — State Government is competent to make requisition for office accommodation of National Cadet Corps. A 1957 Pat 109 (110, 111).

(7) (Per Sinha, J.) — Taking possession under Article 31 has reference to the power of requisitioning under Entry 33 of List 1 and Entry 36 of List 2 of Schedule 7 to the Constitution. **A 1950 Pat 392 (415, 416) (SB).**

(8) Entry 33 of List 1 refers to acquiring of property for the purposes of the Union. It does not lay down in whom the property should vest after it has been acquired. **A 1959 SC 475 (479).**

(9) The husking of coconuts is not an industry; and coconut husk cannot therefore be the product of any industry. At any rate, coconut husks are not the product of any industry whose control by the Union has been declared to be expedient in the public-interest by law by the Parliament. They do not therefore, fall within the ambit of Clause (a) of Entry 33 of List 1 of the seventh schedule to the Constitution. 1972 Ker LT 238 (241).

Schedule 7, List 1, Entry 34

(1) The C. P. Court of Wards Act (24 of 1950) was covered by Entry 22 of List II and Entry 34 of List I of the 7th Schedule. A 1961 Madh Pra 197 (198) (DB).

35. Public debt of the Union.
[Government of India Act, 1935 — Item 6.]

36. Currency, coinage and legal tender; foreign exchange.
[Government of India Act, 1935 — Item 5.]

37. Foreign loans.

38. Reserve Bank of India.

39. Post Office Savings Bank.
[Government of India Act, 1935 — Item 7.]

40. Lotteries organised by the Government of India or the Government of a State.
[Government of India Act, 1935 — Item 48.]

Schedule 7, List 1, Entry 36

(1) This Entry specifically confers jurisdiction on Parliament to legislate in relation to foreign exchange and would embrace laws relating to control of foreign exchange as also relating to its acquisition. **A 1959 SC 1124 (1131).**

(2) The object of the Sugar Export Promotion Act (30 of 1958) is to obtain foreign exchange. **A 1959 SC 1124 (1131).**

(3) Currency notes and bank notes — Offences relating to — Offences under Section 489-A to 489-D, I.P.C. are offences relating to a matter to which executive power of the union extends — The "appropriate Government" competent to remit the sentence of the convicts is the Central Government and not the State Government. **A 1974 SC 31 (33, 34): 1974 Cri L.J 150.**

(4) Chapter III-B of Reserve Bank of India Act (1934) — Validity — Impugned provisions in pith and substance relate to control of currency by the Reserve Bank and fall under entries 38 and 36 of List I and they do not in any way entrench upon entry 30 of List II. (1971) 41 Com Cas 890 (907) (DB) (Mad).

Schedule 7, List 1, Entry 38

(1) M. P. Dhan Parichalan Skeem (Pratishedh) Adhiniyan (19 of 1975) is not beyond the legislative competence of the State Legislature. It would fall under entry 30 of List II. Even if there be any doubt about the application of Entry 30 of List II, the pith and substance of the said Act cannot escape Entry 7 of the concurrent list (List III). Entry 7 of List III is wide and comprehensive. A 1977 Madh Pra 74 (77, 78, 79).

(2) Central Acts 9 of 1910 and 32 of 1959 are in pith and substance within purview of Entry 38 of List I. The condition as to option of purchase under the Central Acts is the result of an agreement though compelled by law. They do not provide for acquisition in ordinary legal sense. The Madras Act 29 of 1954 on the other hand, deals with compulsory acquisition. The Central Acts and the impugned Madras Act being laws with respect to different matters enumerated in the Concurrent List, no question of inconsistency between the two sets of laws made by Parliament, and by the State Legislature can arise. A 1971 Mad 358 (362).

(3) Chapter III-B of Reserve Bank of India Act (1934) — The impugned provisions in pith and substance relate to control of currency by the Reserve Bank and fall under entries 38 and 36 of List I of the Seventh Schedule, and they do not in any way entrench upon entry 30 of List II. 41 Com Cas 890 (907) (DB) (Mad).

Schedule 7, List 1, Entry 40

(1) Under this entry Parliament is given the competence to deal with lotteries organised by the Government of India or the Government of a State and with regard to all other types of lotteries competence is conferred upon the State Legislature under Entry 34 of List 2. A 1956 Bom 1 (6) (DB). **(Reversed** on another point in A 1957 SC 699.)

(2) A lottery has been described as a scheme for distributing prizes by lot or chance. A 1956 Bom 1 (6) (DB).

(3) It is not necessary to constitute a scheme a lottery that the prizes should be distributed wholly by chance. In order to take the scheme out of the category of lottery, it is essential that there must be a substantial element of skill, although that element may not be the preponderating element. A 1956 Bom 1 (6) (DB). **(Reversed** on another point in A 1957 SC 699.)

(4) Amendments by Finance Act, 1972 of Secs. 2 (24) (ix) 10, 56 (2) (1-b) and 80-TT of Income-tax Act, 1961, including winnings from lotteries as taxable income — Not ultra vires — The power to pass laws taxing such winnings is given to Parliament by Entries 82 and 97, and not by Entry 40, of the Union List. 1974 Tax LR 885 (888) (All).

(5) There is an apparent overlapping between Entry 40 in List 1 and Entry 34 in List 2 — No legislature of a State can, therefore, make a law touching lotteries organised by the Government of India or the Government of a State. A 1975 Andh Pra 50 (51).

(6) When there is overlapping between the entries in List I and List II, the power conferred on the Union Parliament under any entry in List I must prevail over the power of a State Legislature under any entry in List II. As a consequence, the power of a State to legislate in respect of gambling would not include a power to legislate in respect of a lottery organised by a State. A 1971 Bom 332 (335).

(7) Entry 40 does not by itself envisage authority in the State to lawfully, i.e. with authority organise a lottery for that State. A 1971 Bom 332.

41. Trade and commerce with foreign countries; import and export across customs frontiers; definition of customs frontiers.

[Government of India Act, 1935 — Item 19.]

42. Inter-State trade and commerce.

Schedule 7, List 1, Entry 41

(1) It has been held that the amended Sec. 14-B of te Bombay Abkari Act 1878, was within the competence of the State Legislature to enact, because it dealt only with the possession of intoxicating liquors including foreign liquors, a subject covered by Item 31. List 2 of the Government of India Act, 1935. **A 1950 FC 69 (71): 51 Cri LJ 1018.** (A 1950 Bom 221, **Affirmed.**)

(2) The provisions of the Bombay Prohibition Act, 1949, in so far as they purported to restrict possession, use and sale of foreign liquor, were covered by Item 31 of List 1 of Schedule VII of the Government of India Act 1935. **A 1951 SC 318 (322): 52 Cri LJ 1361.**

(3) The word 'import' in Item 19 of List 1 of G. I Act, 1935 standing by itself did not include sale or possession of the article imported into the country. **A 1951 SC 318 (323, 324): 52 Cri LJ 1361.**

(4) The Government of India, which under Item 19 of List 1 of the Government of India Act, 1935, possessed the power to define the customs frontiers, defined them by a notification D/- 1-4-1937 as "the frontier, whether one or more than one, whether sea or land, whether exterior or interior, of British India." **A 1940 Bom 307 (310) (SB).**

(5) Customs frontiers of India extend to its terriorial waters. The import of goods must be regarded as complete as soon as the frontier is crossed by the goods. A 1960 Andh Pra 619 (620) (DB).

(6) The subject matter of regulation of imports into the country is within the exclusive jurisdiction of the Union. A 1965 Mys 143 (149) (DB).

(7) The exclusive powers of taxation have to be correlated with the exclusive powers of the Parliament to legislate with respect to trade and commerce with foreign countries, import and export duties across customs frontiers and definition of customs frontiers. **A 1963 SC 1760 (1770).**

(8) Duties of customs and duties of excise are within the exclusive power of legislation by Parliament. **A 1963 SC 1760 (1770).**

(9) Disposal of applications for import licence — State Government constituting committee including State Government Officer who was acting as sponsoring authority under Import and Export (Control) Act — Order constituting committee amounted to encroachment upon exclusive jurisdiction of Union Government. A 1965 Mys 143 (149) (DB).

(10) Customs duties (export or import) and excise duties by Union on property of State — Levy not covered by exemption and can be validly imposed. **A 1963 SC 1760 (1777).**

(11) Entries 41 and 42 of List 1 do not confer any power on the Union Parliament to make laws for the imposition of taxes. The aim and object of those two entries is altogether different from that of Entry 52 of List II. A 1960 Andh Pra 234 (242) (DB).

(12) Sale of oils to foreign ships for their consumption from bonded warehouse takes place then and there and is not exempt from sales tax. A 1960 Andh Pra 619 (621) (DB).

(13) An irrevocable letter of credit has a definite implication. It is a mechanism of great importance in the international trade. Any interference with that mechanism is bound to have serious repercussions on the international trade. Except under very exceptional circumstances, the court should not interfere with that mechanism. The autonomy of an irrevocable letter of credit is entitled to protection. **A 1970 SC 891 (896, 897).**

(14) Held that the perusal of the impugned orders and instructions shows that they dealt with the export of skins of tigers, leopards and panthers and placed a ban on such exports As the subject of import and export across customs barriers falls under entry 41 of the Union List, it follows that the Union Government is well within its powers in issuing impugned orders and instructions. As the orders and instructions stand, there has been no encroachment into the domain reserved for the States. ILR (1971) 1 Delhi 178 (185).

(15) Imports and exports across customs frontiers need not be during the course of trade and commerce with foreign countries. ILR (1971) 1 Delhi 178 (185).

Schedule 7, List 1, Entry 42

(1) The Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948, did not deal with inter-State Commerce and, therefore, could not be condemned as a legislation by the State upon a matter, which was within the exclusive competence of Parliament. A 1954 Mad 291 (302) (DB).

(2) List 1, Items 41 and 42 deal with topics regulating matters indicated in them. They do not authorise imposition of taxes. A 1960 Andh Pra 234 (242) (DB).

(3) Hyderabad Municipal Corporation Act (2 of 1956) does not fall within the scope of Entries 41 and 42 of List 1. A 1960 Andh Pra 234 (242) (DB).

(4) If the State Legislature legislates with regard to trade and commerce outside the State it has overstepped its limits because inter-State trade and commerce is within the competence of the Parliament. A 1956 Bom 1 (8) (DB). **(Reversed** on another point in A 1957 SC 699.)

(5) The provisions of Art. 289 do not preclude the Union from imposing or authorising the imposition of customs duties on the import or export of the property of a State used for purposes other than those specified in clause (2) of that Article. **A 1963 SC 1760 (1767, 1777).**

(6) The immunity granted to the States in respect of Union Taxation under Art. 289 (1) does not extend to duties of customs includ-

43. Incorporation, regulation and winding up of trading corporations, including banking, insurance and financial corporations but not including co-operative societies.

[Government of India Act, 1935 — Item 33.]

Schedule 7, List 1, Entry 42 (contd.)

ing export duties or duties of excise. **A 1963 SC 1760 (1767, 1777).**

(7) The provisions of Art. 289 do not preclude the Union from imposing or authorising imposition of excise duties on the production or manufacture in India, of the property of a State used for purposes other than those specified in Cl. (2) of Art. 289. **A 1963 SC 1760 (1767, 1777).**

(8) Karnatak Contract Carriages (Acquisition) Act 21 of 1976, is primarily and almost wholly an Act providing for the acquisition of contract carriages, the inter-State permits and other properties situated in the State. In pith and substance it is an Act of that kind. The incidental encroachment on the topic of inter-State trade and commerce, even assuming there is some, cannot invalidate the Act. **A 1978 SC 215 (229, 230).**

Schedule 7, List 1, Entry 43

1. Companies and Corporations.— (1) Life Insurance Corporation Act is above reproach of unconstitutionality. A 1968 Mys 71 (72): 1968 Lab IC 455.

(2) The essence of a corporation consists in (1) lawful authority of incorporation, (2) the persons to be incorporated (3) a name by which the persons are incorporated, (4) a place and (5) words sufficient in law to show incorporation. **A 1962 SC 458 (464).**

(3) Society registered under Societies Registration Act (1860) is not a corporation or quasi-corporation but an unincorporated society contemplated by List II, Entry 32. A 1962 Bom 12 (21) (DB).

(4) The enactment of Iron and Steel Companies Amalgamation Act, 1952, is with regard to entries 43 and 44 of List II in view of its pith and substance. A 1953 Cal 695 (699).

(5) This entry while providing for incorporation, regulation, etc. of trading corporations, expressly excludes Co-operative Societies from its ambit. (1968) 34 Cut LT 745 (DB).

(6) Non-trading companies within the old Part B States do not fall within either Entry 43 or 44 of List I. 1958 Ker LT 1178.

(7) The distinction between the expression "office of profit under Government" in Article 102 and the expression "holder of a post or service under the Government" in Articles 309 and 314 is no doubt fine and somewhat intriguing, but in the troubled waters of jurisprudence, one has often to steer clear of shoals. The test for the application of Art. 311 (2), in short is whether there is a master and servant relation between the Government and the employee concerned. Hence when a person is a member of the staff of a company which is a juristic entity other than the Government, he cannot be said to be holding a post under the Government, whatever may be the mode of appointment and removal of such person. A 1969 Cal 95 (102) : 1969 Lab IC 142.

(8) Gujarat Industrial Development Act (23 of 1962) is not beyond the legislative competence of the State Legislature. ILR (1970) Guj 844.

(9) Once a legislation squarely falls under relevant labour entries of labour disputes and welfare merely because this labour participation is in the management of controlled industries or of limited Corporations, the subject matter would not be in any manner changed. The subject matter would remain labour welfare, pure and simple even though it might have some incidental effect on corporate undertakings or controlled industries. (1976) 17 Guj LR 265 (277).

(10) Sections 5 and 18 of Electricity (Supply) Act, 1948 fall under the entry. 1970 Ker LJ 277.

(11) Incorporation is not a mere formality; it must necessarily be for some definite purpose. (1819) 4 US 316 (411). Ref. The expression 'incorporation' as a legislative head in the relevant entries in the constitution, means not only the making of the corporation but also the definition of its functions and powers. This has been done in detail by the Central Legislature in the Electricity (Supply) Act, 1948 in regard to the Electricity Boards. Kerala State Electricity Board has been incorporated under the Electricity (Supply) Act, 1948 and its powers and functions are defined by a Central law under Entry 43, List I, which is an exclusive legislative head for Central Legislation. Any State Legislation affecting the functions or powers of the Kerala State Electricity Board is incompetent. S. 78-A of Electricity (Supply) Act does not oblige the Electricity Board to accept every direction on questions of policy given by the State Government. Where the Board has fixed price of electricity by virtue of its powers under Section 49, Electricity (Supply) Act, no extraneous authority can interfere with the exercise of that power. 1970 Ker LJ 277 (DB). (1969 Ker LJ 571, **Reversed.**)

2. Banking Companies.— (1) Section 46-A of Banking Companies Act, 1949, is perfectly within the competence of Parliament under Entries 43, 45 and 46 of List I of Sch. VII. A 1962 Ker 267 (280).

(2) The power to legislate on the topic of legislation relating to banking carries with it also the power to legislate on an ancillary matter. A 1962 Ker 267 (280).

(3) Winding up of banking companies and jurisdiction and powers of all courts with respect to the same are in the Central List. A 1958 Mad 403 (409).

(4) Every law which in its operation might affect the property or interest of a bank would not come within items 43 and 45 of List I. A 1958 Mad 403 (409).

(5) Deputy Collector, cannot dispose of suit under Section 55, Madras Estates Lands Act against Banking Company in liquidation. A 1958 Mad 403 (405, 411).

(6) Misfeasance proceedings — Company Judge directing some of Directors of com-

44. Incorporation, regulation and winding up of corporations, whether trading or not with objects not confined to one State, but not including universities.

[Government of India Act, 1935 — Item 33.]

Schedule 7, List I Entry 43—Note 2 (contd.)
pany to appear and give evidence — Appeal to Division Bench is maintainable. A 1964 Mys 75 (78) (DB).

(7) The State Bank of India, though not specifically called upon to perform governmental or quasi-governmental functions and though does not possess powers to enforce obedience at the pain of penalty, is still "other authority" within the meaning of that expression under Art. 12. A 1979 Bom 250 (257).

(8) On harmonious construction, business of banking falls within Entry No. 45 whereas corporations and matters relating to them fall within Entry No. 43 — Co-operative Societies are excluded from its purview. A 1970 Punj 528 (531).

3. Miscellaneous.— (1) Motor Vehicles Act (1939), Section 68-CC as added by Section 4 of M. V. (Rajasthan, Amendment) Ordinance (3 of 1974) — Section is constitutional and not beyond the competence of the State Legislature — The subject matter of Section 4 of the said Ordinance clearly falls within Items 35 and 42 of List III and not within Item 43 of List I. **A 1974 SC 1373 (1375).**

(2) Electricity (Supply) Act, 1948, should be deemed to be falling under Entry 38 of List III of the Seventh Schedule. The Act cannot be said to fall under Entry 43 or 44 of that Schedule. **A 1976 SC 1031 (1040, 1042, 1043, 1044).**

(3) U. P. Co-operative Societies Act, 1965 (11 of 1966) — Validity of — Act falls under Entry 32 of List 2 of Schedule 7 and not under Entry 43 or 45 of List I. A 1972 All 159.

(4) Entry 43 of List I excludes all co-operative societies including banking co-operative societies — There is no warrant to say that said Entry 43 excludes only non-banking co-operative societies, but includes within its sweep banking co-operative societies. A 1971 Bom 365 (370).

(5) Co-operative Societies doing banking business are taken out of Entry 43 of List I and deliberately put in Entry 32 of List II — State Legislature is competent to regulate functioning of such Co-operative Societies. A 1970 Punj 528 (531).

(6) Though the expression "property of the Union" in Sch. VII, List I, Entry 32, cannot be construed to include property of a Government company, Entry 43 relating to incorporation and regulation of trading corporations read with Entry 95 which relates to jurisdiction and powers of all Courts, except the Supreme Court, with respect to any of the matters in List I can be construed to confer power on the Parliament to enact the Public Premises (Eviction of Unauthorised Occupants) Act, 1971, in respect of premises belonging to a Government company. A 1980 MP 106 (109) : 1980 Jab LJ 183.

Schedule 7, List I, Entry 44

(1) It cannot be said that the subject matter of the Madras Electricity Supply Undertakings (Acquisition) Act (43 of 1949) was "Corporations". On the other hand it came within purview of "electricity" in the Concurrent List and was, therefore, not ultra vires the Madras Legislature. A 1951 Mad 979 (981, 984, 985) (DB).

(2) A law which attempts to regulate the affairs of a company by laying down certain special rules for its management and administration is fully covered by Entry 43. Consequently, the Sholapur Spinning and Weaving Company (Emergency Provisions) Act, 1950, was held to be fully covered by this entry. **A 1951 SC 41 (59, 60).**

(3) Sections 52A to 52D which were added to the Insurance Act, 1938, by the Insurance (Amendment) Act, 1950, were not ultra vires of the Constitution. A 1952 Punj 9 (25, 26) (DB).

(4) The pith and substance of Iron and Steel Companies Amalgamation Act, 1952 was that it legislated with regard to matters relating to Entries 43 and 44 read with Entry 52 of the Union List and not relating to the matter which fell under Article 31, cl. (2) and Entry 33 of the Union List or Entry 36 of the State List. A 1953 Cal 695 (699).

(5) Section 45-B of the Banking Companies Act, 1949 which fixes the territorial limits of the Ordinary Original Civil Jurisdiction of the High Court so as to be co-extensive with the territorial limits of the States, in relation to matters covered by the Act, is within the competence of Parliament in view of Entries 43 and 95 of the Union List. A 1958 Mad 279 (280).

(6) An action of a statutory corporation may be ultra vires its powers without being illegal. **A 1961 SC 1107 (1113).**

(7) Society registered under Societies Registration Act (1860) can be registered under Section 18 (1), Bombay Public Trusts Act, even if its objects are not confined to State of Maharashtra. A 1962 Bom 12 (21) (DB).

(8) The validity of the Bombay Public Trusts Act, 1950 cannot be challenged on the ground that it incidentally entrenches on the field contemplated by Entry 44. A 1962 Bom 12 (21) (DB).

(9) Per Majority :— On registration under the Societies Registration Act the old Board of the Tibbia College of Delhi did not become a corporation, in the sense of being incorporated within the meaning of Entry 44 of List I. **A 1962 SC 458 (471)** ** A 1968 Bom 91 (94) (DB).

(10) As the objects of the corporation set up by the Sir Currimbhoy Ebrahim Baronetcy Act (1913) was confined to one

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"A" in the citations stands for AIR

45. Banking.
[Government of India Act, 1935 — Item 38.]

Schedule 7, List I, Entry 44 (contd.)

State only, the Sir Currimbhoy Ebrahim Baronetcy (Repeal and Distribution of Trust Properties) Act (Bom IX of 1960) winding up the corporation set up by the 1913 Act fell within the ambit of Item 32 in List II and not of Item 44 in List I. (1969) 67 Bom LR 326 (DB).

(11) The Tibbia College Act (5 of 1952) enacted by the Delhi State Legislature has confined the powers and duties of the board to its institutions in Delhi and hence the Act falls under Entry 32 of List II within the competence of the State Legislature. **A 1962 SC 458 (471).**

(12) The objects of the Orissa Co-operative Societies Act (1962), being confined to one State only is not covered by this Entry. (1968) 34 Cut LT 745 (DB).

(13) Provisions of Punjab Sikh Gurdwaras Act are within scope of Entry 44. **A 1970 Punj 40 (60) (FB).**

(14) Electricity (Supply) Act, 1948, should be deemed to be one falling under Entry 38 of List III of the Seventh Schedule to the Constitution. It cannot be said to fall under Entry 43 or Entry 44 of List I. **A 1976 SC 1031 (1040, 1042 to 1044).**

(15) A. P. (Agricultural Produce and Live Stock) Markets Act, 1966 (16 of 1966) is not invalid on ground of repugnancy of State law to law made by Parliament. A 1975 Andh Pra 58.

(16) Nationalised Bank, State Bank and its subsidiary banks, though not specifically performing Governmental or quasi-Governmental functions and lacking power to enforce obedience at pain of 'penalty' are 'other authorities' within Art. 12 of the Constitution. A 1979 Bom 250 (256).

(17) Incorporation is not a mere formality it must necessarily be for some purpose. The expression as a legislative head in the relevant entries in the Constitution means not only the making of the Corporation but also definition of its functions and powers. 1970 Ker LJ 277.

(18) In the case of a corporation, while its incorporation, regulation and winding up come in Entries 43 and 44 of List I only, some of its activities, namely, production, supply and distribution and trade and commerce come in Entries 26 and 27. Entries 43 and 44 in List I are general and Entries 25 and 27 in List II are particular. 1970 Ker LJ 277.

(19) The Kerala University Act does not make provision for the management of the companies. All it does is to regulate the working of colleges affiliated to the University and this falls squarely and completely within Entry 11 of the State List, irrespective of whether or not a college is run by a company or by any other person. The Act no more entrenches on Entry 44 of the Union List than, for example, legislation regarding land or its management would entrench on that entry because the land belonged to a company. **A 1970 Ker 196 (218) (FB).**

Schedule 7, List I, Entry 45

(1) The corresponding Item 38 of List I in the Government of India Act has been held to be limited to laws which affect the conduct of business of banks qua banks. Accordingly, Sections 30 and 36 of the Bengal Money-Lenders Act, 1940, could not be said to interfere with the 'conduct of banking business' in that item merely because the application of these provisions would greatly reduce the amount which a bank could recover in execution of decree obtained by it. **A 1945 FC 7 (8).**

(2) Banking Companies Act (1949), Section 49-A — Parliament competent to enact measure under Entries 43, 45 and 46 of List I. A 1962 Ker 267 (280).

(3) The Indian Legislature has not purported to legislate in regard to the subject covered by item 18 of List II in enacting Section 45-B of the Banking Companies Act. A 1958 Mad 403 (410) : 1962 (2) Cri LJ 490.

(4) The contention that matters relating to winding up of companies are within the exclusive jurisdiction of Parliament covering under Entries 43 and 45 of List I of Sch. 7 of the Constitution and the Mysore High Court Act being an enactment of the State Legislature under Entry 65 of List II Section 4 of that Act had no application to the matters relating to winding up of companies is not tenable. A 1964 Mys 75 (78) (DB).

(5) The legislative entry in List I of the Seventh Schedule is "Banking" and not "Banker" or "Banks." To include in the connotation of the expression 'banking', in Entry 45 of List I. power to legislate in respect of all commercial activities which a banker, by the custom of bankers or authority of law, engages in, would result in re-writing the Constitution. **A 1970 SC 564 (589, 590).**

(6) U. P. Co-operative Societies Act, 1965 (11 of 1966) falls under Entry 32 of List 2 of Schedule 7 and not under Entry 43 or 45 of List I. A 1972 All 159.

(7) The State Legislature can pass law for controlling the management of a banking co-operative society. Even if such law is connected with banking business matters, it would not necessarily encroach upon the power of Central Legislature to control the conduct of banking business of a co-operative society. A 1971 Bom 365 (370, 371, 373).

(8) Power under Section 78 of the Maha. Co-operative Societies Act (24 of 1961) to supersede a co-operative society falls in pith and substance under Entry 32 of List II of Schedule VII of the Constitution. The true nature and character of the provision is to control and govern the affairs of the co-operative societies and not 'banking'. A 1971 Bom 365 (371, 374).

(9) It cannot be said that the chit or Kuri business is a part of 'Banking' within the meaning of Entry 45 of List I of the Seventh Schedule to the Constitution. The accepted legal concept of banking is carry-

46. Bills of exchange, cheques, promissory notes and other like instruments.
[Government of India Act, 1935 — Item 28.]

47. Insurance.
[Government of India Act, 1935 — Item 37.]

48. Stock exchanges and future markets.

49. Patents, inventions and designs; copyright; trade-marks and merchandise marks.
[Government of India Act, 1935 — Item 27.]

50. Establishment of standards of weights and measure.
[Government of India Act, 1935 — Item 51.]

51. Establishment of standards of quality for goods to be exported out of India or transported from one State to another.

52. Industries, the control of which by the Union is declared by Parliament by law to be expedient in the public interest.
[Government of India Act, 1935, Item 34.]

Schedule 7, List I, Entry 45 (contd.)

ing on business of receiving moneys and collecting profits for customers subject to the obligation of honouring cheques drawn upon them from time to time by the customers to the extent of the amounts available on their current accounts. A 1977 Madh Pra 74 (77).

(10) Pondicherry Chit Funds Act falls under Entry 7 of List 3 and not under Entry 45 of List I or Entry 30, List II. It is within the legislative competence of the State legislature. A 1972 Mad 99.

(11) On harmonious construction, business of banking falls within Entry No. 45, whereas Corporations and matters relating to them falls within Entry No. 43. A 1970 Punj 528 (531).

(12) Banking business need not necessarily include acceptance of deposits from public. Assuming that it does, the State Bank of Dholpur Act (1915) contained several provisions about acceptance of deposits. The Act was, therefore, within competence of Parliament. A 1971 Raj 6 (9).

Schedule 7, List 1, Entry 46

(1) For an instrument to acquire negotiability, it must be in a form capable of being sued upon by the holder of it pro tempore in his own name and it must be by custom of trade transferable like cash by delivery. A 1938 Sind 24 (27) ** A 1919 Cal 546 (548).

(2) The instruments enumerated in this entry have been assigned to the Central Legislature, because, uniformity of practice as regards these instruments for the whole of India is necessary. A 1941 FC 47 (55).

(3) The expression "other like instruments" means "instruments of the same genus as cheques, bills of exchange and promissory notes." **A 1944 Cal 196 (198) (SB).**

(4) Money claim based on promissory note — Nyaya Panchayat has jurisdiction to try such a claim. 1968 All LJ 236 (DB).

(5) The M. P. Dhan Parichalan Skeem (Pratishedh) Adhiniyam does not contain any provision enacted regarding promissory notes. Entry 46 of List I is, therefore, inapplicable. A 1977 Madh Pra 74 (78).

Schedule 7, List I, Entry 47

(1) Emergency Risks (Factories) Insurance Act (1962), Section 11 — Power under to realise evaded insurance premium after expiry of insurance period — Power is not ultra vires Entry 47. A 1971 Andh Pra 145 (154) : 1971 Lab IC 651.

Schedule 7, List I, Entry 48

(1) The Forward Contracts (Regulation) Act (1952) which is a legislation on Forward Contracts would be a legislation on Future Markets within the meaning of Entry 48 in List 1 of the Seventh Schedule. Though a law on forward contracts would also be a law with respect to trade and commerce coming under Entry 26 of List 2, Entry 48 in List 1 being a specific one must be excluded from the general Entry 26 in List 2. **A 1963 SC 90 (93, 94, 95, 96).** (A 1962 Cal 740 was correct under the Government of India Act (1935) but is no longer law in view of the change in the Constitution.) ** A 1959 Cal 89 (92) (DB). **(Reversed on another point in A 1963 SC 90.)**

Schedule 7, List I, Entry 49

(1) Emblems and Names (Prevention of Improper Use) Act, 1950 — Act is not void for want of legislative competence of Parliament. **A 1975 SC 1172.**

Schedule 7, List I, Entry 51

(1) There is no repugnancy between the provisions of the Drugs and Cosmetics Act as amended by Act 11 of 1955 and Act 13 of 1964 and Medicinal & Toilet Preparations (Excise Duties) Act, 1955, on the one hand, and Ss. 4, 40, 75 and 76 of the U. P. Excise Act with regard to the enforcement of the policy of prohibition of misuse of medicinal preparations or drugs containing alcohol as alcoholic beverages. A 1978 All 490 (495).

Schedule 7, List 1, Entry 52

(1) The process of manufacture or production would be comprised in Entry 24 of List 2 except where the industry was one the control of which by the Union was declared by law by Parliament to be expedient in public interest, in which case, it would fall within Entry 52 of List 1. **A 1956 SC 676 (695, 696).**

Schedule 7, List I, Entry 52 (contd.)

(2) The products of the industry would also be comprised in Entry 27 of the List 2, except where they were the products of the "controlled" industries when they would fall within Entry 33 of List 3. **A 1956 SC 676 (696, 697).**

(3) The subject of Entry 52 is not the manufactured product, but the industry engaged in its manufacture. A 1957 All 159 (164) (DB).

(4) The assumption of control of an industry under this entry would not interfere with the powers of the State Legislature under Entry 56 of List 2 which empowers it to levy taxes on goods and passengers carried by road or on inland waterways. **A 1955 Assam 249 (258) (SB).**

(5) A tax on sugarcane entering the factory premises is not a law relating to the process of manufacture or production of sugar within the meaning of Entry 52. **A 1957 All 159 (164, 165) (DB).**

(6) Industries (Development and Regulation) Act (1951), Section 20. The expression 'industry' in Entry 52 of List 1 bears the same meaning as that in Entry 24 of List 2. The result is that the said expression in Entry 52 of List 1 does not take in a gas industry. **A 1962 SC 1044 (1052).**

(7) The West Bengal Oriental Gas Company Act, 1960 is, within the legislative competence of the West Bengal Legislature and is validly made. **A 1962 SC 1044 (1050, 1051, 1052).**

(8) The Rice Milling Industry (Regulation) Act is intra vires the Parliament and is relatable to Entry 52 in List 1. 1966 Ker LT 161 : 1966 Cri LJ 1541 (2).

(9) The Kerala Paddy (Restriction on Milling) Order 1967 issued by the Kerala State Government as a delegate of the Central Government is an Act of the Central Government and therefore no question of any conflict between Parliament and State Legislature can arise. **A 1969 Ker 154 (161) (FB).**

(10) The field covered by the declaration made by Section 2 of the Industries (Development and Regulation) Act is not the same as the field covered by Orissa Mining Areas Development Fund Act and cannot be challenged as a result of Entry 52 read with the former Act. **A 1961 SC 459 (478).**

(11) It cannot be said that the purpose of the Kerala Paddy (Restriction on Milling) Order issued by the Kerala State Government as a delegate of the Central Government is the same as the object of Rice Milling Industry (Regulations) Act and the former is therefore invalid. **A 1969 Ker 154 (161) (FB).**

(12) It is undisputed that sugar industry is a controlled industry, within the meaning of Entry 52 of List I of the Seventh Schedule and, therefore, the Legislative power of Parliament covers enactments with respect to industries having regard to Article 246 (1) of the Constitution. If the impugned legislation invades Entry 52 it must be repulsed by the Court But Entry 54 in List II empowers the State to legislate for taxes on purchase of goods and so if the Act under consideration is attracted, in pith and substance, by this entry the Legislative incompetence cannot void the Act. **A 1980 SC 286 (293) : (1979) 55 Taxation 165 (173).**

(13) Decisions relating to interpretation of word 'industry' in Section 2 (f), Industrial Disputes Act, 1947, are of no avail while interpreting the word industries in Entry 52 of List I. **A 1970 SC 1433 (1460).**

(14) The manufacture of gold ornaments by goldsmiths in India is a process of systematic production for trade or manufacture and so falls within the connotation of the word 'industry' in the appropriate legislative entries. It follows, therefore, that in enacting the Gold (Control) Act, 1968, Parliament was validly exercising its legislative power in respect of matters covered by Entry 52 of List I and Entry 33 of List III. **A 1970 SC 1453 (1459).**

(15) Maharashtra Industrial Development Act, 1961 (III of 1962) does not fall within Entry 52. The establishment, growth and development of industries in the State of Maharashtra do not fall within Entry 7 and Entry 52 of the Union List but they are within the State List of 'industries'. **A 1970 SC 1771 (1775).**

(16) Kannan Devan Hills (Resumption of Lands) Act (5 of 1971), Sections 4, 5 — Constitutional validity — Subject-matter of provisions of Sections 4 and 5 is covered by Entry 18 of List II and Entry 42 of List III — State Legislature cannot be denied the power to legislate on ground that legislation will affect subject-matter of Entry 52 of List. **A 1972 SC 2301.**

(17) The doctrine of 'occupied field' does not totally deprive the State Legislature from making any law incidentally referable to gold. Maharashtra Debt Relief Act, 1976, is not ultra vires the State legislative power. **A 1977 SC 1825 (1846).**

(18) 'Industry' as a legislative topic is of large and liberal import, true. But what peripherally affects cannot be confused with what goes to the heart. An acquisition of land for sugar mills or of sugar mills may affect the industry but is not an action in the legislative field forbidden for the States. Sales tax on raw materials going to a factory may affect the costing process of manufacture but is not legislation on industrial process or allied matters. Indeed if the State legislature cannot go anywhere near measures which may affect topics reserved for Parliament a situation of reductio ad absurdum may be reached. Nothing in the U. P. Sugarcane (Purchase Tax) Act, 1961, regulates or controls the industry itself nor exacts any levy on the manufacture of sugar or its wider ramifications. **A 1980 SC 286 (295, 298) : (1979) 55 Taxation 165 : 45 STC 36.**

(19) Control and regulation of declared industries under List I, Entry 52 does not include power to tax those industries. Taxation is a distinct matter and is reserved to the State under Entry 54 of List II. State is competent to levy Sales Tax on products of declared industry. 1976 Tax LR 1907 : 1975 UPTC 538 (DB) (All).

(20) State is competent to levy sales tax on products of declared industry. 1976 Tax LR 1907 (1916) (All).

(21) The term 'industry' in Entry 52 of List I refers only to the process of production or manufacture. It does not deal with other components or aspects of the industry. 1979 All LJ 730 (732).

(22) Industries (Development and Regulation) Act (1951), Sections 1, 2 — Act is not ultra vires on ground that there is no prior law of Parliament declaring that it is expedient to exercise control over the industry — Declaration

53. Regulation and development of oilfields and mineral oil resources, petroleum and petroleum products; other liquids and substances declared by Parliament by law to be dangerously inflammable.

[Government of India Act, 1935 — Items 32, 36.]

54. Regulation of mines and minerals development to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest.

[Government of India Act, 1935 — Item 36.]

Schedule 7, List I, Entry 52 (contd.)

contained in S. 2 of the Act itself is sufficient. (1969) 2 An WR 402.

(23) The Rice milling industry is a controlled one as declared by Parliament. The W. B. Legislature is not competent to legislate in the same field covered by Entry 52 of List I of the Seventh Schedule to the Constitution. The true character and object of the W. B. Amendment Act does not relate to any of the matters enumerated in Sch. VII, List III, Entry 33. As such that Act is ultra vires the legislative competence of W. B. Legislature. A 1975 Cal 235 (238, 239).

(24) W. B. Relief Undertaking (Special Provisions) Act (13 of 1972) — Pith and substance of legislation directly falls under Entry 23 of List III and Act is not ultra vires the State legislature — Act is also intra vires of Entry 33 (a) of List III — Incidental encroachment on Entry 52 of List I cannot invalidate it. **A 1978 Cal 215 (219, 220) (FB).**

(25) Bombay Relief Undertaking (Special Provisions) Act (1958) falls within Entry 23 of List III. Mere circumstance that some of its provisions entrench upon the provisions of different list not conclusive of competency or otherwise of the Legislature to make the enactment. (1972) 13 Guj LR 33 (43).

(26) Validity of Sections 96, 97 of Kerala Panchayats Act, 32 of 1960 — State legislature held competent to enact law contained in these sections. A 1970 Ker 88 : 1970 Cri LJ 470.

(27) Kerala Private Forests Vesting and Assignment Act (26 of 1971), Pre. — Act is not bad on ground of repugnancy for encroaching on the central subject under Schedule 7, List 1, Entry 52 of the Constitution. **A 1973 Ker 36 (FB).**

(28) The subject-matter of Kerala Ordinance 14 of 1978 falls fairly and squarely within Entry 52 of List I of the Seventh Schedule to the Constitution and not either within Entry 24 or 27 of List III of the said Schedule Being so the State Legislature had no legislative competence in regard to the subject-matter of the said Ordinance, ex hypothesi the Governor had no authority to promulgate the same. A 1979 Ker 56 (59).

(29) The contention that the insecticides manufactured by the formulators within the State by using technical grade pesticides were meant for distribution to the farmers, and therefore the topic fell within Entry 14 of List II of the Seventh Schedule on which the State Government has exclusive executive power is not correct. Entry 14 of List II has not to be read in isolation. It has to be read along with Entries 24, 26 and 27 of List II and corresponding entries relating to a scheduled industry i. e. Entry 52, List I, Entry 33, List III. So read it is clear that the scheme and directions of the Central Government fall within Entry 52, List I and Entry 33, List III and not within Entry 14 of List II. 1979 MPLJ 221 (225) : 1979 Jab LJ 291.

(30) These entries are interrelated — Although all industries fall within Entry 24 and State Legislature is competent to make laws in respect of them that entry is subject to Entry 52 — Rice Milling is an industry which involves manufacturing in it — Though Entry 24 would include rice-milling industry such industry can well be the subject of Entry 52 — Rice Milling Industry (Regulation) Act is, therefore, not beyond the competence of Parliament. A 1971 Mad 245 (252).

(31) Industries (Development and Regulation) Act (1951), Section 18 (b) (1) — State's power to regulate distribution of intoxicating liquor — Neither explicitly nor impliedly taken away by the Orders passed under Section 18 (b) (1) of the Act. **A 1980 SC 614 : 1980 All LJ 258.**

Schedule 7, List 1, Entry 53

(1) Entry 53 of Sch. 7, List 1 has no reference to the imposition of sales tax on motor spirit. By enacting a law for imposing sales tax on petroleum and petroleum goods, the State Legislature does not transgress on the domain allotted to the Centre. A 1959 Andh Pra 225 (229, 230) (DB).

(2) Central Government's notification fixing rate of royalty, payable by all mining leaseholders to whom leases were granted before 25th October, 1949 — Does not affect power of State Government to grant remission in rate of royalty after the date of notification. A 1967 Madh Pra 184 (193) (DB).

(3) The W. B. Fire Services Act comes within Item 6 in List II of Sch. 7. The Petroleum Act, 1934 can come under Item 53 of List and the subject-matter thereof is not identical with Items 5 and 6 in the State List. There is therefore no repugnancy between the two Acts. A 1960 Cal 219 (225).

(4) Entry No. 53 of List 1, Sch. 7 not only relates to petroleum but also relates to other liquids and substances declared by Parliament by law to be dangerously inflammable. The provisions of Entries 1, 5 and 6 in List 2 do not stand in conflict with Entry 53 in List 1 and therefore the question of resolving that conflict does not arise. (1965) 67 Bom LR 484 (487, 497) (DB).

Schedule 7, List 1, Entry 54

(1) The word 'regulation' would not ordinarily imply power to impose taxation, but under particular circumstances where funds are required for the implementation of the objects of an Act, it might include the power of raising such funds. A 1957 Cal 326 (329).

(2) The imposition of excise duty on coal raised and dispatched, under Section 8 (1) (a) of the Coal Mines (Conservation and Safety) Act, 1952, is valid under this entry read with Entry 84 of List 1. A 1957 Cal 326 (329).

Schedule 7, List I, Entry 54 (contd.)

(3) The power given by Entry 54 of List 1 with respect to coal mines is, however, only a power to regulate them by legislation and taxes of the kind imposed by Section 8 (1) (a), Coal Mines (Conservation and Safety) Act, 1952, cannot be supported by reference to the regulatory power and the tax imposed by Section 8 (1) (a) of the Coal Mines (Conservation and Safety) Act cannot be said to be authorised by Entry 54 of List 1. A 1959 Cal 222 (225) (DB).

(4) Where a duty is in the nature of a levy imposed as a contribution to the revenues of the country under Coal Mines (Conservation and Safety) Act, 1952 and not a licence or other fee intended to regulate coalmining, the law imposing it cannot be said to be legislation under Item 54 of Union List but it is good legislation under Item 84 of the same List. A 1959 Cal 222 (231) (DB).

(5) Before Parliament can exercise power under this entry to enact laws with respect to regulation of mines and mineral development it must declare by law that it is expedient to do so in the public interest. A 1957 Cal 326 (328).

(6) The declaration by Parliament specified by Entry 54 must be declaration made by Parliament subsequent to the date when the Constitution came into force. **A 1961 SC 459 (472).**

(7) Assam Land and Revenue Regulation (1886) passed by the Governor-General-in-Council — Will be regarded as a Central Act — No question of taking away power by State legislature by declaration by Parliament under List 1, Entry 54, Sch. VII of Constitution or by Central Legislature under Entry 36 of List I of Government of India Act, 1935, will arise. A 1966 Assam 107 (109) (DB).

(8) Under Entry 23 of List 2 in the Seventh Schedule the States have also power to legislate with respect to regulation of mines and mineral development; but this power is subject to Entry 54 in List 1. A 1958 Raj 140 (142) (DB) °° A 1957 Cal 326 (329) °° A 1952 Mys 84 (85) : 1952 Cri LJ 1348 (DB) °° **A 1961 SC 459 (469)** °° A 1968 Madh Pra 17 (18) (DB).

(9) Where the Legislative competence of Parliament to enact a law is challenged on the ground that it encroaches on a field covered by the State List, the doctrine of pith and substance is the usual test applied. A 1963 Madh Pra 213 (215) (DB).

(10) As to whether mineral includes salt, see the undermentioned case. A 1957 Raj 213 (215) (DB).

(11) State Government has authority to impose royalty in respect of minor minerals. A 1965 Pat 491 (495, 496) (DB).

(12) Use of word 'mines' in conjunction with 'minerals' does not limit meaning of latter — Brick-earth is mineral and its inclusion in definition of 'minor minerals' is not ultra vires the Constitution, Seventh Schedule. A 1965 Pat 491 (496, 498, 499) (DB).

(13) Pursuant to Entries 54, 55, 96 of List 1, Parliament can levy or collect fees which may be regarded as regulatory fees but for purpose of imposing tax resort should be held to other specific Entries like Entries 82 to 92-A of First List. A 1968 Mys 42 (45) (DB).

(14) Rule 27 (b) of Mineral Concession Rules, 1960 in substance and effect provides for compensation for mining operations carried on over the surface area of land and hence is within the expression 'regulations of mines and mineral development' occurring in Entry 54, List I of Sch. 7. A 1963 Madh Pra 213 (215).

(15) The Assam Land and Revenue Regulation is essentially an Act relating to land. The scope and field covered by Oil Fields (Regulation and Development) Act 53 of 1948 and the Mines and Minerals (Regulation and Development) Act 67 of 1957 passed by Central Government are entirely different from those of the Regulations and there can be no repugnancy between the two Acts. A 1966 Assam 107 (109) (DB).

(16) Orissa Mining Areas Development Fund Act (27 of 1952) is superseded by Mines and Minerals (Regulation and Development) Act (1957). **A 1964 SC 1284 (1293).** (A 1962 Orissa 24, Affirmed.)

(17) Entry 54 of List II of the Seventh Schedule empowers the State to legislate on taxes on purchase of goods and so if the Act under consideration is attracted, in pith and substance, by this entry, legislative incompetence cannot void the Act, even though the State has entered forbidden ground by enacting on controlled industry. **A 1980 SC 286 (293)** °° (1979) 53 Taxation 165 (173).

(18) Mines and minerals — Regulation and development — Minor minerals — Declaration by Parliament that control should vest in Central Government — State Legislature not competent under List 2, Entry 23 to enact legislation trenching upon field disclosed in declaration. **A 1970 SC 1436 (1439, 1440).**

(19) Provisions of Sec. 4 (2-A) (b), W. B. Land Reforms Act are ultra vires. A 1975 Cal 58.

(20) The plain effect of subjection of Entry 23 of List II to Entry 54 of List I is that if the Parliament by law declares it to be expedient in the public interest to assume control of regulation of mines and mineral developments by enacting the Mines and Minerals (Regulation & Development) Act, 1957, the ambit and coverage of Entry 23 of List 2 is cut down to the extent to which the control of mines and minerals is taken under the control of the Union. A 1973 Guj 117 (124).

(21) Mines and Minerals (Regulation and Development) Act (1957), S. 15 — Validity — Regulation and development of minor minerals — Not beyond jurisdiction of the Parliament, hence Section 15 is not void. A 1976 Guj 190 (192).

(22) A combined reading of Entries 23 and 50 in List II and Entry 54 in List I establishes that as long as the Parliament does not make any law in the exercise of its powers in Entry 54, the powers of the State Legislature in Entry 23 and Entry 50 would be exercisable by the State Legislature. If the Parliament undertakes the regulation and development of mines and minerals under its control, the power of the State Legislature under Entries 23 and 50 would get denuded. A 1972 Mys 299 (300).

(23) Section 3 (e) of Mines and Minerals (Regulation and Development) Act does not extend beyond field authorised by Sch. 7, List I, Entry 54. A 1972 Punj 356.

(24) A statement of object and reasons is not a part of the statute and, therefore, not relevant in a case where the language of the operative parts of the Act leave no room whatso-

55. Regulation of labour and safety in mines and oilfields.
[Government of India Act, 1935 — Item 35.]

56. Regulation and development of inter-State rivers and river valleys to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest.

57. Fishing and fisheries beyond territorial waters.
[Government of India Act, 1935 — Item 23.]

58. Manufacture, supply and distribution of salt by Urban agencies, regulation and control of manufacture, supply and distribution of salt by other agencies.
[Government of India Act, 1935 — Item 47.]

59. Cultivation, manufacture, and sale for export, of opium.
[Government of India Act, 1935 — Item 31.]

60. Sanctioning of cinematograph films for exhibition.
[Government of India Act, 1935, List III, Item 33.]

JAMMU AND KASHMIR

Omit Entry 60.

61. Industrial disputes concerning Union employees.

62. The institutions known at the commencement of this Constitution as the National Library, the Indian Museum, the Imperial War Museum, the Victoria Memorial and the Indian War Memorial, and any other like institu-

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Schedule 7, List I, Entry 54 (contd.)

ever, as it does not in Haryana Act 48 of 1973, to doubt what was meant by the legislators. It is not disputed here that the object and effect of the said Haryana Act was to acquire proprietary rights to mineral deposits in land. Its provisions, however, do not mention lease-hold or licensee rights. Obviously this is so because these rights are governed by Central Act 67 of 1957. Hence the Haryana Act is valid as it is not, in any way, repugnant to the provisions of the Central Act. Ownership rights could be and have been validly acquired by the Haryana Govt. under the said Haryana Act. **A 1976 SC 1654 (1666, 1669).** (A 1975 P & H 102, Reversed.)

Schedule 7, List I, Entry 55

(1) Pursuant to Entries 54, 55, 96 of List I Parliament can levy or collect fees which may be regarded as regulatory. A 1968 Mys 42 (45) (DB).

(2) Minimum Wages (Rajasthan Amendment and Validation) Act is ultra vires the power of the State Legislature. 1972 Raj LW 358.

Schedule 7, List I, Entry 56

(1) Item 17 of List II is wider in scope and includes what is contemplated in Item 56 of List 1. A project which is essentially a project for purposes of preventing floods is clearly within the competence of the State Legislature and as such the executive action in notifying the same for acquisition and the contemplated project cannot be held to be unconstitutional under Item 56 of List 1 and Art. 162. A 1956 Orissa 114 (118) (DB).

Schedule 7, List I, Entry 57

(1) The Madras Estates (Abolition and Conversion into Ryotwari) Act (26 of 1948) is in substance a legislation in respect of land and land tenure covered by Entry 18 of the State List (Government of India Act, 1935, Sch. VII, List 2, Item 21), and is not to any extent a legislation on fishing and fisheries in the seas. A 1954 Mad 291 (295, 297, 331) (DB).

(2) With reference to right of fishery, the marginal belt must be regarded as part of the territory of the littoral state — Different views on the extent of territorial waters indicated. A 1954 Mad 291 (299) (DB).

(3) Taxing statutes can be retrospectively amended. Therefore Orissa Acts 19 of 1975 and 39 of 1975 are not ultra vires. 1977 Tax LR 1894 (1901 to 1903) (Orissa).

Schedule 7, List I, Entry 58

(1) Imposition of octroi duty on salt under Sec. 61 (2), Punjab Municipal Act is not valid — Since Provincial Legislature had no authority to impose any tax on salt. Section 61 (2) of that Act could not authorise the Municipality to impose such duty. **A 1942 FC 14 (16, 17).**

(2) Marwar Land Revenue Act (40 of 1949), Section 231 — "Mineral" in Section 231 includes salt wherever produced. A 1957 Raj 213 (215) (DB).

Schedule 7, List I, Entry 59

(1) Notification under Hyderabad Opium and Intoxicating Drugs Act — G. O. Ms. No. 1376, Revenue dated 5th September, 1962 — Not ultra vires on ground of repugnancy to Drugs Act 1940. A 1964 Andh Pra 430 (432) (DB).

(2) Section 9 (a), Opium Act (1878), as amended by Madhya Bharat Act 15 of 1955 is not ultra vires. A 1961 Madh Pra 13 (14) : 1961 (1) Cri LJ 92. **(Overruled on another point in A 1963 Madh Pra 337.)**

Schedule 7, List I, Entry 60

(1) The words 'entertainments' and 'amusements', in Entry 62 of List 2, Sch. 7, are wide enough to include theatres, damatic performances, cinemas, etc. In Entry 33, the word 'cinema' had to be specifically mentioned in order to avoid any conflict between it and Entry 60 in List 1. **A 1959 SC 894 (896).**

tion financed by the Government of India wholly or in part and declared by Parliament by law to be an institution of national importance.

[Government of India Act, 1935 — Item 11].

63. The institutions known at the commencement of this Constitution as the Benares Hindu University, the Aligarh Muslim University and the [a][Delhi University; the University established in pursuance of Article 371-E;] and any other institution declared by Parliament by law to be an institution of national importance.

[Government of India Act, 1935 — Item 13].

[a] Substituted by Constitution (Thirty-second Amendment) Act, 1973, Section 4 (1-7-74).

64. Institutions for scientific or technical education financed by the Government of India wholly or in part and declared by Parliament by law to be institutions of national importance.

65. Union agencies and institutions for—

(a) professional, vocational or technical training, including the training of police officers; or

(b) the promotion of special studies or research; or

(c) scientific or technical assistance in the investigation or detection of crime.

[Government of India Act, 1935 — Item 12].

66. Co-ordination and determination of standards in institutions for higher education or research and scientific and technical institutions.

[Government of India Act, 1935 — Item 12].

Schedule 7, List 1, Entry 63

(1) Items 63 to 66 of List 1, are carved out of the subject of education and in respect of these items the power to legislate is vested exclusively in the Parliament. **A 1963 SC 703 (715).**

(2) Under Items 63 to 65 the power to legislate in respect of medium of instruction, having regard to the width of those items must be deemed to vest in the Union. **A 1963 SC 703 (705).**

(3) If a subject of legislation is covered by Items 63 to 66 of List 1 of Sch. 7 even if it otherwise falls within the larger field of "education including universities" power to legislate on that subject must lie with the Parliament. **A 1963 SC 703 (715).**

(4) As under Section 2 of the Hindi Sahitya Sammelan Act (1962) the only institution that was declared as of national importance under List I, Entry 63 was the original society — Parliament was not competent to legislate in respect of the newly constituted Sammelan which at no stage had been declared as an institution of national importance. **A 1971 SC 966 (972, 973).**

Schedule 7, List 1, Entry 64

(1) Use of expression "subject to" in List 2, Entry 11 clearly indicates that legislation in respect of excluded matters cannot be undertaken by State Legislature — Power to legislate with respect to medium of instruction — Must be deemed to vest in the Union. **A 1963 SC 703 (715).** (A 1962 Guj 83 (FB), **Reversed** on another point.)

Schedule 7, List 1, Entry 65

(1) Use of expression "subject to" in List 2, Entry 11 clearly indicates that legislation in respect of excluded matters cannot be undertaken by State Legislature. Power to legislate with respect to medium of instruction must be deemed to vest in the Union. **A 1963 SC 703 (715).** (A 1962 Guj 88 (FB), **Reversed** on another point.)

Schedule 7, List 1, Entry 66

(1) Item 66, List 1 is a legislative head and in interpreting it, unless it is expressly or of necessity found conditioned by the words used therein, a narrow or restricted interpretation will not be put upon the generality of the words. **A 1963 SC 703 (716).**

(2) The power conferred by Item 66 is not conditioned by the existence of a state of emergency or unequal standards calling for the exercise of the power. **A 1963 SC 703 (716).**

(3) Co-ordination in its normal connotation means harmonising or bringing into proper relation in which all things co-ordinated participate in a common pattern of action. The power to co-ordinate is not merely power to evaluate. It is a power to harmonise or secure relationship for concerted action. **A 1963 SC 703 (716).**

(4) The validity of the State Legislation on University education and as regards the education in technical and scientific institutions not falling within Entry 64 of List 1 would have to be judged having regard to whether it impinges on the field reserved for Union under Entry 66. **A 1963 SC 703 (716).** (A 1962 Guj 88 (FB), **Reversed** on another point.)

(5) In so far as medium of instruction is a necessary incident of the power under Item 66, List 1, it must be deemed to be included in that item and therefore excluded from Item 11, List 2. **A 1963 SC 703 (717).**

(6) If legislation relating to imposition of an exclusive medium of instruction in a regional language or in Hindi, is likely to result in lowering of the standards, that legislation would necessarily fall within Item 66 of List 1 and

67. Ancient and historical monuments and records, and archaeological sites and remains, [a][declared by or under law made by Parliament] to be of national importance.

[Government of India Act, 1935 — Item 15].

[a] Substituted for the words "declared by Parliament by law" by the Constitution (Seventh Amendment) Act, 1956, Section 25 (1-11-1956).

JAMMU AND KASHMIR

In entry 67, omit the words 'and records'.

OBJECTS AND REASONS

"Entry 67 of the Union List refers to ancient and historical monuments and records and archaeological sites and remains, declared by Parliament by law to be of national importance". A large number of ancient monuments, archaeological sites, etc., have been declared to be of national importance by an Act of Parliament. It requires another Act of Parliament to make the slightest alteration, in, or in addition to, the Lists in the Act which seems to be an unduly cumbrous procedure. It is therefore proposed to amend the entry by substituting for the words 'declared by Parliament by law', the words 'declared by or under law made by Parliament'. The same amendment is proposed to be made in the connected provisions. Entry 12 of the State List, Entry 40 of the Concurrent List and Article 49."—Gaz. Ind., 1956, Pt. II, Sec. 2, Ext., p. 222.

68. The Survey of India, the Geological, Botanical, Zoological and Anthropological Surveys of India; Meteorological organisations.

[Government of India Act, 1935 — Item 14].

69. Census.

[Government of India Act, 1935 — Item 16].

70. Union public services; all-India services; Union Public Service Commission.

[Government of India Act, 1935 — Item 8].

71. Union pensions, that is to say, pensions payable by the Government of India or out of the Consolidated Fund of India.

[Government of India Act, 1935 — Item 9].

Schedule 7, List I, Entry 66 (contd.)

to that extent would be deemed to be excluded from the amplitude of the power conferred by Item 11 of List II. **A 1963 SC 703 (717).**

(7) Provisions of Gujarat University Act (50 of 1949), S. 4 (27) proviso (as amended by Act 4 of 1961) and S. 38-A are not ultra vires of State Legislature. **A 1963 SC 703 (717). (A 1962 Guj 88 (FB), Reversed.)**

(8) It cannot be said that the interview test prescribed in the Order No. P. L. M/80/MMC/64, dated 29-6-1964 corrodes the power given to the Union under Entry 66 of List I. **A 1966 Mys 40 (47, 48) (DB).**

(9) State Government has power to prescribe machinery and criteria for admission to Medical and Engineering colleges. **A 1964 SC 1823 (1830).**

(10) The State has no legislative competence to prescribe any particular medium of instruction in respect of higher education or research and scientific or technical instruction, if it interferes with the power of the Parliament to co-ordinate and determine the standards in such institution. **A 1971 SC 1731 (1735, 1736).**

(11) Punjab University Act (35 of 1961), Section 4 (2) does not require Punjabi to be made the exclusive medium of instruction and hence is not violative of Sch. VII, List I, Entry 66 of the Constitution. **A 1971 SC 1731 (1737).**

(12) Training to post-graduate studies in medicine — Subject is covered by Entry 66 and is within the legislative competence of Parliament. **A 1976 Raj 34 (36).**

Schedule 7, List 1, Entry 70

(1) The plenary power of the Legislature conferred by Entry 70 in List 1 would entitle the legislature to provide for any change or even for termination of service subject to Article 311 of the Constitution. **A 1960 Punj 284 (285, 286).**

(2) Conflict between Central Act and a State Act on same subject — Corruption charges against All India Service Personnel allotted to Jammu and Kashmir State have to be inquired under All India Services Act having been passed by the Union Parliament under Entry 70 read with Entry 94 of List I, Sch. 7 and not J. and K. Act. **A 1967 J & K 37 (41, 42) (FB).**

(3) In determining the applicability of the competing Central and State enactments, the true nature and scope of the subject-matter covered by the enactments have to be looked into. **A 1967 J & K 37 (42) (FB).**

(4) Executive power of Union Government regarding Union Services — Earlier order granting increments — Such an order can be modified by another order made in exercise of powers under Article 73 and issued under Act 77. (1975) 1 Kant LJ 156.

(5) Coercive steps for compelling appearance of witnesses and production of documents — Notification by State Government enabling inquiring authority to take, invalid. 1971 Ker LT 749.

72. Elections to Parliament, to the Legislatures of States and to the offices of President and Vice-President; the Election Commission.

[Government of India Act, 1935 — Item 40].

JAMMU AND KASHMIR

In its application to the State of Jammu and Kashmir, in Entry 72, the reference to the States shall be construed—

(a) in relation to appeals to the Supreme Court from any decision or order of the High Court of the State of Jammu and Kashmir made in an election petition whereby an election of either House of the Legislature has been called in question as including a reference to the State of Jammu and Kashmir;

(b) in relation to other matters as not including a reference to that State—See Constitution (Application to Jammu and Kashmir) Order, 1954, para. 2, sub-para. (22) (a) (as substituted by C. O. 83).

73. Salaries and allowances of members of Parliament, the Chairman and Deputy Chairman of the Council of States and the Speaker and Deputy Speaker of the House of the People.

[Government of India Act, 1935 — Item 41].

74. Powers, privileges and immunities of each House of Parliament and of the members and the Committees of each House, enforcement of attendance of persons for giving evidence or producing documents before committees of Parliament or commissions appointed by Parliament.

[Government of India Act, 1935 — Item 41.]

75. Emoluments, allowances, privileges, and rights in respect of leave of absence, of the President and Governors; salaries and allowances of the Ministers for the Union; the salaries, allowances, and rights in respect of leave of absence and other conditions of service of the Comptroller and Auditor-General.

[Government of India Act, 1935 — Item 41].

76. Audit of the accounts of the Union and of the States.

77. Constitution, organisation, jurisdiction and powers of the Supreme Court (including contempt of such Court), and the fees taken therein; persons entitled to practice before the Supreme Court.

[Government of India Act, 1935 — Item 53].

Schedule 7, List 1, Entry 72

(1) Parliament is competent under, Art. 327 read with this entry to make a law prescribing the authority and procedure for challenging an election to the State Legislature. A 1954 Madh B 111 (112) (DB).

(2) The subject-matter of Ss. 131 (1) (b) and 136 (1) of the Representation of the People Act, 1951, falls within the scope of Article 327 and this entry and also Entry 93 of the Union List. A 1954 Pat 356 (357) : 1954 Cri LJ 1132.

(3) Section 126 of the Representation of the People Act provides necessary safeguards for peaceful elections, but in doing so it incidentally touches upon the field of public order which is within the exclusive jurisdiction of the State Legislature to legislate. But the encroachment is only incidental. A 1957 Pat 252 (255) : 1957 Cri LJ 648 (DB).

(4) Sections 5-B, 5-C of the Presidential and Vice-Presidential Elections Act not ultra vires the Constitution. **A 1975 SC 1288.**

Schedule 7, List 1, Entry 74

(1) Clause (3) of Article 105 envisages express legislation on the questions of privileges and immunities and mere legislation on qualifications and disqualifications will not touch the question. Disqualification is a very different matter from any particular immunities claimed by members. If a member is not disqualified it only means that he remains a member and not that he can claim any particular immunity. **A 1952 Cal 632 (635, 636) (SB) •• A 1951 Mad 269 (Pr. 4) (DB).**

(2) The Representation of the People Acts, 1950 and 1951, do not deal with the question of privilege and they were not passed to give effect to Cl. (3) of Art. 105. **A 1952 Cal 632 (635) : 1952 Cri LJ 1454 (SB).**

(3) A resolution of either House of Parliament does not amount to law. (1884) 12 QBD 271 (274) : 53 LJQB 209, Bradlaugh . v Gossett.

Schedule 7, List 1, Entry 77

(1) The power to legislate in regard to persons entitled to practise before Supreme Court and High Court is carved out of the general power relating to professions in Entry 26 in List III and is made the exclusive field for Parliament. **A 1968 SC 888 (892).**

(2) Legislative competence to enact law of contempt of Courts is beyond question in view of List 1, Entry 77 and List III, Entry 14 of Sch. 7 and there is nothing unconstitutional in the judicial determination by the Courts as to the meaning of the expression "contempt of

78. Constitution and organisation [a][including vacations] of the High Courts except provisions as to officers and servants of High Courts; persons entitled to practise before the High Courts.

[a] Inserted and deemed always to have been so inserted, by the Constitution (Fifteenth Amendment) Act, 1963, Section 12.

Schedule 7, List I, Entry 77 (contd.)

Court". **A 1969 Delhi 201 (206) : 1969 Cri LJ 884 (FB).**

(3) The Parliament has the exclusive power under Entry 77 and Entry 78 of List I to prescribe, inter alia, the qualifications and conditions on the fulfilment of which persons would be entitled to practice before the Supreme Court or the High Courts. Any fee payable by such persons before they can claim to be entitled to practice would fall under Entry 96 of that List. **A 1973 SC 231 (236).**

(4) A law which confers additional powers on the Supreme Court by enlarging its jurisdiction is evidently a law with respect to the "jurisdiction and powers" of that Court within the meaning of Entry 77 of List I of Sch. VII to the Constitution — Entry 77 stands out in its uniqueness amongst cognate entries in the Legislative Lists by its wide and unqualified language. **A 1979 SC 478 (499, 501, 502).**

(5) Power of Supreme Court or the High Court to prescribe its own procedure in contempt matter is subject to power of the Parliament to make laws in that regard. 1975 Cri LJ 164 (167) (All).

(6) The levy of court-fee for raising the general revenue has been authorised by the relevant entries in the legislative lists under the Constitution, therefore, the challenge, to the validity of such fees on the ground that they are not earmarked as a separate fund for the purposes of meeting the expenses of the services rendered cannot be sustained. Thus the fee referred to in Entry 77 of List I and Entry 3 of List II is a special type of fee which though confers considerable benefit on the payer, is not required to possess the other attributes of fee as generally understood. **A 1974 J & K 19 (25) (SB).**

Schdule 7, List I, Entry 78

(1) The constitution and organisation of the High Courts has been made a Central subject because (a) it was necessary to have uniformity in the organisation of all High Courts and this could only be effected by Parliament, and (b) the Constitution provides for extension of the jurisdiction of a High Court beyond the State where it has its principal seat and also for a common High Court in two States or two States and a Union territory and this can only be effected by Parliament. **A 1957 Cal 534 (544).**

(2) The setting up of the Calcutta Civil Court and vesting it with general jurisdiction, by the Calcutta Civil Court Act (21 of 1953) and taking away of the same jurisdiction from the Calcutta High Court did not affect the 'constitution and organisation' of the High Court and hence there was no infringement of Entry 78. A 1957 Cal 534 (544).

(3) Under Entry 78 of List I, the topic of jurisdiction and powers of the High Courts is not dealt with. Under Entry 3 of List II the State Legislature can confer jurisdiction and powers or restrict or withdraw the jurisdiction and powers already conferred on any of the Courts except the Supreme Court. The State Legislature has therefore the power to make a law with respect to the jurisdiction and powers of the High Court. **A 1980 Punj 1 (7, 10, 17, 18) (FB).**

(4) The change in the number of Judges by whom a second appeal is to be decided cannot be regarded as affecting the constitution or organisation of the High Court. In this view, the amendment of Section 15 of the Mysore High Court Act (Mysore Act 35 of 1951), cannot be impeached as ultra vires. A 1952 Mys 75 (76).

(5) The Indian Bar Councils (U. P. Amendment) Act (24 of 1950) is a legislation with respect to 'persons entitled to practise before the High Courts' in Entry 78 and hence ultra vires the State Legislature. A 1954 All 728 (732) : 1954 Cri LJ 1485 (DB).

(6) The phrase "persons entitled to practise before the High Courts" obviously seeks to bring all persons practising the law in the High Courts in various forms and capacities under one comprehensive term. **A 1952 Cal 178 (183) (SB). (Reversed** on another point in A 1952 SC 369.)

(7) It cannot be said that the proviso to Section 8 (2) (b) was not within the legislative competence of Parliament. **A 1958 Andh Pra 63 (65) (SB).**

(8) The rate of stamp duty on an application for enrolment as Advocate is not one of the matters provided for in Items 91 and 78 of List 1. A 1966 Mys 138 (140) (DB).

(9) Code of Criminal Procedure (Madras Amendment) Act (34 of 1955) — Constitution has provision to make such laws as can be seen from the provisions of Articles 200 and 225 and Item 78 of List 1, Item 3 of List II and Items 1, 2 and 46 of List III of Sch. 7 of the Constitution. A 1959 Mad 261 (268) : 1959 Cri LJ 731 (DB).

(10) Code of Criminal Procedure (Madras Amendment) Act (34 of 1955) — Not ultra vires the State Legislature. A 1959 Mad 261 (268) : 1959 Cri LJ 731 (DB).

(11) Law regulating practice and procedure of High Court and also powers of Judges thereof sitting alone or in Division Benches is within the competence of State Legislature to enact — Kerala High Court Act (5 of 1959) is intra vires power of State Legislature and is valid. A 1961 Ker 226 (232) (DB).

(12) (Case before amendment of Item 78 in 1963) Subject-matter of Section 23-A of High Court Judges (Conditions of Service) Act (28 of 1954) falls within Sch. 7, List 2, Entry 3 and not under Sch. 7, List 1, Entry 78. A 1961 Cal 545 (553) (DB).

(13) (Case before amendment of Items 78 in 1963). The periodic or annual control of vacations of State High Courts as institutions of justice by the President under Section 23-A of High Court Judges (Conditions of Service) Act 1954 cannot be brought within either 'Constitution' or 'organisation' of a State High Court. **A 1961 Cal 545 (553) (SB).**

[a][79. Extension of the jurisdiction of a High Court to, and exclusion of the jurisdiction of a High Court from, any Union territory.]

[a] Substituted for the original Entry 79 by the Constitution (Seventh Amendment) Act, 1956, Section 29 and Schedule (1-11-1956).

JAMMU AND KASHMIR

Omit Entry 79.

80. Exetension of the powers and jurisdiction of members of a Police force belonging to any State to any area outside that State, but not so as to enable the Police of one State to exercise powers and jurisdiction in any area outside that State without the consent of the Government of the State in which such area is situated; extension of the powers and jurisdiction of members of a Police force belonging to any State to railway areas outside that State.

[Government of India Act, 1935 — Item 39.]

Schedule 7, List I, Entry 78 (contd.)

(14) U. P. Taxation Laws Amendment Act (11 of 1969) — Validity — Provision falls within Entry 63 of List II and is valid — It is not possible to read in Entry 78 of List I the implied power to impose stamp duty and to fix the rate of stamp duty with respect to enrolment of a person entitled to practise in High Court. A 1971 All 186 (188) : 1970 All LJ 1026.

(15) U. P. High Court (Abolition of Letters Patent Appeals) Act (14 of 1962) (as amended by U. P. High Court (Abolition of Letters Patent Appeals) (Amendment) Ordinance (U. P.) Ordinance 12 of 1972) later replaced by U. P. High Court (Abolition of Letters Patent Appeals) (Amendment) Act (32 of 1972), Section 4 — Constitutionality of Amending Ordinance and Amending Act — State Legislature was competent to make such amending laws (Per majority). A 1973 All 596 (FB).

(16) Notification under Cl. 14 of U. P. High Courts (Amalgamation) Order 1948, by Chief Justice — Falls under Entry 3 of List 2 and not under Entry 78 of List I. A 1975 All 52 (60) (DB).

(17) When the Parliament exercising powers under Arts. 2 and 3, enacts a law for the organisation of States., it can provide for the organisation of the respective organs of the State including the High Court. Entry 78 read with Entry 95 in List I of the Seventh Schedule to the Constitution confers power on the Parliament to provide for the organisation and constitution of a High Court. A 1977 Madh Pra 116 (154 to 157) (FB).

Schedule 7, List 1, Entry 79

(1) The Mysore High Court (Extension of Jurisdiction to Coorg) Act, 1952 and the Calcutta High Court (Extension of Jurisdiction) Act, 1953, are instances of Acts passed by Parliament extending the jurisdiction of High Courts.

Schedule 7, List I, Entry 80

(1) The Delhi Police Establishment is a "Police force belonging to any State" within the meaning of this Entry. A 1969 Delhi 330 (338, 339) (DB).

(2) Substitution of the words "in Delhi" for the words "for the State of Delhi" by the Delhi Special Police Establishment (Amendment) Act (26 of 1952) does not make any change in the Delhi Special Police Establishment Act, 1946, which conflicts with this Entry or with any other provision of the Constitution. A 1969 Delhi 330 (339, 341) (DB) (A 1962 SC 145 and A 1954 SC 587, Distinguished.)

(3) Substitution of the words "Union Territories" for the words "Part C, States" in the Delhi Special Police Establishment Act (1946) by the Adaptation of Laws Order (3 of 1956) does not bring the Act into conflict with this Entry (as amended by the Constitution (7th Amendment) Act (1956)). A 1969 Delhi 330 (342) (DB).

(4) The expression 'belonging to' does not mean that the police force must be under the employment of a Provincial Government or of a Chief Commissioner as distinct from the Central Government. A 1969 Delhi 330 (338) (DB).

(5) The scheme of the Constitution is that the Union territories are centrally administered and if the words belonging to in the expression "Police force belonging to any State" in Entry 80 of Union List mean belonging to a part of India, the expression is equal to a police force constituted to function in an area. In this way the Delhi Police Establishment means a police force constituted and functioning in the Union Territory of Delhi. The expression 'belonging to' only conveys the meaning that it is a police force constituted and functioning in one area which may be authorised to function in another area. The change from 'for' to 'in' makes no difference because both expressions fit in with the meaning of the phrases 'belonging to' in the Entry. A 1970 SC 1126 (1132).

(6) Section 3 (58) of the General Clauses Act has been validly adapted by the Adaptation Order No. 1 and includes in the definition of the 'State' a Union Territory. This adaptation has been made under Article 372-A. This was a fresh power equal and analogous to Article 372 (2). Therefore when the President adopted the General Clauses Act by giving a new definition of 'State' the new definition appropriate to the purpose applied to the interpretation of the Constitution. The word 'State' in Entry 80 of Union List, therefore, applied to Union Territories also. A 1966 SC 644. (Reference to Art. 372, held was per incuriam). °° A 1970 SC 1126 (1130, 1131).

(7) Extension of Delhi Special Police Establishment Act to the State of Jammu and Kashmir under Entry 80 — Act even though is repugnant and inconsistent with the Jammu and Kashmir Code of Criminal Procedure and Jammu and Kashmir Police Act shall have overriding effect. A 1972 SC 1193 (1196) : 1972 Cri LJ 751.

81. Inter-State migration; inter-State quarantine.
[Government of India Act, 1935 — Item 50.]

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In its application to the State of Jammu and and Kashmir, in entry 81, the words "Inter-State migration", shall be omitted.

82. Taxes on income other than agricultural income.
[Government of India Act, 1935, Item 54.]

Schedule 7, List I, Entry 80 (contd.)

(8) Railway Protection Force Act (1957) and Railway Property (Unlawful Possession) Act (1966) do not fall within ambit of Entry No. 80. 1975 Cri LJ 1891 : (1975) 77 Bom LR 295

(9) The Delhi Special Police Establishment (Amending) Act (XXVI of 1952) does not make any change in the Delhi Special Police Establishment Act, 1946, which could be said to conflict with Entry 80 of the Union List of the 7th Sch. of the Constitution or with any other provision of the Constitution. The words 'for the State of Delhi' or 'for the Chief Commissioner's Province of Delhi' which existed in the Act prior to the amendment of 1952 had never meant that the Delhi Special Police Establishment was a police force of the State of Delhi or of the Chief Commissioner's Province of Delhi in the sense that it was under the control of the Chief Commissioner of the Part C State of Delhi or of the Chief Commissioner's Province of Delhi. A 1969 Delhi 330 (339 to 341).

(10) Entry 80 of the Union List and Entry 2 of the State List operate in distinct and different fields and there is no overlapping. Entry 80 operates in its ultimate effect on the executive and procedural field and not on the legislative field. (1976) 17 Guj LR 382 (391).

(11) Delhi Special Police Establishment Act (1946) and J. & K. (Extension of Laws) Act (1956), are validly enacted and extended to I. & K. — Acts not violative of Art. 14. 1972 J & K LR 252.

(12) By virtue of Amending Act 26 of 1952, the words "for investigation of certain offences committed in connection with matters concerning departments of Central Government" in Section 3 of D. S. P. E. Act, 1946, were omitted, thereby giving unlimited powers to the Central Government to notify any offence committed by any one in any place to be investigated by the Delhi Special Police Establishment, the only vital constitutional restriction limiting the unlimited powers of the Central Government being the obtaining of the consent by the respective State Government before notification is issued by it. 1972 Mad LW (Cri) 11 (17).

Schedule 7, List 1, Entry 81

(1) Any law made by Parliament under this entry cannot curtail the Fundamental Right of a citizen under Art. 19 (1) (d) to move freely throughout the territory of India, beyond the limits prescribed by Article 19 (5). A 1950 SC 27 (35, 36, 95, 111).

(2) Section 7, Bombay Refugees Act (22 of 1948) is ultra vires the Provincial Legislature, inasmuch as the definition of 'refugees' in that Act embraces within its scope a person who has come into the Province from another Province, and to the extent to which it does so the Act falls within Item 50, List 1 of Sch. VII of the Government of India Act, 1935. A 1953 Bom 415 (417).

Schedule 7, List 1, Entry 82

1. Scope.— (1) The power to levy taxes on income has been parcelled out by the Constitution between the Union and the States, the former having authority under List I, Entry 82, to legislate with regard to 'taxes on income other than agricultural income' and the latter having authority under List II, Entry 46 with respect to taxes on agricultural income. A 1942 FC 8 (14).

(2) 'Agricultural income' in List 1, Entry 82 and List 2, Entry 46 has the same meaning as contained in the definition given in Sec. 2 (1), Income-tax Act, 1922. A 1942 FC 8 (14) •• A 1954 Cal 225 (231) (DB).

(3) Entries 82 to 92-A of List 1 enumerate various kinds of taxes which the Union is competent to legislate upon. A 1959 Andh Pra 398 (401) (DB).

(4) This entry does not indicate whose income may be taxed; no limitation is placed on the power of the Union Parliament as to the person, who should be taxed in respect of his income. A 1954 Mad 1120 (1123) (DB).

(5) The expression "income" in Entry 82 of List 1 should be widely and liberally construed so as to enable a Legislature to provide, by law, for the prevention of evasion of income-tax. A 1965 SC 1862 (1865) •• A 1965 SC 1375 (1376) •• A 1962 SC 123 (125, 126) •• A 1961 SC 736 (743) •• A 1963 Mad 183 (185) (DB) •• (1962) 1 Mad LJ 155 (156) (DB).

(6) A provision of income-tax law which provides for the incidence of taxation not on the person whose income is assessed to tax but on another cannot be held to be ultra vires of the powers of Parliament under this entry. A 1957 Mad 133 (138) (DB) •• A 1956 Mad 387 (388) (DB) •• A 1964 Andh Pra 342 (347) (DB).

(7) Provisions of Income-tax Act, S. 34 (1-B), (1-C) and (1-D) are matters which are necessarily ancilliary to the matter of taxation and therefore are not beyond the legislative competence of the Parliament. A 1960 Assam 76 (83) (DB).

(8) The general conception as to the scope of income-tax underlying the legislative practice in the United Kingdom finds a place in the phrase 'taxes on income' in this entry. A 1948 PC 118 (120).

(9) The Central Legislature had power to levy a fee as a condition for preferring an appeal to the Appellate Tribunal under S. 33 (3), Income-tax Act, by virtue of Item 54 read with Item 59 of List I, Sch. VII of the Government of India Act and as such S. 33 (3), Income-tax Act, was not ultra vires. A 1954

Schedule 7, List I, Entry 82 — Note 1 (contd.) Mad 806 (808) (DB) °° A 1960 Cal 619 (622) (DB).

(10) Articles 245 and 246 read with this entry empower Parliament to make laws with respect to taxes on income for the whole of the territory of India and no limitation or restriction is imposed in regard to retroactive legislation. **A 1954 SC 158 (162).**

(11) Taxes on income other than agricultural income — Assessment of tax by Panchayat under Section 57 of West Bengal Panchayat Act on basis of income from trade or business carried on within its jurisdiction — Provisions are saved by Art. 271 (1), Constitution of India. A 1964 Cal 590 (592).

(12) Opium and Revenue Laws (Extension of Application) Act (1950), Section 3 — Travancore Taxation of Income (Investigation Commission) Act (14 of 1124) — Keeping in force by Parliament of Act 14 of 1124 by Act of 1950 not illegal. **A 1962 Ker 38 (41) (FB).**

(13) (Per Hidaytullah, J.)— Pith and substance of Chap. 22-A of Income-tax Act, 1961 belongs to topic of taxes on income. **A 1966 SC 619 (624).**

(14) Replacement of Cochin I. T. Act (6 of 1117 M. E.) by I. T. Act or I. T. Act 1961 — Replacement does not amount to provision to the contrary made by the Parliament within Article 277 of the Constitution. A 1968 Ker 31 (32).

(15) Parliament is competent to introduce charging provision in Finance Act — Finance Acts are not necessarily temporary Acts. Though it will be unconventional for the Parliament to amend a taxing statute by incorporating the amending provisions in an Act of a different pith and substance, such a course will not be unconstitutional. **A 1975 SC 2016 (2020).**

(16) Amendments by Finance Act, 1972 of Sections 2 (24) (ix), 10, 56 (2) (1-b) and 80-TT of Income-tax Act, 1961, including winnings from lotteries as taxable income — Not ultra vires. 1974 Tax LR 885 (888) (All).

(17) Entry 82 authorises not only legislation for imposition of tax but also legislation for preventing tax imposed being evaded — Hence provisions of S. 40-A (3) and (4) of Income-tax Act which are meant for checking evasion of tax are not ultra vires the powers of Parliament. 1973 Tax LR 284 (288, 289) (Andh Pra).

(18) The Parliament, by virtue of the power conferred upon it by Article 276, has exclusive power to levy tax on income, other than agricultural income under Entry 82 of List I. There is also residuary Entry 97 of the said list which empowers the Parliament to make laws with regard to any other matters not enumerated in List II or List III including any tax not mentioned in either of those lists. The contrast in the language of Entry 82 in List I and Entry 62 in List II is apparent. While Parliament has got power to tax the income, the State Legislatures have got the power to impose tax on betting and gambling. By virtue of Entry 82 of List I, Parliament is competent to levy tax on income from betting and gambling. A 1977 Andh Pra 33 (34, 35).

(19) Legislature is competent to enact provisions of S. 64 (ii) of the Income-tax Act, which are meant to prevent the evasion of tax, by virtue of Sch. VII, List I, Entry 82 of the Constitution. 1971 Tax LR 1279 (1281, 1287) (Bom).

(20) Income-tax Act (1961), Chap. XX-A (introduced by Taxation Laws (Amendment) Act) — Amending Act is within legislative competence of Parliament, as it falls within purview of Entry 82. (1975) 1 Cut WR 390 (DB).

2. Income.— (1) The word 'income' in the Income-tax Act connotes a periodical return coming in with some sort of regularity from definite sources. The source must be one whose object is the production of a definite return, excluding anything in the nature of a mere windfall. **A 1932 PC 138 (140).**

(2) The word 'income' in this Entry should be interpreted in its natural and grammatical meaning and should be given its widest connotation in view of the fact that it occurs in a legislative head conferring legislative power. **A 1955 SC 58 (62)** °° A 1964 Andh Pra 342 (345) (DB).

(3) The expression 'income' is wide enough to include capital gains. Hence the Income-tax and Excess Profits Tax (Amendment) Act, 1947, introducing a new head of income — capital gains — in Section 6 and inserting the new S. 12-B, is intra vires the powers of Central Legislature under this entry. **A 1955 SC 58 (62)** °° A 1962 Punj 337 (343) (FB) °° A 1961 Mad 146 (151) (DB) °° A 1960 Mad 96 (97) (DB).

(4) The word 'income' is wide enough to include within its scope income which has not actually accrued but which is supposed notionally to have accrued. **A 1954 SC 155 (157).**

(5) Though the incidence of tax does not fall on the person to whom the income has accrued in the first instance but on some one else it is none-the-less an "income" within the purview of Entry 82. A 1964 Andh Pra 342 (347) (DB).

(6) J. and K. Immovable Property Tax Act, 1962 is within the legislative competence of the State and is not covered by Entry 82 of List 1. A 1968 J and K 105 (107) (DB).

(7) A tax on income is on that which is received; a tax on net wealth is on that which accumulates. Parliament in enacting Wealth Tax Act has not committed trespass on the State field of legislation in imposing a tax on net wealth, part of which may have sprung from agricultural income. A 1962 Ker 110 (115) (DB).

(8) Madhya Pradesh Nagariya Sthavar Sampatikar Adhiniyam does not levy a tax on income of capital value of the assets but a tax on lands or buildings. A 1967 Madh Pra 268 (271) (DB).

(9) Even if accumulated profits in the hands of a company are derived from agriculture, the money received by the shareholders would not retain that character. In other words, neither a dividend nor a deemed dividend paid out of agricultural income is itself an agricultural income. (1962) 1 Mad LJ 155 (157).

(10) The Income-tax Act, 1961, with Ss. 45, 68, 69 and 69-A is still an Act on income. The charging section being Section 4 of the Act makes that position clear. As it is a tax on income even with the aforesaid provisions imposition is by virtue of the power to legislate under Entry 82 of List I of the Seventh Schedule to the Constitution. A 1964 SC 572, Foll. 1976 Tax LR 164 (170) (Cal).

83. Duties of customs including export duties.
[Government of India Act, 1935, Item 44.]

84. Duties of excise on tobacco and other goods manufactured or produced in India except—

(a) alcoholic liquors for human consumption;

(b) Opium, Indian hemp and other narcotic drugs and narcotics,

but including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry.
[Government of India Act, 1935, Item 45.]

Schedule 7, List I, Entry 82 — Note 2 (contd.)

(11) Tax being on the income from property there is no question about the constitutional validity of provisions of Sections 22 and 23 — It is no doubt true that for purposes of tax on income it must be money or money's worth. It is not necessary that income must be received in cash. It may also be received in kind but that may represent money's worth that in something which is capable of being converted in terms of money. 1976 Tax LR 622 (625, 633) : (1975) 2 ITJ 135 (Guj).

3. Tax on income and tax on profession, trade, calling, etc.— (1) Where a tax is payable by any person practising a trade, calling or profession irrespective of whether he derives any income from it or not, will be a tax on trade, calling or profession and not a tax on income. Such a tax falls within Entry 60 of List 2 which is exclusively a State subject and no question of its invalidity can arise and recourse to Article 276 is not necessary for its validation. A 1957 All 433 (436) (DB). (Overruled on another point in A 1969 All 40 (FB).)

(2) The tax on the receipt of pension or on the income from investments which is referred to in the last part of Section 111 (1) of the Madras City Municipal Act is in truth and substance a tax on income. At the time the tax is levied the pensioner is in no employment but is only in receipt of income though it might be for past services, in an employment. A 1964 SC 1172 (1178).

(3) Property tax levied by Section 3, Punjab Urban Immovable Property Tax Act, 1940, falls in pith and substance, within List 2, Item 42 and is not a tax on income falling within List 1, Item 54, Government of India Act, 1935. A 1949 FC 81 (88).

(4) Distinction between tax on income and tax on circumstances and property pointed out. A 1948 All 382 (386) (FB) •• A 1969 All 40 (42) (FB). ((1961) All LJ 743 and 1955 All LJ 630 and A 1957 All 433, Overruled.)

(5) If a State tax, by whatever name it may be called, is based on income derived by the assessee from trade, calling or profession, it may be a tax on income falling within the exclusive jurisdiction of Parliament under this entry. A 1957 All 433 (436) (DB).

(6) A State law relating to taxes for the benefit of the State or of a municipality in respect of profession, trade callings etc., falls within Item 60 of List II of Schedule 7 although it is to be realised on the basis of income. 1967 BLJR 135 (149) (DB).

(7) The U. P. Vriti, Vyapar, Ajivika Aur Sevayojan Kar Adhiniyam does not impose tax on income, but one on trades, calling, professions and employments. Hence it is within the Legislative competence of the U. P. Legislature under Entry 60 of List 2 of Schedule 7. A 1969 All 317 (321) (FB).

(8) For assessment of Circumstances and Property tax it is the net income of the accounting year that has to be taken into consideration and not the profit or loss of the assessment year itself. 1971 Tax LR 784 (787) (All).

Schedule 7, List 1, Entry 83

(1) Customs duties are, in their essence, trading taxes and may be said to be more concerned with the commodity in respect of which the taxation is imposed than with the particular person from whom the tax is extracted (1934) 103 LJPC 1 (6, 7) : 1934 App Cas 45, Attorney-General of British Columbia v. Kingcome Navigation Co.

(2) Export tax is normally collected on merchantable goods in course of transit in pursuance of commercial transactions. A 1930 PC 173 (175, 176).

(3) Whether an export tax is ultimately borne by the exporting seller at home or by the importing buyer abroad depends on the terms of the contract between the parties. A 1930 PC 173 (175, 176).

(4) A sales tax is a tax on transactions of sale. It is in no sense a tax on goods exported outside a territory. A 1954 Mad 1090 (1091) (DB).

(5) Entry 83 of List 1 is concerned only with customs and export duties and has nothing to do with taxes to be collected on goods imported into a local area. A 1960 Andh Pra 234 (241, 242) (DB).

(6) Levy of customs duties (export or import) by Union on property of State — Levy not covered by exemption and can be validly imposed. A 1963 SC 1760 (1777).

Schedule 7, List I, Entry 84

1. Scope.— (1) The Bengal Excise Act 1909 and the Rules and the Notifications thereunder even after the Constitution are covered by the State subjects in Sch. VII, List II, Entry 51. A 1958 Cal 203 (207) •• ILR (1956) 2 Cal 22.

(2) Customs duties are levied on goods going abroad or imported from abroad, while duties of excise on the other hand, are levied on home-made goods or goods made in the taxing country and intended for home consumption. A 1955 Assam 249 (255) (SB) •• A 1955 Raj 114 (118, 119) (DB).

(3) The words "manufactured or produced in India" are an integral part of the entry, and excise duties, though on goods, are connected with their manufacture or production. A 1955 Raj 114 (118, 119) (DB).

(4) In construing the expression duty of excise as it occurs in Entry 84 of List 1 in Schedule VII of the Constitution the Court is not concerned so much with whether the tax is direct or indirect as upon the transaction or activity on which it is imposed. A 1962 SC 1006 (1011, 1013 to 1019, 1027, 1028) ..

Schedule 7, List I, Entry 84 — Note 1 (contd.)

(5) The licence fee levied under Travancore Tobacco Act (1 of 1087) is not a duty levied upon a manufacturer or producer in respect of a commodity manufactured or produced. Therefore the levy cannot be said to be duty of excise coming within the ambit of Entry 84 of the Union List. **A 1958 Ker 129 (133) (FB). (Reversed on another point in A 1962 SC 922.)**

(6) The levy of duty upon consumption of electrical energy cannot be regarded as duty of excise falling within Entry 84 of List 1 in Schedule 7 of the Constitution. The Central Provinces and Berar Electricity Duty Act, 1949, does not fall under Entry 84, List 1 but under Entry 53, List 2. **A 1963 SC 414 (419, 420, 421).**

(7) A Tax on the income derived from the cultivation of tobacco does not amount in substance and effect to a duty of excise within the ambit of Entry 84 of the Union List but amounts only to a tax on agricultural income within the meaning of Entry 46 of the State List. Hence the levy of an agricultural income-tax on the income derived from the cultivation of tobacco under the Agricultural Income-tax Act, 1950, is not beyond the powers of the State Legislature. A 1961 Ker 111 (112) (DB).

(8) The excise duty cannot be avoided on the ground that the goods were meant for the producer's own consumption. A 1957 Cal 326 (331, 332).

(9) The excise duties are to be charged from the manufacturer or producer in respect of the goods manufactured or produced. A 1955 Raj 114 (118, 119) (DB).

(10) Merely because the imposition of excise duty may have the effect of exercising control on a certain trade, that would not take the matter out of the exclusive competence of Parliament. A 1955 Raj 114 (118, 119) (DB).

(11) The excise duty is not a tax on the process of production or manufacture. It is no answer to a demand for excise duty to say that the excisable goods were produced prior to the enactment levying an excise duty. A 1952 Nag 139 (142) (DB) ** A 1963 Punj 549 (551) (DB).

(12) If the Legislature has the competence to impose an excise duty that competence can be exercised upon goods at any point of time from the time they are manufactured or produced till the time they are consumed. ILR (1955) Bom 336 (345) (DB)

(13) The words "duties of excise" are wide enough to admit of such a duty being charged from a manufacturer on goods at a stage even after their issue from their place of manufacture. A 1956 Pat 131 (132, 133) (DB) ** A 1955 Raj 114 (120) (DB) ** A 1964 Punj 465 (468) ** 1962 (2) Cr. LJ 407 (408) (All).

(14) Parliament has the power to levy excise duty with retrospective effect and where the Parliament has, by a process of legal fiction, related back the levy of duty to the stage of manufacture or production, the duty imposed retains its character of an excise duty. A 1957 All 84 (86) (DB) ** A 1956 Pat 131 (132) (DB) ** A 1952 Nag 139 (141, 142) (DB) ** **A 1962 SC 1006 (1011, 1013 to 1019, 1027, 1028).**

(15) This entry does not conflict with Entry 52 in List 2 which refers to "taxes on the entry of goods into a local area for consumption, use or sale therein." **A 1950 SC 11 (14) ** A 1942 All 156 (168, 169).**

(16) Octroi duty on raw materials cannot always be taken to be included in excise duty. A 1957 All 159 (172) (DB).

(17) In the case of a sales tax the liability to pay taxes arises on the transaction of a sale, but in the case of an excise tax, the liability arises in respect of the manufacture or production of the commodity taxed. **A 1958 SC 452 (459) ** A 1945 PC 98 (101) ** A 1942 FC 33 (35) ** A 1939 FC 1 (9, 11, 14) ** A 1962 SC 1006 (1011, 1013 to 1019, 1027, 1028).**

(18) A tax levied on the first sale of goods must in the nature of things be a tax on the sale by the manufacturer or producer; but it is levied upon him qua seller and not qua manufacturer or producer. **A 1958 SC 452 (459) ** A 1942 FC 33 (35) ** A 1955 Assam 249 (255) (SB) ** A 1957 Mad 325 (329) (DB) ** A 1950 Pat 450 (453) (DB).**

(19) The tax on transportation of goods provided in Entry 56 of the State List is quite a different kind of impost in its nature from that of excise duty payable by the manufacturer or producer. **A 1955 Assam 249 (255) (SB).**

(20) It is true that under Entry 51 of List II which relates to imposition of excise duty, the power of the State Government to impose excise duty on medicinal and toilet preparations has been taken away; but that does not affect the power of the State Government to charge sales tax on such preparations which is independently given to them under Entry 54. 1961 MPLJ 1397.

(21) Excise Acts of States imposing duties on medicinal and toilet preparations must be held to be repealed by the Medicinal and Toilet Preparations (Excise Duties) Act 1955 enacted by Parliament under Entry 84, List 1, Schedule 7. **A 1963 SC 622 (625, 626).** (Ayurvedic preparations held to be medicinal preparations within Section 2 (g) of Medicinal and Toilet Preparations (Excise Duties) Act (1955) — Excise duty levied on such preparations by State Government cannot continue after Central Act of 1955.)

(22) The Parliament has not the power to make legislation in regard to licences to be taken for the possession and sale of medicinal and toilet preparations containing alcohol. A 1962 Mys 192 (195, 196) (DB).

(23) Central Excises and Salt Act (1944) is within legislative competence of Central Legislature under List 1, Entry 45 of the Government of India Act, 1935 — Incidental encroachment on Entry 27 or 29 of List II does not affect its validity. **A 1960 SC 424 (429).**

(24) Levy of excise duties by Union on property of State — Levy not covered by exemption and can be validly imposed. **A 1963 SC 1760 (1777).**

(25) A tax can be imposed by the State Legislature on an article of luxury. This is even though "in respect of and in relation to" the same article an excise duty may be imposed by the Central Legislature under Entry 84, List 1, Schedule 7. A 1966 Ker 46 (51). (Kerala Luxury Tax on Tobacco (Validation) Act, 1964 does not lack legislative competence.)

(26) Nature of cess imposed under S. 3 (2) of Produce Cess Act (1966) is a tax by way of excise duty and comes under Schedule 7, List 1, Entry 84. A 1969 Ker 176 (177, 178) ** 1969 Ker LR 503 (504) (DB).

(27) Section 37-A of the U. P. Excise Act, 1910, does not seek to levy any excise duty.

85. Corporation Tax.
[Government of India Act, 1935, Item 46.]

86. Taxes on the capital value of the assets, exclusive of agricultural land, of individuals and companies; taxes on the capital of companies.
[Government of India Act, 1935, Item 55.]

Schedule 7, List I, Entry 84 — Note 1 (contd.)
It contemplates prohibition in relation to intoxicating drinks and drugs. The State Legislature is competent to make laws in respect of intoxicating liquors as well as drugs under Entry 6 which refers to 'public health'. Section 37-A is thus within the legislative competence of the State Legislature. A 1978 All 386 (389).

(28) Cochin Abkari Act (1 of 1077), Ss. 12, 12-A, 12-B, 13, 13-A, 14 and 68-A (as amended in 1967) — Validity — Kerala Spirituous Preparations (Control) Rules (1969), Rr. 4, 5, 6 (3) and 11 (a) — Rules are intra vires — No conflict between Entry 84 of List 1 and Entry 8 of List II. **A 1979 NOC 146 : 1979 Tax LR 2475 (FB) (Ker).**

(29) M. P. Excise Act (2 of 1915), S. 25 — Notification issued under the section imposing duty on rectified spirit or pure alcohol — Notification would be ultra vires the provisions of the Constitution as well as the Act — From Entry 84 of List I and Entry 51 of List II in the Seventh Schedule it is clear that the State can impose excise duty on alcoholic liquors for human consumption and that two if they are not medicinal preparations. 1972 Tax LR 2058 (2059, 2060) (Madh Pra).

(30) Levy of countervailing duty on imported goods by introducing Section 2-A in Tariff Act, 1934, is within legislative competence of Parliament — Countervailing duty is not a tax — In view of Entry 97 in List I of the Seventh Schedule as also the provisions of Art. 248 of the Constitution Parliament would have legislative competence even with regard to the imposition of tax which does not fall within Entry 84 of List I. (1973) 2 Mad LJ 413 (417).

(31) Levy of litre fee on denatured spirit — Is unconstitutional being beyond the legislative competence of the State Legislature — The power to levy excise duty on alcohol unfit for human consumption rests with the Parliament by virtue of Entry 84 of List I of the Seventh Schedule. ILR (1973) Mys 124 (126, 127).

(32) State Legislature cannot levy excise duty on Methanol. Levy of excise duty on Methanol can neither be justified under Entry 19 of List III nor Entry 8 of List II. None of these entries empowers the State Legislature to levy excise duty on intoxicating liquors. Till alcoholic liquor becomes consumable by human beings, it is the Parliament alone that can impose excise duty under Entry 84 of List I. 1977 Tax LR (NOC) 47 (Raj) : 1976 Raj LW 338.

2. Goods.— (1) Article 366 (12) defines 'goods' as including all materials, commodities and articles, and coal comes within this definition. A 1957 Cal 326 (328).

(2) Levy of sales tax on incorporeal movable property is not ultra vires Article 366 (12). **A** 1969 Mad 284 (291) (DB).

(3) Where the packing material is purchased by the manufacturer from the market and is used for packing the excisable goods, there is no change or identity of goods or does a new article emerge which may attract the levy of a fresh excise duty. Therefore levy of excise duty on the manufacturer of excisable goods after the manufacture of packing material paid it when he cleared them from his factory, would mean payment of excise duty twice. There is no provision in the Central Excises and Salt Act, 1944 for levying excise duty twice on the same article or commodity which has not changed its identity and which has not become a new marketable commodity. 1980 Tax LR 2251 : 1979 ELT (J) 444 (448) (Guj).

(4) Value of packing which is of durable nature and is returnable by the buyer should not be included in the cost of the excisable goods, while assessing excise duty payable thereon by the manufacturer. A requirement that the packing which is of durable nature should be returned in order to exclude its value is not justified from the wording of the provision. 1980 Tax LR 2325 (2327) (Kant).

3. "Manufactured or produced".— (1) Coal is not said to be manufactured in a colliery as coke is. But it is produced. A 1957 Cal 326 (328).

(2) To speak of coal as produced in the sense of its being made a material of consumption by human skill and labour is entirely correct and has a sanction of approved usage. **A** 1959 Cal 222 (226) (DB).

(3) Kerala Luxury Tax on Tobacco (Validation) Act (1964) is within the legislative competence of the State Legislature. Levy of excise duty should be linked with production or manufacture of the excisable article. Where, however, the levy imposed or tax has no nexus with the production or manufacture of an article, the impost or tax cannot be regarded to be one in the nature of excise duty. It therefore follows that levy of tax under Section 3 of the Act is not excise duty. Argument that the provisions of the Act fall under Entry 84 of List I of the Seventh Schedule to the Constitution must be held to be bereft of force. **A 1976 SC 182 (189).**

Schedule 7, List 1, Entry 85

(1) A tax in order to be deemed a corporation tax must be payable by corporations alone. Mere fact that incidence of sales tax falls on corporation does not make tax corporation tax. A 1960 Bom 470 (475, 476). (C. P. and Berar Sales Tax Act is intra vires State Legislature — Mere fact that incidence of Sales Tax falls on corporation does not make tax corporation tax.)

SCHEDULE 7, LIST 1, ENTRY 86

SYNOPSIS

1. Entry 86, List I and Entry 49, List II.
2. 'Assets' — Meaning of.
3. 'Individual' — Meaning of.

1. Entry 86, List I and Entry 49, List II.— (1) There is a real and vital distinction between

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Schedule 7, List 1, Entry 86 — Note 1 (contd.) tax on lands and buildings on the basis of their capital value (List II, Entry 49) and tax on such capital value itself treating lands and buildings as an item of asset (List I, Entry 86). There is really no conflict and no overlapping of jurisdictions in the case of the two entries. A 1962 Ker 110 (113, 114, 115) °° ILR (1969) 1 Ker 268 °° A 1968 Guj 124 (140) (DB) °° (1968) 1 Mys LJ 524 (DB) °° A 1964 Orissa 128 (130, 131) (DB).

(2) Capital means excess of assets over liabilities as understood in accountancy practice. (Obiter.) (1968) 1 Mys LJ 524 (DB) °° A 1968 Guj 124 (140) (DB).

(3) Imposition of Wealth tax on non-agricultural lands and buildings under Wealth Tax Act (1957) is constitutional as it is not directly a tax on land and buildings. **A 1969 SC 59 (61, 62).** (Observation made in A 1960 All 136 held were obiter and did not correctly interpret Entry 86 of List 1.) °° **A 1961 All 487 (497, 499, 500) (FB) °° A 1962 Ker 110 (113, 114, 115).**

[See also A 1969 Ker 69 (72) : 1968 Ker LJ 422.]

(4) There is no principle of public finance in support of the view that a tax on the capitalised value of assets can be levied only once. The location of Entry 86 in List I may be a mere accident of draftsmanship and too much importance should not be given to the collocation of the Entries. A 1964 Orissa 128 (132) (DB).

(5) Section 4 of the Wealth Tax Act has been enacted in exercise of the ancillary power of preventing evasion. Section is within the legislative competence of Parliament conferred by Entry 86. A 1964 Orissa 128 (133) (DB).

(6) Municipalities — M. P. Nagriya Sthavar Sampati Kar Adhiniyam (XIV of 1964) Section 4 levies not a tax on income or on capital value of the assets but tax on lands or buildings. It is therefore one falling under Entry 49 of List II and not under Entry 86, List 1. A 1967 Madh Pra 268 (271) (DB).

(7) Madras Urban Land Tax Act (XXXIV of 1963). is validly enacted by State Legislature as subject falling within Entry 49 in List II in Seventh Schedule in Constitution and does not trench upon Entry 86 in List 1. (1966) 2 Mad LJ 172 (DB).

(8) Gujarat Imposition of Taxes by Municipalities (Validation) Act 1963 is intra vires the State Legislature and does not trespass or purport to trespass upon the legislative field delineated by Entry 86. A 1968 Guj 124 (140) (DB).

(9) It was held that the Explanation to Section 75 of the Bombay Municipal Boroughs Act (18 of 1925) and Rule 350-A framed by the Corporation were not ultra vires, as they did not fall within Item 55 of List 1 of the Government of India Act, 1935 (corresponding to the present entry) but under Item 42 of List 2 of the Government of India Act, 1935 (corresponding to Entry 49 of List 2 of the Constitution of India). It was held that the power to adopt the basis of the capital value of certain properties in levying tax could not be said to be excluded from Item 42 of List 2 of the Government of India Act, 1935, that the adoption of this method or basis did not alter the character of the tax and that it still continued to be a tax on land and could not be mistaken to be a tax on capital value of assets. A 1954 Bom 188 (191, 192, 193, 195, 202) (DB).

(10) Bihar and Orissa Municipal Act (VII of 1922), Sec. 82 (1) (ff) and Sch. 4 — Falls under Item 60 of List II and not under Item 86 of List 1 of Sch 7. A 1962 Pat 465 (467) (DB).

(11) Law enabling Municipalities to levy tax imposed on buildings is covered by Entry 49 of List II and not by Entry 86 of List 1 → Andhra Pradesh Urban Areas Surcharge on Property Tax Act (13 of 1958), Section 3 — Act is validly enacted. A 1963 Andh Pra 379 (380) (DB).

(12) Acts relating to taxation on lands and buildings — Competency of State Legislature to enact — Madras Urban Land Tax Act 12 of 1966, is not beyond competence of State Legislature — In pith and substance the Madras Act is entirely within the ambit of Entry 49 of List II — The Act does not in any way trench upon the field of legislation of Entry 86 of List I. **A 1970 SC 169 (175).**

(14) State Legislature is competent to impose tax on buildings under Entry 49 of List II. A tax directly imposed on one's lands and buildings will not be a tax under Entry 86 of List I. **A 1980 SC 271 (275, 276).**

(15) Provisions of Ss. 81 (2) and 85 (2) of A. P. Municipalities Act (6 of 1965) are not ultra vires the competence of State Legislature on ground that they are both in form and substance taxation on capital which is permissible to Parliament under List I, Entry 86 of the Seventh Schedule to the Constitution. ILR (1972) Andh Pra 436 (DB).

2. 'Assets' — Meaning of.— (1) The word 'assets' in Entry 86, List 1 is not qualified by any limiting expression. On the other hand, by excluding agricultural lands only it is made absolutely clear that all other assets would come within the scope of Entry 86. A 1964 Orissa 128 (130, 131). (A 1960 All 138, Not Foll.) °° A 1968 Guj 124 (140) (DB) °° A 1963 Mys 111 (111) (DB).

[But see A 1960 All 136 (144, 145, 147) : 1959 All LJ 754 (FB). (Observations in this case in this respect held obiter and not correctly interpreting Entry 86, List 1. in A 1969 SC 59.)]

(2) The expression 'assets' can also include a portion thereof. A 1968 Guj 124 (140) (DB) °° A 1952 Bom 261 (263).

(3) It is open to the Legislature to levy a capital tax under this entry in respect of only some of the assets or assess the tax on a value which is not the total value of the assets, after making certain deductions. A 1952 Bom 261 (263) (DB).

(4) Land used as an airfield cannot be termed agricultural land though originally it was agricultural land. A 1963 Mys 111 (112) (DB).

(5) Test to determine whether it is agricultural or non-agricultural land — Capacity of land for being put to agricultural use is not determining factor — Plots situate in residential Town-planning Scheme area, lying uncultivated for many years, though assessed for agricultural purposes held not agricultural land. A 1965 Guj 259 (262) (DB).

(6) Words 'Agricultural Land' should be liberally interpreted. **A 1969 Andh Pra 345 (355) (FB).**

87. Estate duty in respect of property other than agricultural land.

88. Duties in respect of succession to property other than agricultural land.

[Government of India Act, 1935, Item 56.]

Schedule 7, List 1, Entry 86 — Note 2 (contd.)

(7) Assuming that the Wealth Tax Act, as originally enacted, is held to be legislation under Entry 86, List I, there is nothing in the Constitution to prevent Parliament from combining its powers under Entry 86, List I, with its powers under Entry 97, List I. There is no principle that debars Parliament from relying on the powers under specified Entries 1 to 96, List I, and supplement them with the powers under Entry 97, List I, and Article 248, and for that matter powers under entries in the Concurrent List. The Constitution has not denied to the Union power to levy wealth tax inclusive of agricultural land as was contended by the respondents. **A 1972 SC 1061 : 1972 Tax LR 449.** (1971 Tax LR 61 : A 1971 P & H 155 (FB), **Reversed.**)

(8) Imposition of Wealth Tax on capital value of the assets is within the legislative competence of Parliament under Entry 86 or Entry 97 of List I of the Seventh Schedule. Tax contemplated by Entry 86 of List I is not directly a tax on lands and buildings. It is a tax on capital value of the assets of individuals and companies on the valuation date. 1976 Tax LR 164 (170) (Cal).

(9) Tax under Entry is on the economic value of the totality of the assets. The entry includes lands and buildings and is not in conflict with Entry 49 of the List II. ILR (1969) 2 Mad 699.

(11) 'Capital value of assets of an individual' — Meaning of — Tax under Entry 86 is in essence in the nature of capital levy — Capital means excess of assets over liabilities as understood in accounting practice. (Obiter.) (1968) 1 Mys LJ 524.

(12) Madras Urban Land Tax Act, 12 of 1966, is not beyond competence of State Legislature. In pith and substance the Act, imposing a tax on Urban Land at a percentage of market value, is entirely within the ambit of Entry 49 of List II and does not in any way trench upon the field of legislation of Entry 86 of List I. Asstt. Commissioner of U. L. T., Madras and others v. Buckingham and Karnatak Co. Ltd. **A 1970 SC 169 (176).**

(13) Levy of Cess on land on basis of capital value is not a tax on capital value as covered by Entry 86. 1975 Ker LT 102 (DB).

3. 'Individuals' — Meaning of.— (1) The expression 'individuals' cannot merely mean individual human beings but is wide enough to comprehend individuals forming a unit. A 1961 Andh Pra 355 (357, 358).

(2) The word 'individual', occurring in Entry 86 of List 1 of the Sch. 7 covers a Hindu undivided family which composes of several individuals. Hence, Section 3 of the Wealth Tax Act authorising the Wealth Tax Officers to assess the capital assets of Hindu undivided families is valid. A 1961 Andh Pra 355 (357, 358) (DB) °° **A 1965 SC 1387 (1392)** °° A 1964 Orissa 128 (132, 133) °° A 1962 Ker 110 (118, 119) (DB) °° A 1960 Bom 191 (192) (DB).

(3) A Mappila Marumakkatayam Tarwad is included in the term 'individual' occurring in Section 3 of Wealth Tax Act (1957) passed by Central Government. **A 1966 Ker 77 (88) (FB).**

(4) Income-tax and Excess Profits Tax Amendments Act (22 of 1947) was valid either as a whole if 'individuals and Companies' comprised all the categories of assessees or in any case to the extent that it applied to individuals and companies. A 1952 Bom 261 (264, 265) (DB).

(5) Legislative competence — Parliament to enact Section 18 (1) (a) of Wealth Tax Act — Levy of penalty for late submission of return — It is not a uniform imposition of penalty in the sense that every defaulter, irrespective of his net wealth and duration of delay, is made to pay a fixed sum of money — Penalty is linked with quantum of net wealth and the period of the delay — It has rational relation to object sought by it. 1974 Tax LR 232 (236) (Mad).

Schedule 7, List 1, Entry 87

(1) There is a distinction between estate duty and duty in respect of succession. An estate tax is levied on the inheritance as a whole, and a succession duty or share tax is levied on the separate portions going to the different beneficiaries, the Estate Duty is more productive and efficient source of revenue while Inheritance Tax may be said to be more equitable. **A 1944 FC 73 (77, 78, 79).**

(2) Entries 86 and 87 of List I do not preclude the State Legislature from taxing capital value of land and buildings under Entry 49 of List II. **A 1970 SC 169 (175).**

(3-4) Parliament has power under Entry 87 of List I of the Seventh Schedule of the Constitution to make laws with regard to estate duty and this power necessarily includes also the power to fix rates of estate duty. 1973 Tax LR 704 (706, 708) (AP).

(5) Estate Duty Act (1953), S. 34 (1) (c) — Estate duty is not levied on the share of the lineal descendant — Section levies estate duty only on property which passes on death. 1973 Tax LR 710 (715, 717) (Andh Pra).

(6) Estate Duty Act (1953), S. 34 (1) (c) is not ultra vires the Constitution. 1973 Tax LR 710 (714, 717) (Andh Pra).

(7) Estate Duty Act (1953), S. 34 (1) (c) — Provision is within the legislative competence of Parliament — It is also not discriminatory. 1973 Tax LR 1084 (1086, 1087) (Andh Pra).

Schedule 7, List 1, Entry 88

(1) There is a general presumption that the Legislature does not exceed its jurisdiction. Thus when the Legislative Assembly passed the Hindu Women's Rights to Property Act, 1937, it must be presumed that the word "Property" used in the Act must have been used as referring to property other than agricultural land, because the power to legislate in respect of succession to agricultural land was vested in the Provincial Legislature and not in the Central Legislature. **A 1941 FC 72 (75).**

(2) Bengal Finance (Sales Tax) Act (VI of 1941) (as amended by Bengal Act XIX of 1954), Section 17 — Validity — Section not a law with respect to Entry 88 of Union List — Falls within purview of Entry 54 of State List — State competent to enact section. A 1963 Cal 578 (580) (DB).

89. Terminal taxes on goods or passengers, carried by railway, sea or air; taxes on railway fares and freights.

90. Taxes other than stamp duties on transactions in stock exchanges and future markets.

91. Rates of stamp duty in respect of bills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of insurance, transfer of shares, debentures, proxies and receipts.

[Government of India Act, 1935, Item 57.]

92. Taxes on the sale or purchase of newspapers and on advertisements published therein.

[Cf. Government of India Act, 1935, List II, Item 48.]

[a][**92A.** Taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce.]

[Cf. List II, Entry 54.]

[a] Inserted by the Constitution (Sixth Amendment) Act, 1956, Section 2 (a), 11-9-1956.

OBJECTS AND REASONS

See under Article 269.

Schedule 7, List 1, Entry 88 (contd.)

(3) Entries 86 to 88 of List 1 do not exclude any power of the State Legislature to implement the principle embodied in Art. 39 (c). **A 1970 SC 169 (175).**

(4) Acts relating to taxation on lands and buildings — Madras Act 12 of 1966 is not beyond the competence of State Legislature. **A 1970 SC 169.**

(5) For distinction between estate duty and duty on succession, See Notes under Entry 87 of List 1.

Schedule 7, List 1, Entry 89

(1) The terminal tax must have reference to some activity within the municipal area, i. e., the entry for the purpose of remaining within that area or commencement of journey from that area. **A 1958 SC 341 (347).** (A 1950 Nag 169 (FB), Reversed.)

(2) A terminal tax is not leviable by the Municipality on goods which are in transit and are only carried across the limits of the Municipality and are neither loaded nor unloaded within the municipal area. **A 1958 SC 341 (347, 349).**

(3) While terminal taxes are leviable on goods imported or exported from the municipal limits denoting thereby that they were connected with the traffic of goods. Octroi is leviable in respect of goods brought into a municipal area for consumption or use or sale. **A 1963 SC 906 (911).**

(4) Where tax is clearly imposed on goods which enter and leave the municipal limits and the tax has no relation to transport of goods as such, it cannot fall within Entry 52, List II. A 1967 Bom 413 (416) (DB).

(5) The tax under Entry 30 of List 1 is entirely different from a tax covered by Entry 86, List 1, Sch. 7. A 1967 Bom 413 (416) (DB).

(6) The expression "goods" includes incorporeal movable property. A 1969 Mad 284 (285) (DB).

(7) Tax levied by Rajasthan Passengers and Goods Taxation Act (18 of 1959), Section 3 is tax on passengers and goods and not on income or on fares and freights — Not ultra vires. **A 1961 SC 1480 (1484, 1485).**

(8) Octroi and terminal taxes are different taxes, though they resemble in one respect, viz., that they are leviable in respect of goods brought into a local area. While terminal tax is leviable on goods 'imported or exported' from the municipal limits denoting thereby that they are connected with the traffic of goods, octroi is, however leviable in respect of goods brought into municipal area for consumption, use or sale. The expression "for the purpose of consumption" should be understood as having reference not merely to the individual importer or purchaser but as contemplating distribution eventually to the consumers. 1971 All LJ 1303.

(9) Levy of Sales Tax on incorporeal movable property is not ultra vires Art. 366 (2). A 1969 Mad 284.

Schedule 7, List 1, Entry 91

(1) The States have exclusive power to make laws in respect of rates of stamp duty on matters other than those enumerated in Entry 91 of List 1. **A 1958 Andh Pra 63 (65) (SB).**

(2) Parliament has no power to make laws with respect to rates of stamp duty payable on an application for enrolment as an advocate which is not one of the matters enumerated in List 1, Entry 91. **A 1958 Andh Pra 63 (65) (SB)** °° A 1966 Mys 138 (140) (DB).

(3) Rajasthan Stamp Law (Adaptation) Act (VII of 1952), Sec. 6 — Second proviso is not hit by Article 14. A 1961 Raj 181 (181).

(4) Pronote executed in J. and K. State — It must bear stamp as prescribed by J. and K. Stamp Act. **A 1975 J & K 50 (FB).**

(5) The rate of stamp duty on an application for enrolment is not one of the matters provided for in Item 91 and 78 of List I and Parliament has no power to fix rate of stamp duty payable on such documents. A 1966 Mys 138 (140).

Schedule 7, List 1, Entry 92-A

(1) "Inter-State trade or commerce" is not confined to mean trade or commerce between the States as such between a seller-State and purchaser-State It is inter-State trade where goods sold or purchased move from one State

93. Offences against laws with respect to any of the matters in this List.

94. Inquiries, surveys and statistics for the purpose of any of the matters in this List.

[Government of India Act, 1935, Item 43.]

Schedule 7, List 1, Entry 92-A (contd.)

to another, though the trade is very often between individuals, firms, companies or corporations. A 1963 Cal 442 (450).

(2) The sale of a thing "in the course of inter-State Trade or Commerce" and the intra-State sale of a thing which is of special importance to inter-State Trade or Commerce are not identical transactions. A 1965 Cal 498 (505).

(3) The States retained their power to tax intra-State sales under Entry 54 of List II even after the introduction of Entry 92-A of List 1. A 1965 Cal 498 (505).

(4) Sales effected between 11th September 1956 and 4th January 1957 in which goods moved from outside into Mysore State were inter-State sales understood in its ordinary natural sense unaided by any other statutory provision — State of Mysore had no power to tax such sales in view of Art. 269 (1) (g) read with Sch. VII, List 1, Item 92-A and List II, Item 54. A 1967 SC 585 (587).

(5) The expression "goods" includes incorporeal movable property. A 1969 Mad 284 (285).

(6) The sale of animate things will not fall within Entry 54 of List 2 or Entry 92-A of List 1. It would therefore fall within Entry 97 of List 1 and tax on such sales would be within the competence of Parliament. A 1960 Ker 360 (360)

(7) Taxing authorities have power to select commodities for taxation — Discrimination to be shown before the act can be struck down. 1968 All LJ 802.

(8) Collection of tax on transactions of sales of goods which were not liable to tax under the Act — Order forfeituring such wrongfully collected amounts to the Government was legal. (1979) 44 STC 102 (117) (DB) (Bom).

(9) Levy of Sales Tax on incorporeal movable property is not ultra vires Art. 366 (1). A 1969 Mad 284.

(10) Under Section 65 of Mysore Agricultural Produce Marketing (Regulation) Act, 1966, the levy of the market fee is on the first sale by the producer inside the yard or outside the market as the case may be to a trader or any other person. Character of the impost is that of fee and not that of tax. Said section therefore is not unconstitutional. A 1970 Mys 114 (128, 129).

(11) The Central Sales Tax Act, 1956, Sections 2 (1), 8 and 9, and the constitutional provisions contained in Arts. 286, 261 (1), Sch. VII, List I, Entry 92-A and List II, Entry 54 were intended to restrict the imposition of multiple taxation on a single inter-State transaction by different States, each State relying on some territorial nexus between the State and the sale. A 1970 Mys 259 (262).

(12) Held that the bamboos and trees agreed to be severed are nothing but bamboos and timber after they are felled. When admittedly timber and bamboos are liable to taxation at sale point, taxation of those goods at the purchase point amounts to double taxation and, as such, the notifications challenged are ultra vires the provisions of the Orissa Sales Tax Act. Further the impugned notifications amount, in the facts and circumstances of the case, to taxation on agreements of sale and not on sale and purchase of goods and in the case of bamboo exploitation contracts, the impugned notifications amount also to impost of tax on profit a prendre, and, as such, are against the provisions of the Orissa S. T. Act. (1980) 45 STC 170 (189) (DB) (Orissa)

Schedule 7, List 1, Entry 93

(1) Parliament had full competence by virtue of this entry to legislate with regard to election offences in the manner provided by S. 131 (1) (b) and S. 136 (1) of the Representation of the People Act 1951. A 1954 Pat 356 (357) : 1954 Cri LJ 1132.

(2) Legislation in respect of insurance and creation of new offences in respect of insurances comes exclusively within Parliament's legislative jurisdiction. A 1944 FC 25 (28).

(3) Under the provisions of S. 10 (2) of Suppression of Immoral Traffic in Women and Girls Act (1956) a person is detained in lieu of a term of imprisonment or imposition of fine. The Parliament can legislate in respect of this matter both under Art. 35 (i) and (ii) and also under Entry 93. A 1959 All 57 (66). (Overruled on another point in A 1964 SC 416.)

(4) Offences under Ss. 489-A to 489-D, I. P. C. — Matters relating to fall within competence of Union Legislature — Conviction under Ss. 489-A to 489-D — 'Appropriate Government' competent to remit sentence of convict is Central Government. A 1974 SC 31 : 1974 Cri LJ 150.

Schedule 7, List 1, Entry 94

(1) The words 'for the purpose of' indicate that the scope of the inquiry is not necessarily limited to the particular or specific matters enumerated in any of the entries in the list concerned but may extend to inquiries into collateral matters. A 1958 SC 538 (544, 545). (59 Bom LR 769, Reversed.)

(2) Corruption charges against an officer of All India Service allotted to the State of J. & K. have to be enquired into under the All India Services Act and not under the J. & K. Government Servants' Prevention of Corruption (Commission) Act since the former covers all the aspects of the officers of All India Services. A 1967 J & K 37 (42) (FB).

(3) Central Reserve Police Force Act is enacted by competent legislature. 1971 Cri LJ 1489 (J & K) (FB).

(4) Coercive steps for compelling appearance of witnesses and production of documents — Notification by State Government enabling inquiring authority to take such steps invalid. 1971 Ker LT 749.

(5) Section 3 of the Commissions of Inquiry Act (1952) is not invalid on ground that federal structure of the State is jeopardised. It is within the legislative competence of the Parliament. A 1978 SC 68 (102, 104, 105, 107, 110, 114).

95. Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this List; admiralty jurisdiction.

[Government of India Act, 1935, Items 21, 53.]

96. Fees in respect of any of the matters in this List, but not including fees taken in any Court.

[Government of India Act, 1935, Item 59.]

Schedule 7, List 1, Entry 95

(1) The effect of Entry 65 of List 2 and Entry 95 of List 1 is that while legislating with regard to the matters in their respective legislative lists, the two Legislatures are competent also to make provisions in the several Acts enacted by them, concerning the jurisdiction and powers of Courts in regard to the subject-matter of the Acts. **A 1951 SC 69 (70, 71).**

(2) Entry 95, List 1 only enables jurisdiction and powers to be given in respect of matters enumerated in List I. A 1957 Cal 534 (543).

(3) Section 45-B of the Banking Companies Act, 1949, inserted by Act 52 of 1953, is within the plenary powers of Parliament under Article 246 of the Constitution read with Entries 43 and 95 of List 1. A 1958 Mad 279 (280).

(4) Sections 45-A and 45-B were inserted in Banking Companies Act by the Amending Act 1950. The Legislature did not purport to legislate in regard to the subject covered by Item 18 of List II. The Court deciding the claim of banking company may only incidentally have to decide other matters. This is why the phrase "with respect to" has been used in Entry 95 of List 1 and Entry 65 of List II. A 1958 Mad 403 (410).

(5) The word "powers" was added to the word "jurisdiction" in this entry and the corresponding entries in the other two lists in order to enable the Legislature to grant special powers to the Courts which are to deal with the subject-matter of any special legislation. **A 1951 SC 69 (71).**

(6) A scrutiny of Entry 95 of List 1 and Entry 46 of List III would clearly show that the power to legislate conferred on the concerned legislatures is only in relation to the subjects which are assigned to the respective legislatures in those lists. These entries do not in any way derogate from the general powers given to the State Legislatures under Item 3 of List II. A 1959 Andh Pra 3 (6) (DB).

(7) The 95th entry does authorise legislation on jurisdiction and powers of Courts with respect to the constitution and organisation including vacations of the High Courts. Whatever else may be a law which Parliament may make in respect to that matter under the 95th entry, it is clear that within the field of that entry, there can be no power in Parliament to make a legislation on the jurisdiction which a High Court may exercise after its constitution and organisation for the administration of justice. A 1965 Mys 76 (82, 83) (DB).

(8) Money claim based on promissory note — Nyaya Panchayat has jurisdiction to try such a claim. 1968 All WR (HC) 211 (DB).

(9) Kerala High Court Act, 1959 does not affect the constitution and organisation of the High Court. It merely provides for the internal working of the High Court by enacting a law to regulate the practice and procedure of the Court and also the power to be exercised by Judges sitting alone or in Division Benches, consisting of two or more Judges. Act is intra vires the powers of the State Legislature and is valid. A 1961 Ker 226 (232) (FB).

(10) Constitutionality of Amending Ordinance and Amending Act — State Legislature was competent to make such amending laws (Per majority). A 1973 All 596 (FB).

(11) Central Reserve Police Force Act is enacted by a competent legislature. 1971 Cri LJ 1489 (J & K) (FB).

(12) **Held** : The Commissions of Inquiry Act, 1952, deals with the constitution of the Commission and in that matter neither the Central Government nor the Shah Commission can by any consent or any approval confer any authority to the State Government or a Commission to constitute such a body. For implementation of a Central Act if there is any excess or abuse of power simpliciter without reference to the user or application of the Central Act which endangers public order or any abuse of power which creates public disrespect in administration, whether the State Government may or may not be able to constitute a body is not concerned with this application. In the instant case the complaints upon which the notices have been issued to the petitioners showing abuse or excess of power under MISA or DISIR, which admittedly were matters relatable to List I of the Seventh Schedule to the Constitution and as such the Central Government alone was entitled to constitute any commission, if at all. (1980) 1 Cal HN 440 (456, 457).

(13) Though the expression "property of the Union" in Entry 32 of List I of the Seventh Schedule to the Constitution cannot be construed to include property of a Government company, Entry 43 relating to incorporation and regulation of trading corporations read with Entry 95 which relates to jurisdiction and powers of all Courts except the Supreme Court, with respect to any of the matters in List I can be construed to confer power on Parliament to enact the Act in respect of premises belonging to a Government company. A 1980 MP 106 (109) : 1980 Jab LJ 183.

Schedule 7, List 1, Entry 96

(1) This entry has to be read as an adjunct to every legislative power including the entries conferring the power to levy particular taxes. That indicates that the fees can be levied in the course of the levy or collection of the particular taxes. A 1958 Mad 158 (169) : ILR (1958) Mad 35 (DB) •• **A 1965 SC 1107 (1122, 1123).**

(2) Although under Entries 54 and 55, List I or Entries 23 and 24 of List III read with Entry 96, List I it may be open or competent to Parliament to levy or collect fees which may be regarded as regulatory fees, the power of imposing a tax is not comprehended within the said entries, nor can the said power be exercised pursuant to the said entries. A 1968 Mys 42 (DB).

97. Any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists.

JAMMU AND KASHMIR

For Entry 97, the following shall be substituted, namely :—

"97. Prevention of activities directed towards disclaiming, questioning or disrupting the sovereignty and territorial integrity of India or bringing about cession

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Schedule 7, List 1, Entry 96 (contd.)

(3) Since the Income-tax Appellate Tribunal was not a Court, the Central Legislature had the power, under the Entries 59 and 54 of List I of Government of India Act (corresponding to Items 82 and 96 of List 1 of the Constitution) to levy a fee as a condition for preferring an appeal to that body.) A 1954 Mad 806 (808, 809) (DB).

(4) Section 4 and Sch. II, Article 1 (e) as amended by Court-fees U. P. Amendment Act 10 of 1959 are within competence of U. P. Legislature as the Court-fee imposed by Amendment is not a tax but a fee. **A 1960 All 462 (465) (FB)**

(5) Andhra Court Fees Act falls in Entry 3, List II and is valid — It does not fall under Entry 96, List 1. A 1959 Andh Pra 271 (272) (DB).

(6) For the meaning of "fees", see under Article 265.

(7) Imposition of stamp duty on the certificate of enrolment under Section 22 of Advocates Act — Constitutionality of — Any fee which may be payable by such persons before they can claim to be entitled to practice falls under Entry 96 of List I of the Seventh Sch. **A 1973 SC 231 (236).**

(8) Mysore Agr. Pro. (Reg.) Act (27 of 1966) — Section 65 and Preamble — Levy of Market fee — Pith and substance of subject-matter of the Act falls within Entries 26 and 28 of the State List — Imposition of fee with respect to sales made in the course of inter-State trade and commerce is only incidental to main legislation and hence within competence of the State Legislature. A 1970 Mys 114 (129).

(9) From Clause (2) of Art. 110 and Cl. (2) of Article 199 of the Constitution it is clear that the Constitution clearly draws a distinction between the imposition of tax by a Money Bill and the impost of fees by any other kind of Bill. So also in the Seventh Schedule both in List I and List II a distinction has been maintained in relation to the entries of tax and fees. In the Union List, Entries 82 to 92A relate to taxes and duties and Entry 96 carves out the legislative field for fees in respect of any of the matters in the said list, except the fees taken in the Courts. Similarly in the State List entries relating to taxes are Entries 46 to 63 and Entry 66 provides for fees in respect of any of the matters in List II but not including fees taken in any court. Entry relating to fees in List III is Entry 47. Our Constitution, therefore, recognises a different and distinct connotation between taxes and fees. Generally stated fees are, by and large, intimately connected or interwoven with the services rendered to the payer thereof. **A 1980 SC 1008 (1015).**

Schedule 7, List 1, Entry 97

(1) Resort to the residual power should be the very last refuge, and only when all the categories in the three lists are absolutely exhausted. **A 1941 FC 47 (55) •• A 1962 Ker 97 (100) (DB).**

(1A) Every entry in the three lists in Sch. VII to the Constitution, except Entry 97 in List I, should be given widest possible construction. The principle applies both to entries relating to general powers of legislation as well as entries relating to taxation. Recourse to residuary entry must be had only as a last resort. A 1966 Mys 138 (139) •• A 1962 Mys 269 (274, 275).

(1B) The tax on capital value of assets when such assets consist also of agricultural land may fall within Entry 97, List I since it must be considered as a residuary power vested in the Parliament. 1975 Ker LT 104 (106).

(2) Unless a subject-matter falls exclusively within the competence of the State Legislature, Parliament would be competent to legislate with regard to a subject which would either fall in the concurrent list or if not specifically enumerated in the first list would undoubtedly fall in Entry 97, List I. A 1951 Bom 440 (447) (DB) •• A 1965 Punj 65 (66, 67, 68) (DB). (A 1962 Mys 269, Not foll.) •• A 1963 Mad 419 (423) (DB) •• A 1962 Ker 97 (103) (DB).

(3) Gift Tax Act, 1958, is not ultra vires of Parliament and is protected by Article 248 of Constitution read with Entry 97, List 1, Sch. 7. **A 1967 All 19 (21) (DB).**

(3-A) Expenditure Tax Act (1957) is not invalid for want of legislative competency — It falls within ambit of Entry 97. **A 1970 Andh Pra 86 (91, 92) (FB).**

(4) The entries in List 3 of Sch. VII are to be given a broad and liberal interpretation and each item regarded as including ancillary matters. The State therefore has power to create offence against laws with respect to any of the matters covered by the Concurrent List and it cannot be said that such offences can only be created by Parliament under the residuary Entry 97 of List 1. **A 1950 Pat 332 (339) (DB).**

(5) Parliament had power to legislate with regard to the subject dealt with in the Administration of Evacuee Property Act, 1950, under the residuary legislative powers given to it by Entry 97 of List 1. A 1952 Punj 389 (390) (DB).

(6) Act by State Legislature invalid being beyond its competence — Cannot be validated by Parliament. **A 1966 SC 416 (421) •• A 1965 All 420 (432) (FB).**

(7) Sugarcane Cess (Validation) Act (1961), Sections 3 and 2 (b) being merely and simply an Act imposing taxation for union purposes the Parliament had the power to enact that legislation under Entry 97 of List 1. A 1964 Madh Pra 118 (123) (DB).

(8) The contribution made under Section 70 of the Bihar Hindu Religious Trusts Act is in the nature of a fee and not in the nature of a

of a part of the territory of India or secession of a part of the territory of India from the Union or causing insult to the Indian National Flag, the Indian National Anthem and this Constitution; taxes on foreign travel by sea or air, on inland air

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Schedule 7, List 1, Entry 97 (contd.)

tax and the State Legislature was competent to enact this provision. A 1954 Pat 266 (276) (DB).

(9) Parliament is competent by reason of the residuary entry in List 1 of Sch. VII, to bring to tax as part of the turnover, any amount, be it tax or designated by any other name. A 1962 Mad 290 (296) (DB).

(10) Parliament is competent to incorporate Chap. 22-A relating to Annuity deposits in Income-tax Act by virtue of Entry 97 of List 1, Sch. 7. **A 1966 SC 619 (622).**

(11) The Payment of Bonus Act, 1965, falls under the residuary powers contained in Item 97 of List 1 which must lend validity to the enactment. **A 1967 SC 691 (717).**

(12) Imposition of Wealth Tax on Hindu undivided family is intra vires. **A 1961 All 487 (490, 501) (FB).**

(13) Adjustment of boundaries between India and Foreign States is within the competence of Parliament under Entry 97, List I. A 1959 Cal 506 (507).

(14) Parliament is competent to enact law for an opinion poll in Goa, Daman and Diu. A 1967 Goa 79 (84).

(15) Sale of animals and birds in captivity will fall within List 1, Entry 97 and not under List II, Entry 54 or List I, Entry 92-A — Levy of tax on such sales is within competence of Parliament. A 1960 Ker 360 (360).

(16) Even if it be held that Sections 2 (6-A) (e) and 12-B of Income-tax Act (1922) as amended by Finance Act (1955) impose tax not on the income but on loan and thus outside the ambit of Entry 82, List I the legislative authority could be derived therefor under Entry 97, List I. A 1961 Mad 146 (151) (DB).

(17) It is obvious that Entry 97 in List 1, Schedule 7 among other things includes tax not mentioned in either List II or III and the Parliament has not otherwise enacted. Therefore the Travancore Cochin State can claim the benefit of Articles 372 and 277 of Constitution and continue the tax imposed under Travancore Cochin General Tax Act. **A 1964 SC 207 (217).** (A 1962 Ker 72 (FB), Reversed.)

(18) Articles 245, 246 and 248 read with Sch. VII, List 1, Item 97, show that the residuary power of legislation is vested in Parliament, whether in the field of constitutional law or statutory law amendment. **A 1967 SC 1643 (1658).**

(19) Section 2-A, Industrial Disputes Act, is not ultra vires — Parliament had power to enact it either under Entry 22 of Concurrent List or under Entry 97. A 1970 Delhi 60 (66) (DB) °° A 1970 Mad 82 (84) °° 1970 Lab IC 203.

(20) Peripheral similarity between purchase tax and excise levy does not spell essential sameness. Sugarcane tax operates in the neighbourhood of sugar excise but proximity is not identity. The tax is only on the purchase of cane, not its conversion into sugar. If the miller has his own cane farm and crushes it, he has no purchase tax to pay but cannot escape excise duty if any. A perspicacious appreciation of implications of purchase and production dispels confusion on the issue. **A 1980 SC 286 (298) : (1979) 55 Taxation 165.**

(21) It is competent for Parliament to impose special duty on import of country liquor in Union Territory of Delhi, and hence competent for the President to issue Ordinance in that behalf. **A 1979 SC 1550 (1552 to 1554) : 1979 Tax LR 2486 (2488-2490).**

(22) Entry 97 of List I of the Seventh Schedule to the Constitution provides full legislative competence to Parliament in relation to the Central Act inasmuch as it vests all residuary powers of legislation in Parliament. The contention based on the alleged lack of authority of law in Parliament is, therefore, rejected. **A 1979 SC 1972 (1976).**

(23) Commissions of Inquiry Act (1952), Section 3 is not invalid on the ground that federal structure of the State is jeopardised. It is within the legislative competence of the Parliament. The three Entries Nos. 94 and 97 of List I and Entry 45 of List III are bound to cover, between them, legislation authorising inquiries such, as one entrusted to the impugned Commission. **A 1978 SC 68 (102, 105, 111, 114).**

(24) Emblems and Names (Prevention of Improper Use) Act, 1950 — Act is not void for want of legislative competence of Parliament. **A 1975 SC 1172.**

(24A) The State Legislature is fully competent to pass a legislation prohibiting conversion by force or inducement to one's own religion. A. P. Act 27 of 1968 and Orissa Act 2 of 1968 fall within the purview of Entry 1 of List II of the Seventh Schedule. The said two Acts do not provide for the regulation of religion and there is no justification for the argument that they fall under Entry 97 of List I of the Seventh Schedule. **A 1977 SC 908 (912) : 1977 Cri LJ 551.**

(25) There is a distinction between a true net wealth tax and a tax which can be levied under Entry 86 of List I. While legislating in respect of Entry 86 of List I it is not incumbent on Parliament to provide for deduction of debits in ascertaining the capital value of assets. The Wealth Tax Act (1957) is amended by the Finance Act (1969) clearly falls within Entry 97 of List I, and no part of the legislation falls within Entry 86 of List I. **A 1972 SC 1061 : 1972 Tax LR 449 (469).**

(26) Section 24 of Finance Act 1969 which amends the relevant provisions of the Wealth Tax Act, 1957 so as to include capital value of agricultural lands for computing net wealth is not beyond the legislative competence of the Parliament and is intra vires the Constitution — Per majority. **A 1972 SC 1061 : 1972 Tax LR 449.**

(27) Expenditure Tax Act, 1957 is not invalid for want of legislative competence — Since the Act does not fall under any of the entries in List II or List III, it is covered by the residuary Entry 97 of List I. **A 1972 SC 2319 : 1972 Tax LR 360 °°** (1970) 1 Delhi 656 (DB).

travel and on postal articles, including money orders, phonograms and telegrams."

See the Constitution (Application to Jammu and Kashmir) Order, 1954, Para. 2, sub-para. (22) (a) (iii) as substituted by C. O. 93 of 1972 (6-5-72).

Schedule 7, List 1, Entry 97 (contd.)

(28) Gift Tax Act (1958) is validly made by Parliament. A 1970 SC 999. (A 1962 Mys 269, Reversed.)

(29) Rubber Act (1947) (as amended in 1960), S. 12 (2) — Validity — Excise duty on rubber — Levy and collection from users of rubber — Whatever be the nature of the duty imposed, Parliament has legislative competence under List I, Entry 97 of Sch. VII read with Article 248 of the Constitution even with regard to imposition which does not fall within Entry 84. A 1970 SC 1589 (1593).

(30) Interpretation of Entries 86 and 97 — Wealth Tax Act (1957) — Expression 'net wealth' as amended by Finance Act, 1969 so as to include capital value of agricultural land — Amendment is ultra vires — Amendment cannot be justified under Article 248 read with Entry 97. A 1971 Punj 155 : 1971 Tax LR 61 (FB).

(31) Whether provisions of S. 64 (ii) of Income-tax Act (1961) can be sustained as valid under the residuary powers of the Central Legislature under Art. 248 read with Sch. 7, List I, Entry 97. (Quaere.) 1971 Tax LR 1279 (Bom).

(32) Amendments by Finance Act, 1972 of Ss. 2 (24) (ix), 10, 56 (2) (1-b) and 80-TT of Income-tax Act, 1961, including winnings from lotteries as taxable income — Not ultra vires. 1972 Tax LR 885 (All).

(33) Income-tax Act (1961), S. 140-A (3) — Validity of — It is not beyond the legislative competence of the Parliament. 1973 Tax LR 1008 (Mad).

(34) Power to levy fees given by S. 59 (d) of Punjab Excise Act (1 of 1914) to the Excise Commissioner is within the competence of the Central Legislature. 1972 Tax LR 1776 (Punj).

(35) A power to levy penalty is incidental or ancillary to the power to legislate on taxes on capital value of assets under Sch. 7, List I, Entry 86 of the Constitution. Apart from this, having regard to the widest language employed in Article 248 and Entry 97 of List I of Sch. 7 of the Constitution, in the absence of any contention that the subject matter is covered by any of the entires in List II, it must be held that Parliament is competent to legislate S. 19 (1) (a) of the Wealth Tax Act, 1957. 1974 Tax LR 232 (237) (Mad).

(36) Imposition of wealth tax on capital value of the assets — Is within legislative competence of Parliament under Entry 86 or Entry 97 of List I of the Seventh Schedule to the Constitution. 1976 Tax LR 164 (170) (Cal).

(37) Beedi and Cigar Workers (Conditions of Employment) Act, 1966, is within the legislative competence of the Parliament The subject matter of the Act falls principally under entry as also partly under Entries 7, 22 and 23 of List III in the Seventh Schedule without the necessity to resort to the residuary power under List I, Entry 97 which also covers it. A 1971 Bom 244 (251) : 1971 Lab IC 1080.

(38) Resort to residuary power under Article 248 read with Entry 97, List I, should be made as a last refuge, and only when all the categories of the three lists are absolutely exhausted. A 1972 Cal 160 (166).

(39) Parliament had power to enact S. 2-A of the Industrial Disputes Act, either under Entry 22 of the Concurrent List or under Entry 97 of the Union List read with Art. 248 of the Constitution. A 1970 Delhi 60 (66) : 1970 Lab IC 421.

(40) Even if the amended Section 2-A of the Industrial Disputes Act, 1947, is held to be not falling under Entry 22 of List III, it would certainly fall under the residuary Entry 97 of List I. A 1970 Mad 82 (84).

(41) Orissa Freedom of Religion Act, 2 of 1968, is in pith and substance a law relating to religious Entry No. 1 of either List II or List III does not authorise the impugned legislation. Entry 97 of List I of Seventh Schedule applies. A 1973 Orissa 116 (122, 123).

(42) The Parliament is competent to enact Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, under Entry 97 of List I of the Seventh Schedule of the Constitution. Even if the matter does not fall under the Entries 9 and 36 of List I and Entry 3 of List III, the Parliament can exercise legislative power under Entry 97. 1975 Cri LJ 1974 (1977, 1980) (Punj).

(43) Inclusion of agricultural lands in definition of assets for purposes of wealth tax — Not ultra vires. (1974) 94 ITR 393 (DB) (Mad). ((1972) 83 ITR 582 (SC), Applied.)

(44) Parliament can impose a duty on import of liquor into the Union territory without such duty being the countervailing duty. The subject matter of this duty does not fall under Entry 51 of the List II and the basis of this new duty is different from the old one. Secondly under Article 246 (4) it is the Parliament that has the power to legislate for the Union territories and that power is untrammelled by the limitations prescribed by Art. 246 (2) & (3) and Entry 54 of List II and is plenary and absolute subject to such restrictions as are imposed by the Constitution. Thirdly special duty is not covered by Entry 51 of List II but is an independent duty falling under Entry 97 of List I which includes not only subjects outside List II and List III but also taxes which are outside those lists. ILR (1979) 1 Delhi 712 (718, 719) (DB).

(45-46) Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (1974) — Validity — Not beyond legislative competence of Parliament. ILR (1975) 2 Delhi 820 (DB).

(47) Section 2-A of Industrial Disputes Act (1947) is not ultra vires Entry 22 of List III — Residuary power under Entry 97 of List I cannot be invoked to save Section 2-A — That

LIST II — STATE LIST.

1. Public order (but not including [a][the use of any naval, military or air force or any other armed force subject to the control of the Union or of any contingent or unit thereof] in aid of the civil power).

[a] Substituted by Constitution (Forty-second Amendment) Act, 1976, Section 57 (3-1-77).

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The State List shall be omitted. See Constitution (Application to Jammu and Kashmir) Order, 1954, Para. 2, sub-para. (23) (b).

Schedule 7, List 1, Entry 97 (contd.)

power can be invoked only when matter is not enumerated in List II or III. (1970) 83 Mad LW 574.

(48) Levy of countervailing duty on imported goods by introducing Section 2-A is within legislative competence of Parliament — Countervailing duty is not a tax. (1973) 2 Mad LJ 413.

(49) Beedi and Cigar Workers (Conditions of Employment) Act (1966), Preamble — Validity of Act — Even if it does not fall within Entry 24 of List 3, the Act is protected by Entry 97. (1972) 1 Mys LJ 450.

(50) Post manufacturing expenses cannot be brought within the ambit of 'duty of excise' within Art. 248 and Entry 97 of List I of the Seventh Schedule. 1978 ELT (J) 595 (606) (Ker).

(51) Levy of circumstances and property tax is covered by Entries 49 and 60 of List II of Sch. VII to the Constitution and as such is valid. It is not a tax on income. It is not necessary to resort to Art. 277 to uphold its validity. **A 1980 SC 1088 (1095) : 1980 All LJ 483.** (A 1970 All 316 (FB), **Reversed.**)

(52) The mere name of a tax does not bear on legislative competence and the absence of express enumeration of a tax by a particular name will not justify the tracing of legislative authority to the residuary entry. What is true in other jurisdictions is true in this branch of law also, namely, that one must have regard to the substance of the matter and not to the form or label. **A 1980 SC 1088 (1095) : 1980 All LJ 483.**

Schedule 7, List 2 (General)

(1) Power conferred on legislature can be exercised both prospectively and retrospectively. **A 1963 SC 1667 (1673).**

(2) The Constitution recognises a clear distinction between a tax and a fee. In the lists I and II entries conferring taxation powers are separately enumerated after entries conferring general legislative powers. A fee may be levied even under an enactment relating to imposition of tax. **A 1965 SC 1107 (1122, 1123).**

(3) State Legislature is competent to enact law under the various provisions of the list. **A 1967 SC 1512 (1519).**

(4) The object of setting out various items and assigning them to separate lists is to make division of power as clear cut and as exhaustive as possible, though overlapping in the same list between various items and overlapping between items in different lists was inevitable to some extent. (1965) 67 Bom LR 484 (DB).

(5) Constitution makes a clear division of authority between the Centre and the States and each one is supreme in its own sphere. The question of repugnancy can arise only in respect of list III. 1968 Cri LJ 557 (559) (Cal) (DB).

(6) Article 246 has nothing to do with question of interpreation of the Union or State Entries. A 1968 Guj 124 (139) (DB).

(7) Entries in the Legislative Lists in Schedule VII should be given the widest scope of which their meaning is fairly capable and each general word should accordingly be held to extend to all ancillary and subsidiary matters which can fairly and reasonably be comprehended in it. A 1969 Mys 23 (35) (DB).

(8) Within its own sphere the powers of State Legislatures are as large and as complete as they are in a sovereign Parliament. So, a State Legislature can exercise that power as many times as it may consider necessary and can pass successive enactments by way of repeal or amendment of former enactments. (1967) 33 Cut LT 263 (319) (DB).

(9) Construction without permission — State Government is competent to enact legislation regarding same. 1971 All Cri R 566 (All).

(10) Circumstances and Property tax falls within State List. 1971 Tax LR 784 (All).

Schedule 7, List 2, Entry 1

(1) The expression 'public order' in this entry is an expression of wide connotation and signifies that state of tranquillity prevailing among the members of a political society as a result of the internal regulations enforced by the Government which they have instituted. **A 1950 SC 124 (127) : 51 Cri LJ 1514 ** A 1955 All 193 (219) : 1955** Cri LJ 623 (DB).

(2) Maintenance of public order within a State is primarily the concern of that State and subject to certain exceptions the State Legislature is given plenary power to legislate on all matters which relate to or are necessary for maintenance of public order. **A 1950 FC 59 (63) : 51 Cri LJ 921.**

(3) 'Public order' includes public safety in its relation to maintenance of public order, both of them being interdependent. **A 1943 FC 75 (83) : 45 Cri LJ 341 ** A 1949 Pat 369 (375) : 50 Cri LJ 730 (FB) ** A 1953** Trav-Co 540 (540, 541) : 1953 Cri LJ 1786.

(4) Any law imposing reasonable restrictions on the Fundamental Right granted under Article 19 (1) (a) to (c) of the Constitution, in the interest of public order is expressly saved and such law cannot be said to be void on ground of violation of Fundamental Rights. A 1955 All 193 (217) : 1955 Cri LJ 623 (DB).

[2. Police (including railway and village police) subject to the provisions of Entry 2A of List I.]

[a] Substituted by Constitution (Forty-second Amendment) Act, 1976, Section 57 (3-1-77).

Schedule 7, List 2, Entry 1 (contd.)

(5) Section 3. U. P. Special Powers Act, 1932, is inconsistent with Article 19 (1) (a) of the Constitution and the restrictions imposed by it were not in the interest of public order. A 1952 All 193 (223): 1955 Cri LJ 623 (DB).

(6) If a law made by the State Legislature falls in pith and substance under this entry, it cannot be declared ultra vires merely because it incidentally trenches upon a subject assigned to the Union Parliament under List 1 of the Constitution. A 1948 Nag 199 (203): 49 Cri LJ 230 (DB).

(7) If a law made by the Parliament falls in pith and substance under one of the subjects enumerated in the Union List it cannot be declared invalid merely because there is an incidental encroachment on the subject of public order under this Entry. A 1957 Pat 252 (255): 1957 Cri LJ 648 (DB).

(8) Parliament has power to legislate with respect to election offences by virtue of Article 327 read with Entries 72 and 93 in List I, even though such offences may relate to 'public order.' A 1954 Pat 356 (357): 1954 Cri LJ 1132.

(9) An order of externment passed under Sec. 46 (3) of the Bombay District Police Act is not void under Art. 13 as it does not place an unreasonable restriction on the fundamental right under Art. 19 (1) (d) and (e) of the Constitution. **A 1950 Bom 374 (375): 52 Cri LJ 1059 (FB).**

(10) S. 9, Punjab Security of the State Act deals primarily with the question of public order, and not with the question of contempt. The entire provisions of Sec. 9 fall within the ambit of Item I of List II and therefore there is nothing repugnant in this section to the Contempt of Courts Act 1952. A 1956 Punj 169 (170, 171): 1956 Cri LJ 1015 (DB).

(11) Ajmer (Sound Amplifiers Control) Act (III of 1953), Sec. 2. is within the powers of Entry 6 and also conceivably within Entry 1 of the State List. **A 1959 SC 544 (547): 1959 Cri LJ 660**

(12) The object of preventing the occurrence of fire and preventing of consequent danger to life and property evidently falls within entry No. I of List II. (1965) 67 Bom LR 484 (DB).

(13) Under Entry 1 and Entry 2 subjects "Law and Order" and "Police" are specifically State subjects under List II yet, Police Act (1861) being an existing law within Article 372 still continues in force and any action taken by the Parliament or the Central Government under the Act will not be ultra vires. A 1958 Cal 365 (372).

(14) An insult to national honour like the kind mentioned in Sec. 5 of Madras Prevention of Insults to National Honour Act (14 1957) falls under "Public order" and hence State Government was competent to enact the statute under Entry I List II. A 1965 Mad 11 (13): 1965 (1) Cri LJ 49 (DB).

(15) Appointment of a Committee to inquire and investigate into the activities of Christian Missionaries was within the competence of State Government and falls within Entry 1 of List II. 1957 MPLJ (Nag) 1 (18) (DB).

(16) The words 'person or property' in Sec. 4 (a) do not refer to the body or property of a specified individual. The word "person" is used in the sense of the 'living body of a human being.' Since the provisions of Cl. (a) are enacted to prevent a person from movements or acts which are causing or are calculated to cause alarm, danger or harm to human body or property of the public or of a section of the public or of unspecified individuals, they are directly related to maintenance of public order as meaning peace and tranquillity. So also the provisions of Clause (b) under which preventive action can be taken in respect of certain offences referred to therein refer not to offences against specified individuals but against the community and therefore they are intended for the maintenance of public order. 1972 Cri LJ 150: 1972 Jab LJ 370 (Madh Pra).

(17) Provisions of Sections 3, 4 and 5 of M. P. Dharma Swatantrya Adhiniyam (1968) relating to conversion by allurement — Whether State legislature has competence to enact — Is the subject matter beyond the competence of State legislature? No. A 1973 Orissa 116, **Dissented from.** A 1975 Madh Pra 163.

(18) Consideration which governs the interpretation of the phrase "public order" in Article 19 (2) cannot be imported into construction of 'public order' as a legislative head of power. A 1973 Orissa 116 (123).

(19) Orissa Freedom of Religion Act (2 of 1968) — State Legislature is competent to enact. A 1973 Orissa 116.

(20) M. P. Act 27 of 1968 and Orissa Act 2 of 1968, prohibiting forcible conversion fall within the purview of Entry 1 of List II of the Seventh Schedule, as they are meant to avoid disturbances to the public order by prohibiting conversion from one religion to another in a manner reprehensible to the conscience of the community. **A 1977 SC 908 : 1977 Cri LJ 551 (552).**

(21) Inasmuch as Art. 33 applies to the Police Forces (Restriction of Rights) Act, 1966, and in view of the nature of the provisions no question of usurping jurisdiction of the State Legislature as contained in Entries 1 & 2 of List II of the VIIth Schedule arises in the instant case. A 1977 Cal 237 (239).

Schedule 7, List 2, Entry 2

(1) The word "police" in its general sense connotes the department of the Government or the civil force charged with duty to maintain internal peace and order. A 1955 All 370 (372): 1955 Cri LJ 901.

(2) Under this entry it is within the powers of the State Legislature to legislate with regard to police including its strength, its manner of recruitment and other in-

3. [a][* * * * *] Officers and servants of the High Court; procedure in rent and revenue Courts; fees taken in all Courts except the Supreme Court. [Government of India Act, 1935, Items 1 and 2.]

[a] Omitted by Constitution (Forty-second Amendment) Act, 1976, S. 57 (3-1-77).

Schedule 7, List 2, Entry 2 (contd.)

cidental matters. A 1955 All 370 (372): 1955 Cri LJ 901

(3) The fact that 'police' is exclusively a State subject under this entry does not affect the Police Act of 1861, which as a 'law in force' has been saved by Article 372 (1). A 1957 Raj 28 (29): (DB) ** A 1958 Cal 365 (372).

(4) The notification of the Central Government, under Sec. 3 of the Delhi Special Police Establishment Act, 1966, extending its powers and jurisdiction to the Madras State in respect of the offences noted thereunder has no vice and is good in law. 1972 Mad LW (Cri) 11 (18, 19).

(5) Railway Protection Force officers are not "police-officers." Confessions made to them are not hit by Sec. 25 of the Evidence Act. (1975) 77 Bom LR 295.

SCHEDULE 7, LIST 2, ENTRY 3

SYNOPSIS

1. Scope.
2. Court.
3. Fees taken in Courts.

1. Scope.— (1) Administration of justice is a subject on which only the State Legislature can legislate. **A 1951 SC 69 (70).**

(2) "Administration of justice" is a conception of the most general nature. The following words, "constitution and organisation of all Courts, except the Supreme Court and the High Court" are not words of limitation but of explanation or illustration. A 1954 Pat 97 (99) (DB).

(3) The entry includes "administration of justice" and "constitution and organisation" of Courts but does not include their jurisdiction and powers. But, it has been held that the language of these expressions is of the widest amplitude and would include within its ambit legislative power in respect to jurisdiction and powers of Courts for the purpose of administration of justice and that this general power conferred by Entry 3 is not curtailed or limited by Entries 95, 65 and 46. **A 1951 SC 69 (83, 85)** ** A 1949 Bom 197 (202) (DB).

(4) Since a State Legislature is competent under this entry to confer by legislation general jurisdiction and powers upon a Court, the mere fact that, while doing so, there is an incidental encroachment upon any Central subject will not make the law invalid. **A 1951 SC 69 (85)** ** A 1957 Cal 534 (545) ** A 1949 Bom 197 (202) (DB).

(5) The expression "administration of justice" includes the power to try suits and proceedings of a criminal nature, as also the power of defining, enlarging, altering, amending and diminishing the jurisdiction of the Courts and defining their jurisdiction territorially and pecuniarily. **A 1951 SC 69 (70)** (Per Fazl Ali J.) ** A 1959 Andh Pra 3 (6) (DB).

(6) Bombay City Civil Courts Act (40 of 1948) and the Calcutta City Civil Courts Act (21 of 1953) are intra vires of the Provincial Legislatures. **A 1951 SC 69 (85)** ** A 1949 Bom 197 (202) (DB) ** A 1957 Cal 534 (543).

(7) Section 22 of the Rajasthan Premises (Control of Rent and Eviction) Act (17 of 1950), the amendment of Section 15 of the Mysore High Court Act by Act 35 of 1951, and the Travancore Cochin High Court (Amendment) Act (1 of 1952) are intra vires as they fell under this entry. A 1954 Raj 252 (256) (DB) ** A 1952 Mys 75 (76) ** A 1953 Trav-Co 53 (54, 55) (DB).

(8) Though the expression "administration of justice" is capable of being understood in a very wide sense, it should not be understood as including a provision for appeal and that every case of conferment of a right of appeal would not amount to the "constitution and organisation of Courts". **A 1949 Mad 481 (487) : 50 Cri LJ 684 (FB).**

(9) The validity of the Punjab Gram Panchayat Act (4 of 1953) cannot be challenged on the ground that it has sanctioned the appointment of an elective judiciary, because the State Legislature has power under entries 3 and 5 of List 2 to pass such legislation. A 1957 Punj 149 (150) : 1957 Cri LJ 796 (DB).

(10) The expression "administration of justice" is wide enough to include in it not merely "administration of justice" through Courts properly so called, but "administrative justice" through the machinery of administrative tribunals. A 1954 Pat 97 (99) (DB).

(11) The legislature had powers under this entry to make a provision like Section 37 of Vindhya Pradesh Abolition of Jagirs and Land Reforms Act (11 of 1952). **A 1960 SC 796 (800).**

(12) The enlargement of the pecuniary jurisdiction of a Civil Court comes within the purview of the expression "administration of justice — Courts" in Entry 3. A 1959 Andh Pra 3 (6) (DB).

(13) Entry 95 List I and Entry 46 List III do not in any manner derogate from the general powers given to the State Legislature under Entry 3. A 1959 Andh Pra 3 (6) (DB).

(14) The Parliament has no power to legislate with respect to vacation which matter falls under Entry 3. The power to regulate sittings includes the power to regulate the recess of the sittings, or the termination of the sittings. This power is exclusively with State Legislature under Entry 3. **A 1961 Cal 545 (549, 553) (SB).**

(15) Bengal Public Demands Recovery (Validation of Certificates and Notices) Act (11 of 1961) falls under Entries 3 and 45 of State List — Does not fall under Entry 43 of Concurrent list. A 1964 Cal 165 (172) : 1962 Cal LJ 210 (DB).

(16) Kerala State Legislature was fully competent to pass Kerala High Court Act (5 of 1959) by virtue of powers under Articles 225, 246 (3) read with Sch. VII, List II, Entry 3 and hence the Act is valid. **A 1961 Ker 96 (97) (FB).**

Schedule 7, List 2, Entry 3 — Note 1 (contd.)

(17) So far as the High Courts are concerned, the topic of jurisdiction and powers in general is not separately mentioned in any of the entries. But administration of justice as a distinct topic, finds a place in Entry 3 of List 2, even though this Entry excludes constitution and organisation of the High Court. Provisions, regulating the exercise of the jurisdiction of the High Court and the powers of the Judges thereof either sitting alone or in Division Courts have a direct bearing on the administration of justice. It will be within the competence of the State Legislature to enact a law governing those matters. **A 1961 Ker 226 (230, 231, 232) (FB).**

(18) Provisions of Sections 19 and 29 (2) (c) of Mysore Civil Courts Act (21 of 1964) are within the legislative competence of the State Legislature by virtue of Entry 3, List II. A 1965 Mys 76 (82) (DB).

(19) Rajasthan Civil Courts Laws (Extension) Act (2 of 1957) falls under List 2, Item 3 of Sch. 7 and not under List 3, Item 13 and does not conflict with Ajmer Courts Regulations (9 of 1926) — It is intra vires. ILR (1960) 10 Raj 1678 (DB).

(20) It is open to a State Legislature to define a "foreign judgment" and how it is to be enforced within its State subject to any legislation by the Parliament. **A 1959 Punj 265 (269) (FB).**

(21) U. P. High Court (Abolition of Letters Patent Appeals) Act (14 of 1962) (as amended by U. P. High Court (Abolition of Letters Patent Appeals) (Amendment) Ordinance (U. P.) Ordinance 12 of 1972) later replaced by U. P. High Court (Abolition of Letters Patent Appeals) (Amendment) Act (32 of 1972). Section 4 — Constitutionality of Amending Ordinance and Amending Act — State Legislature was competent to make such amending laws (Per majority). **A 1973 All 596 (FB).**

(22) Notification under Cl. 14 of U. P. High Courts (Amalgamation) Order 1948, by Chief Justice — Falls under Entry 3 of List II and not under Entry 78 of List I. A 1975 All 52 (DB).

(23) State Legislature of J. and K. State is competent to enact J. and K. Court-fees Act (7 of Smvt. 1977). **A 1974 J & K 19 (27) (SB).**

2. Court.— (1) The term "Court" has acquired the meaning of "a place where justice is administered." **A 1951 SC 69 (88)** ** A 1956 Orissa 7 (10) (DB).

(2) It also applies to persons who exercise judicial functions under authority derived either immediately or mediately from the sovereign power. **A 1950 SC 188 (195)** ** A 1956 Orissa 7 (10) (DB).

(3) The Constitution distinguishes between Courts and tribunals, and it is clear that in Entry 3, the word "Courts" cannot include all tribunals. A 1956 All 258 (265) : 1956 Cri LJ 679 (DB).

(4) The test to determine whether a tribunal is a Court is whether it exercises sovereign judicial power of the State and whether it is a place where justice is judicially administered. A 1956 Orissa 7 (10, 11) (DB).

(5) There is power in the State Legislature under Entry 3 of List II to constitute the Sessions Court of Madras and to invest it with a part of the jurisdiction then existing in Original or Appellate side of the High Court. A 1959 Mad 261 (268) : 1959 Cri LJ 731.

(6) Entry 3 of List II of the Seventh Schedule to the Constitution is wide enough to include the power of the Legislature to make a law for the operation of a Tribunal. 1977 Lab IC (NOC) 48 (All).

(7) Power to establish additional Court is included within this entry. A 1972 Cal 160 (168) : 75 Cal WN 236.

(8) When the Parliament, exercising powers under Articles 2 and 3 of the Constitution, enacts a law for the organisation of States, it can provide for the organisation of the respective organs of the State including the High Court. **A 1977 Madh Pra 116 (154, 155) (FB).**

(9) The President's notifications dated 28-11-1968 conferring territorial jurisdiction on respective Benches of the M. P. High Court are not in contravention of Art. 214 of the Constitution or Item 3 in List II of the Seventh Schedule thereof. **A 1977 Madh Pra 116 (158, 167, 172, 173) (FB).**

3. Fees taken in courts.— (1) The Mysore Legislature was fully competent under this entry to pass the Mysore Court Fees (Amendment) Act (9 of 1954). A 1954 Mys 161 (162) (DB).

(2) Andhra Legislature having power under this entry to enact the Andhra Court-fees and Suits Valuation Act (7 of 1956), the provision in that Act prescribing court-fee payable on a writ petition should prevail over the rule made by the High Court for the same purpose. A 1957 Andh Pra 123 (126) (DB).

(3) The Assistant Collector or the Revenue Commissioner exercising powers under the Orissa Sales Tax Act (14 of 1947) is not a judicial tribunal functioning as a Court, therefore, the State Legislature has no power under this entry to levy court-fees on petitions filed before him. A 1956 Orissa 7 (11) (DB).

(4) The levy imposed by the provisions of Section 4 and Sch. II, Article 1 (e) of Court-fees Act (1870) as amended by U. P. Act (10 of 1959) is a fee and not a tax and comes within the purview of Entry 3. **A 1960 All 462 (463) (FB).**

(5) The power has been specifically conferred on State Legislature by Entry 3, to make law in regard to fees taken in all Courts except Supreme Court. A 1959 Andh Pra 271 (272) (DB).

(6) The Assam Sales Tax Act was enacted under List II, Entry 48. So no rule enacted under S. 52 (1) of the Act derives its legislative competence from Entry 3 of List II. A 1959 Assam 216 (220) (DB).

(7) In order to avoid confusion and in order to avoid provision being made for fees taken in Court at two places — One specifically under Entry 3 and the other generally under Entry 66 — Fees taken in Court are specifically excepted from the general entry under Entry 66. A 1960 Bom 96 (99).

(8) Levy imposed under Bombay Court-Fees Act (36 of 1959), Sch. 1, Article 16 is neither tax nor fee in the strict sense — It is within legislative competence of the State under Sch. 7, List 2, Entry 3. A 1962 Bom 106 (113) (DB).

4. Prisons, reformatories, Borstal institutions and other institutions of a like nature, and persons detained therein; arrangements with other States for the use of prisons and other institutions.

5. Local Government, that is to say, the constitution and powers of municipal corporations, improvement trusts, district boards, mining settlement authorities and other local authorities for the purpose of local self-government or village administration.

[Government of India Act, 1935, Item 13.]

Schedule 7, List 2, Entry 3 — Note 3 (contd.)

(9) Article 1 of Sch. 1 of the Madras Court-fees and Suits Valuation Act of 1955 and Rule 1 of Order 2 of the High Court Fees Rules, 1956, in so far as they set out for the levy of Court-fees in the High Court in the exercise of its original jurisdiction are invalid and ultra vires as an impost in excess of the powers conferred on the State Legislature by Entry 3 of List II of the 7th Schedule to the Constitution of India. (1968) 1 Mad LJ 37 (DB). (A 1960 All 462 (FB) and A 1962 Bom 106, **Dissented.**)

(10) The fees taken in Courts and the fees mentioned in Entry 66, List I are of the same kind. They may differ from each other only because they relate to different subject matters and the subject matter may dictate what kind of fees can be levied conveniently, but the overall limitation is that fees cannot be levied for the increase of general revenue. Observations of Mootham, J. in A 1960 All 462 (FB), **Overruled** — Whenever the State Legislature generally increases fees it must establish that it is necessary to increase court-fees in order to meet the cost of administration of civil justice. As soon as the broad correlationship between the cost of administration of civil justice and the levy of court-fees ceases, the imposition becomes a tax and beyond the competence of the State Legislature. It is for the State to establish that what has been levied is court-fees properly so-called and if there is any enhancement the State must justify the enhancement.

Fees and taxes are both revenue for the benefit of the State. The fact that one item of revenue is credited to the consolidated fund is not conclusive to show that the item is a tax. The Constitution did not contemplate it to be an essential element of a fee that it should be credited to a separate fund and not to a consolidated fund. Observations of Dayal, J. in A 1960 All 462 (FB) Approved. **A 1973 SC 724 (729, 730, 733): 1973 Tax LR 581.**

(11) Court-fee referred to in these entries is different from fee as generally understood. **A 1974 J & K 19 (SB).**

(12) Ad valorem court-fee on value of subject-matter without any slab system or upper limit is not invalid or ultra vires the powers of the State Legislature. A 1979 Kant 119 (126).

(13) Levy of court-fees at the flat rate of 7½ per cent under Act 1 in Sch. I to the Madras Court-fees and Suits Valuation Act, 1955 and R. 1 (1) of the High Court-fees Rules, 1956, is unreasonable and arbitrary and as such invalid. No principle of rationalisation justifiably demands such a flat rate as found in the said provisions. (1975) 1 Mad LJ 390 (401) (DB).

Schedule 7, List 2, Entry 5

(1) The entry is very wide in its terms and legislation is permissible to the State Legislature with regard to any subject of local Government. A 1955 Bom 185 (187) (DB) ** A 1966 Bom 15 (18) (DB) ** A 1962 Manipur 28 (30).

(2) The mere fact that the Constitution has not provided for any reservation for women in Parliament or in State Legislatures cannot be used as an argument against competency of the State Legislature to make provision for reservation of seats for women in local bodies. A 1953 Bom 311 (312, 313) (DB).

(3) State Legislature has no power to confer upon a local authority the power to tax, which power it itself does not possess. A 1955 Bom 185 (187) (DB).

(4) The fact that the State Legislature has authorised a local body to levy a tax within its power does not prevent the State Government from levying again a tax on the same subject matter. A 1954 Bom 261 (265) (DB).

(5) The State Legislature is competent to confer upon the local authority the power to tax and its competency cannot be affected because the power that has been conferred is an unlimited power. A 1955 Bom 185 (187) (DB).

(6) The pith and substance of the Industrial Disputes Act, 1947, is industrial and labour disputes. The enactment trespasses upon or invades this entry so far as it applies to disputes between a municipality and its employees. But, the Act is not ultra vires the Central Legislature because it invades to a slight extent upon an entry in the State List. A 1950 Cal 457 (462) (DB).

(7) In enacting the U. P. Panchayat Raj Act (26 of 1947) constituting Panchayat Adalats, defining their powers, laying down the procedure and regulating the rules of evidence, the U. P. Legislature purported to act under the relevant entries of the Concurrent List. A 1954 All 655 (657) : 1954 Cri LJ 1399 (DB).

(8) The power conferred by this entry on the State Legislature necessarily carries with it all ancillary and incidental powers. The Rules framed by the State Government under Section 112 (2) (1) of the Madras Village Panchayats Act (10 of 1950), constituting the Election Commissioner to hear the election disputes are, therefore, intra vires and valid. A 1957 Andh Pra 393 (400, 403) ** 1955 Andh WR 754.

(9) The State Legislature cannot authorise a Municipal body, a power higher than it itself possesses. Entry 5, List II cannot be understood in the light of Legislative practice and Legislative practice cannot prevail over limitation imposed upon the Legislature. **A 1965 SC 1107 (1135, 1136).**

Schedule 7, List 2, Entry 5 (contd.)

(10) From a conjoint reading of Entries 5, 17 and 66 of List II it could be clear that U. P. State Legislature is competent, after coming into force of the Constitution, to enact a law with respect to fees in relation to water supply by a Municipality to its inhabitants. A 1961 All 583 (584).

(11) The contention cannot be accepted which in effect urges that since the word "constitution" in Entry 5, List 2 of Sch. 7 of the Constitution includes dissolution, the power of dissolution is a legislative function and incidental to the power to constitute, a similar construction should be given to that word in Section 3 (1) of the Andhra Pradesh Panchayat Samithis and Zilla Parishads Act, 1959, as to confer a power on the Government to abolish Panchayat Samithis. A 1965 Andh Pra 40 (48) (DB).

(12) State Legislature can confer on a local body power to tax "Land" under Entry 5. The Legislature has this power under Entry 49. **A 1959 Assam 221 (227) (SB).**

(13) Entry 5, List II does not stand in conflict with Entry 53 in List I. (1965) 67 Bom LR 484 (DB).

(14) State Legislature is competent under Entry 5 to enact Ch. 14 of Maharashtra Zilla Parishads and Panchayat Samities Act (5 of 1962). A 1967 Bom 482 (503) : 1968 Lab IC 368 (DB).

(15) Under Entry 5 the delegation to a Municipality or local body of a power to impose or levy a tax enumerated in List II for purposes of local self-government is permitted. A 1959 Cal 704 (734) (DB).

(16) The term "local authority" in Article 12 is to be understood as referring to the authorities mentioned in Entry 5 of List II. A 1962 Cal 10 (11).

(17) Licence fee on purchasers of entrails and offals at slaughter house — No provision in Act or Bye-laws authorising its imposition — Corporation is statutory body and its powers to realise fees, charges and taxes have been defined and created by statute and unless there is clear provision in statute or in Bye-laws framed thereunder imposition of fee is unlawful. A 1967 Cal 174 (178).

(18) Under Entry 5, it is permissible for the State Legislature to create Janpad Sabhas, Municipalities and to authorise them to levy taxes which the Legislature could levy. **A 1963 Madh Pra 74 (84) (FB).**

(19) The word "powers" used in Sch. 7, List 2, Entry 5 of the Constitution, which is unqualified, includes the powers of making laws and imposing taxes. When the Constitution enabled the Legislature of a State to make laws about the constitution and "powers" of local authorities for the purpose of local self-Government, it authorised the Legislature to confer on the local authorities, by such laws made for that purpose, limited powers of making laws and imposing taxes. **A 1963 Madh Pra 74 (81, 82, 85) (FB).**

(20) It is not necessary to read Entry 5 in conjunction with Entry 49 of List 2 to interpret Entry 49. (1966) 2 Mad LJ 172 (DB).

(21) Though the law enacted under Section 262-A of Madras District Municipalities Act (5 of 1920) and justified as coming within the purview of Entry 5, List II, any provision therein delegating to a local body the authority to levy a tax or a licence-fee must be related to one or the other of the topics in List II. A 1966 Mad 20 (21) (DB).

(22) The Bombay Village Panchayats Act (6 of 1933) falls under List 2, Entry 5 of Sch. 7. A 1961 Mys 257 (259) : 1961 (2) Cri LJ 789 (DB).

(23) Under Entry 5, the State Legislature can provide for other disqualifications other than those provided in Representation of the People Act (1950) subject to the provision of the Constitution. A 1968 Mys 198 (200).

(24) Validity of Sections 388 to 390 of Bihar and Orissa Municipal Act (7 of 1922), need not be tested for its validity with reference to Entry 5, as the Act has continued as a valid law. A 1954 Pat 346 (DB).

(25) The true nature and character of the Minimum Wages Act (1948) in making provision for minimum wages and machinery for the payment of the same is to bring that statute strictly and squarely within the ambit and scope of Entry 27, List III (Entry 24, List III, Sch. VII Constitution of India) only and merely because in one respect it shades into the field of Entry 13, List II (Entry 5, List II Sch. VII of Constitution) it cannot be held unconstitutional. (1963-64) 24 FJR 194 (197) (DB) (Punj).

(26) Entry 3 and Entry 5 of List 2 confer ample power on State Legislature to provide for administration of justice and constitution of local authorities. The mere fact that Punjab Gram Panchayat Act (4 of 1953) does not lay down the criteria for determining the qualification of the Panchas it would not contravene the Constitution. A 1957 Punj 149 (151) : 1957 Cri LJ 796.

(27) By virtue of Entry 5 read with Entry 11 of List II, the Punjab Legislature has power to pass laws in respect of taking over management and control of aided schools run by Local Authorities. A 1966 Punj 232 (238) (DB).

(28) The definition of the term "the State" in Article 12 read with Entry 5 of List II clearly shows that Gram Panchayats also are included in the expression "the State". A 1966 Raj 125 (127) : 1966 Cri LJ 584.

(29) Even if the word "constitution" occurring in Entry 5 of List II has reference only to establishment of municipal bodies, the word 'power' occurring in the same entry is wide enough to include not only powers of municipal bodies but also limitation of such powers. Sec. 320 of Karnatak Municipalities Act conferring on the State Government power to transfer municipal officers from one body to another, is not ultra vires the powers of the State Legislature. 1980 Lab IC 414 (416) (Kant) : (1979) 2 Kant LJ 173.

(30) In view of the language of Entry 5 of List II of the VIIth Schedule, the objection regarding the validity of Rule 6 (2) (iii) of the U. P. Palika (Centrallised) Services Rules, 1966, is not sustainable (Obiter). **1979 SC 592 (597) : 1979 All LJ 340 (345) (SC).**

(31) U. P. Municipalities, Notified Areas and Town Areas (Alpakalik Vyavastha)

6. Public health and sanitation; hospitals and dispensaries. [Government of India Act, 1935, Item 14].

7. Pilgrimages, other than pilgrimages to places outside India. [Government of India Act, 1935, Item 15].

Schedule 7, List 2, Entry 5 (contd.)

Adhiniyam (13 of 1977) is within the Legislature competence of the State Legislature and is valid. 1978 All LJ 1247 (1248).

(32) The key to Item 5 of List II is to be found in the opening expression "local Government." The phrase "for the purposes of local self-Government' in Item 5 does not qualify and limit the scope of the opening expression 'local Government.' The subject-matter of the U. P. Ordinance No. 6 of 1970 falls within its wide scope. A 1970 All 571 (577, 578).

(33) Art. 171 (3) (a) enacts neither express nor implied limitation on scope of Item 5 of List II of Seventh Schedule. A 1970 All 571.

(34) Under Entry 5 of the State List of the Seventh Schedule to the Constitution it is open to the State Legislature to legislate in respect of every matter connected with "local government", which includes a Municipality, which includes election control & supervision thereof cancellation of calendar of events and postponement of poll etc. As such Sec. 38 of Karnataka Act 22 of 1964 is within the legislative competence of the State Legislature. A 1980 Kant 169: (1979) 2 Kant LJ 421.

(35) Extension of Kerala Municipal Corporation Act to Willington Island by notification under Sec. 3-A (2) of the Act — Whether without legislative competence — Held no — It cannot be said that the topic municipal administration undoubtedly covered by Entry 5 of List II also falls within the Entry 27 of List I of the Constitution. 1974 Tax LR 1929 (1932, 1933) (Ker).

(36) When legislating on the subject in Entry 5 of the State List of the VIIth Schedule to the Constitution, it is competent for the State Legislaure to delegate, for municipal purposes and subject to the procedure indicated any or all of its taxing powers. (1976) 89 Mad LW 131 (DB).

(37) It is well-settled that under the general Entry 5 of List II of the 7th Schedule to the Constitution, the legislature does not derive the power to impose taxes. The legislature derives such a power under Entry 5 read with Entry 49 in List II. ILR 1974 Cut 865 (876).

(38) Bihar Panchayat Raj Act, 7 of 1948, Sec. 4, as amended by 'Bih. Ordn. 5 of 1975, is not invalid on ground of repugnancy to the Representation of the People Act, 1951. The Bihar Panchayat Raj Act has been framed not under any item of the Concurrent List but under item 5 of the State List. **A 1979 Pat 130 (135) (FB).**

(39) Whenever an Entry demarcates the area of jurisdiction of a legislature to make laws for local self-government, it by a necessary implication authorises that legislature to confer authority on the local-body created to impose taxes in accordance with the law. But this principle cannot be invoked where the State Legislature frames a law as envisaged by Entry 5 of List II of the Seventh Schedule. 1977 Tax LR 2197 (2199) (Punj).

(40) The legislature is competent to enact two laws providing for two taxes of the same kind though for different purposes. The power to legislate with respect to local authorities for purpose of local self-government necessarily implies the power of taxation. The legislature when constituting a local authority for the purpose of self-government may therefore entrust to the local authority the power of taxation also. **A 1977 Punj & Har 297 (301, 302) (FB).**

(41) Emergency Legislative power of Governor — Promulgation of Rajasthan Urban Improvement (Amendment) Ordinance (1972) — Validity — **Held**, Governor had power to enact the Ordinance and the motive with which it was promulgated could not be looked into by the Court. A 1972 Raj 168.

Schedule 7, List 2, Entry 6

(1) Ajmer (Sound Amplifiers Control) Act (3 of 1953) is within Entry 6. **A 1959 SC 544 (547): 1959 Cri LJ 660.**

(2) Entry 6, List II is not in conflict with Entry 53 in List I of Sch. VII. (1965) 67 Bom LR 484 (497) (DB).

(3) West Bengal Fire Services Act (18 of 1950) is not repugnant to provisions of Petroleum Act, 1934. The Act certainly comes within Entry 6 of List II, while the Petroleum Act falls under Entry 53 of List I. A 1960 Cal 219 (225).

(4) West Bengal Cattle Licensing Act (1 of 1959) and Rules framed thereunder in 1960 were framed with the object to improve public health, and were within powers under Entry 6. Neither the Act nor the Rules violate Art. 301 of Constitution. A 1964 Cal 409 (415).

(5) The State Legislature is competent to make laws in respect of intoxicating Liquors as well as drugs under Entry 6, which refers to 'public health' Sec. 37-A of Punjab Act 4 of 1910 is, therefore, not beyond the Competence of State Legislature. **A 1978 All 386 (389): 1978 All LJ 581 (584) (FB).**

(6) Validity of Sections 96, 97 of Kerala Panchayats Act — State Legislature held competent to enact law contained in these Sections. A 1970 Ker 88: 1970 Cri LJ 470.

(7) Both medicinal and toilet preparations have to do with the 'health' and therefore the State Legislature would be well within its right to enact legislation to regulate the use of medicinal and toilet preparations in a manner so as to not affect the health of the citizens. A 1979 Punj 102 (108).

(8) Provision of Sec. 23B of the Raj. Sales Tax Act cannot be said to be ultra vires the State Legislature on the ground that it is not covered by Entry 54 of List II of the Seventh Schedule to the Constitution or by Entry 6 relating to transfer of property, or Entry 7 relating to contracts. 1976 Tax LR 2142 (Raj).

8. Intoxicating liquors, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors.

[Compare List I Entry 84 — Government of India Act, 1935, Item 31].

SCHEDULE 7, LIST 2, ENTRY 8
SYNOPSIS

1. Scope.
2. "Intoxicating liquors."
3. This Entry and Entry 41 of List I.
4. Duties on intoxicating liquors.

1. Scope.— (1) The power to legislate with respect to intoxicating liquors is expressed in wide terms and includes the power to prohibit intoxicating liquors throughout the State or in any specified part of the State. **A 1951 SC 318 (321) : 52 Cri LJ 1361 ** A 1942 FC 17 (19) : 43 Cri LJ 481 ** A 1950 Bom 221 (223) : 51 Cri LJ 1207 (DB) ** A 1951 Nag 58 (73) : 52 Cri LJ 1140 (FB).**

(2) The words "that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors" explain or illustrate and do not amplify or limit the words "intoxicating liquors" immediately preceding them and cover the whole field of possible legislation on the subject. **A 1942 FC 17 (20) : 43 Cri LJ 481.**

(3) Provisions of Section 129-A Bombay Prohibition Act (25 of 1949) are only ancillary to the legislative power of the State Legislature to make a law relating to matter under Entry 8. The ancillary provisions cannot be considered separately from the enactment and fall under the same head of Legislation. A 1964 Bom 253 (258) : 1964 (2) Cri LJ 523.

(4) Power to tax cannot be deduced as ancillary power from legislative entries. A 1969 Mys 23 (35) (DB).

(5) Auction of liquor licences — State has the exclusive right of privilege of manufacturing and selling liquor. **A 1975 SC 360 : 1975 Tax LR 1285.**

(6) Sections 11 and 12 of the A. P. Excise Act are clearly within the ambit of the State Legislature's power to legislate. The State Legislature is empowered to legislate in regard to transport of intoxicating liquors. (1972) APLJ 428 (430).

(7) No conflict between Entry 84 of List I and Entry 8 of List II. **A 1979 NOC 146 : 1979 Tax LR 2475 (2480) (Ker) (FB).**

(8) Kerala Rectified Spirit Rules (1972). R. 16 (4) — Power to levy supervision charges in respect of sales of non-duty paid rectified spirit from bonded spirit store — Not taken away by enactment of Medicinal and Toilet Preparations Act **A 1979 NOC 146 : 1979 Tax LR 2475 (Ker) (FB).**

(9) Bihar and Orissa Excise Act (2 of 1915), Section 22 (as amended by Orissa Act 4 of 1971), Section 29 (as amended by Orissa Act 10 of 1971) are intra vires the State Legislature. (1974) 40 Cut LT 247.

(10) Entry 8 of List II of the Seventh Schedule confers power on the State Legislature to enact a regulatory measure like the B. & O. Excise Act, 2 of 1915. 1972 Tax LR 1981 (1990).

(11) The State Legislature is fully authorised and competent to make a provision regarding prohibition, its source of power being Entry 8 of List II of the 7th Schedule to the Constitution. 1980 Tax LR (NOC) 13 (Pat) (DB).

(12) Entry 8 to be construed in a manner most beneficial to the widest possible amplitude of State's Legislative powers — Not confined to liquors which can intoxicate. (1972) 74 Punj LR 248.

(13) Power to levy fees given by Section 59 (d) of Punjab Excise Act (1 of 1914) to the Excise Commissioner is within the competence of the State Legislatures. 1972 Tax LR 1776 (Punj).

(14) A taxation law cannot be sustained by reference to a general entry in the legislative list. Thus it is clear that levy of excise duty on methanol can neither be justified under Entry 19 of List III nor under Entry 8 of List II. 1977 Tax LR (NOC) 47 (Raj) : 1976 Raj LW 338.

(15) Section 2 of the Bihar Excise (Amendment and Validation) Second Ordinance, 1977, is not invalid in that denatured spirit could be brought within ambit of Entry 8 of List II of the Seventh Schedule to the Constitution. 1980 Pat 32 (37, 40).

2. "Intoxicating liquors."— (1) The words "intoxicating liquors" cover not only those alcoholic liquids which are generally used for beverage purposes and produce intoxication, but also all liquids containing alcohol. **A 1951 SC 318 (325) : 52 Cri LJ 1361 ** A 1951 Nag 58 (73) : 52 Cri LJ 1140 (FB) ** A 1956 Bom 304 (309) (DB) ** A 1954 Mad 643 (645) (DB).**

(2) The definition of liquor in Sec. 2 (24) of the Bombay Prohibition Act (29 of 1949) and in Section 3 (14) of the Punjab Excise Act (1 of 1914) does not contravene the provisions of the Constitution. **A 1951 SC 318 (325) : 52 Cri LJ 1361.** (A 1951 Bom 210 (FB). **Reversed.)** ** A 1953 Punj 77 (78) : 1953 Cri LJ 549 (DB).

(3) The State Legislature is competent to make a law with respect to liquor even as broadly defined. **A 1951 SC 318 (329) : 52 Cri LJ 1361 **** A 1954 Mad 643 (645) (DB).

(4) The regulation in respect of liquors, other than consumable liquors, cannot exceed the legitimate purpose of assuring that non-beverages would not be consumed to produce intoxication but would be used in legitimate manner. **A 1951 Nag 58 (73) : 52 Cri LJ 1140 (FB).**

(5) The scheme of regulation introduced by the amended Bombay Prohibition Act, 1949, in so far as it relates to medicinal and toilet preparations which are fit for the use as intoxicating liquors is reasonable and it is reasonable in regard to preparations which are unfit for such use, with the result that the whole of that scheme is

9. Relief of the disabled and unemployable.
[Government of India Act, 1935, Item 32.]

Schedule 7, List 2, Entry 8 — Note 2 (contd.) reasonable; and since it is reasonable, it leads to the further consequence that Sections 12 (c) and (d) and 13 (b) of the Act which were declared to be void in the unamended Act by the Supreme Court in **A 1951 SC 318** are valid qua such preparations in the amended Act. A 1956 Bom 304 (318, 319) (DB).

(6) Provisions of the Madras Prohibition Act, 1937, except Section 23 (2), in so far as they relate to medicinal preparations, are regulatory and reasonable in character. A 1954 Mad 643 (646) (DB).

(7) The Punjab Intoxicating Spirituous Preparations Import, Export, Transport, Possession and Sale Rules, 1952, were held not ultra vires the Constitution. A 1953 Punj 77 (80) : 1953 Cri LJ 549 (DB).

(8) The Assam Liquor Prohibition Act 1 of 1953, was within the legislative competence of the State Legislature. A 1961 Assam 16 (17). (A 1957 SC 318, Foll.)

(9) Words "Intoxicating liquors" must include all preparations made from alcohol whether denatured or not — French Polish and Varnish fall within that expression. A 1964 Guj 59 (66, 67, 68) (DB).

(10) Sections 18, 27 and 28 of M. P. Excise Act (2 of 1915) (as amended by M. P. Excise (Amendment and Validation) Act (19 of 1964) — Sections 18 and 27 enabling State to lease its exclusive right to manufacture or trade in any intoxicant or liquor as made applicable to foreign liquor come within the legislative competence of the State. **A 1975 Madh Pra 1 (FB).**

(11) Section 3 of the U. P. Excise (Amendment) Ordinance, 1972, is ultra vires so far as it makes the provisions of Section 30 of the Excise Act applicable to the grant of licence for foreign liquor. 1973 Tax LR 2271 (2283) (All).

(12) There is no fundamental right to trade in liquor and the power of the State under Entry 8 List II in the Seventh Schedule to the Constitution is not merely regulatory but extends beyond it and the State can even exercise its police powers as the intoxicants are dangerous commodity in a society. Therefore the orders by the State to keep the liquor shops closed on stated days would be valid. A 1980 Kant 164 (165).

3. This Entry and Entry 41 of List I.— (1) The legislative powers given to Provinces under Item 31, List 2, Sch. VII of the Government of India Act, 1935 (corresponding to Entry 8, List 2, Sch. VII of the Constitution) were expressed in wide terms and there was nothing in Item 19 of List I to lead the Court to cut down the full meaning of the Provincial Entry by excluding foreign liquor from its purview. **A 1950 FC 69 (71) : 51 Cri LJ 1013.**

(2) The Bombay Prohibition Act (25 of 1949), in so far as it purported to restrict possession, use and sale of foreign liquor, was not an encroachment on the field assigned to the Federal Legislature under Item 19, List I, Schedule VII, Government of India Act, 1935. **A 1951 SC 318 (322) : 52 Cri LJ 1361.**

(3) If the true nature and character of the legislation or its pith and substance is not import or export of intoxicating liquor but its sale and possession, etc., then such a legislation cannot be declared invalid. **A 1951 SC 318 (323) : 52 Cri LJ 1361 ** A 1950 FC 69 (71) : 51 Cri LJ 1018 ** A 1951 Nag 58 (73) : 52 Cri LJ 1140 (FB) **** A 1950 Bom 221 (224) : 51 Cri LJ 1207 (DB) ** A 1941 Mad 621 (621) : 42 Cri LJ 672 (DB).

(4) It is true that Entry 8, in List 2, does not expressly mention imports, but it is well settled that entries in such list are enumerative and not exhaustive and, therefore, legislation with regard to import of intoxicating liquor would be included within the purview of the entry. A 1964 Guj 59 (65) (DB).

4. Duties on intoxicating Liquors.— (1) The duty on the spirit contents of medicinal preparations is in reality a duty on intoxicating liquors which has always been within the competence of the State Legislature. The duty imposed on bulk gallon of potable medicinal preparations is clearly excise duty on medicinal preparations and is within the exclusive competence of the Union. The two duties are so dissimilar that it is not possible to treat the one as substantially identical with the other. A 1954 Mad 643 (649) (DB).

[See also A 1958 Cal 203 (207).]

(2) Vending fee levied under the rules as consideration for parting with the exclusive privilege vesting in the State to trade in denatured spirit is valid under Entry 8 of List II. A 1978 All 529 (532) : 1978 All LJ 1112 (1115).

(3) A. P. Excise Act and the Rules thereunder in so far as they deal with methyl alcohol as intoxicating substance fall under Entry 8 of List II and are valid. 1978 Tax LR 1603 (1608) (Andh Pra) (DB).

(4) Power to levy license fee for retail vending of liquor cannot be deduced from Entry 8. 1975 Tax LR 1377 (Kant). (DB).

(5) U. P. Excise Manual Para. 680, R. 17 — Levy of vend fee on denatured spirit — Not without legislative competence — Word 'liquor' covers not only alcoholic liquor which is generally used for beverage purposes and produce intoxication but would also include liquids containing alcohol. **A 1980 SC 614 (619, 620) : 1980 All LJ 258.** (1973 All LJ 732 **Reversed.**)

Schedule 7, List 2, Entry 9

(1) Where the question arose whether the Bombay Refugees Act (22 of 1948), the pith and substance of which was the relief and rehabilitation of displaced persons, fell within the head "relief of the poor" in Item 32 of List 2 in the Government of India Act, 1935, it was held that though some of the refugees were poor, others were just evacuees, and it could not be said that the Act fell within the legislative head "relief of the poor." A 1953 Bom 415 (416, 417).

(2) M. P. Nirashriton Ki Sahayata Adhiniyam (12 of 1970) is a Legislation providing for the helpless and as such is within scope of State Legislation under Sch. 7, List 2, Entry 9 read with Art. 41. A 1972 Madh Pra 95.

10. Burials and burial grounds; cremations and cremation grounds.
[Government of India Act, 1935, Item 16.]

11. [Omitted by Constitution Forty-second (Amendment) Act, 1976, S. 57 (3-1-77).]

12. Libraries, museums and other similar institutions controlled or financed by the State; ancient and historical monuments and records other than those [a][declared by or under law made by Parliament] to be of national importance.

[a] Substituted for "declared by Parliament by law" by the Constitution (Seventh Amendment) Act, 1956, S. 27 (1-11-1956).

OBJECTS AND REASONS

See under List I, Entry 67.

13. Communications, that is to say, roads, bridges, ferries, and other means of communication not specified in List I; municipal tramways, ropeways; inland waterways and traffic thereon subject to the provisions of List I and List III with regard to such waterways; vehicles other than mechanically propelled vehicles.

[Government of India, 1935, Item 18.]

14. Agriculture, including agricultural education and research, protection against pests and prevention of plant diseases.

[Government of India Act, 1935, Item 20.]

Schedule 7, List 2, Entry 13

(1) Action of Calcutta Tramways Company Ltd., in fixing and charging fares to its passengers does not fall under Entry 13 of List II. A 1960 Cal 396 (399).

(2) Minimum Wages Act (1948) falls strictly and squarely within the ambit and scope of Entry 27, List III. Simply because in one respect it trenches into the field of Entry 13 of List II it does not become unconstitutional. (1963-64) 24 FJR 194 (197) (Punj) (DB).

(3) Imposition of terminal tax on passengers carried by road under Clause (e) — State Legislature is competent to legislate and impose tax. ILR (1973) Cut 1174.

Schedule 7, List 2, Entry 14

(1) Though actual tillage is not necessary to constitute agriculture there must be some expenditure of skill and labour upon the land itself and not merely on the growth of the land. A 1954 Cal 225 (233) (DB).

(2) The operations, other than the basic operations, such as tilling of the land, sowing of the seeds, planting etc., are as much agricultural operations as the basic operations themselves. A 1957 SC 768 (788).

(3) Forestry operations carried on to help the regeneration and the fresh growth of trees in the denuded areas in forests come within the meaning of the word 'agriculture'. A 1957 SC 768 (790) •• A 1954 Assam 113 (123) (SB).

(4) Having regard to the object of the Madras Commercial Crops Markets Act (20 of 1933) and its scheme it undoubtedly falls under Entry 14. A 1959 Andh Pra 398 (403) (DB).

(5) Being a tax by way of excise duty, the Produce Cess Act (1966) cannot be related to Entry 14 of List II. The Act comes under Entry 84, List I Sch. VII. A 1969 Ker 176 (177).

(6) Government's power to make law under Entries 14, 11 and 41 of List II, Sch. 7 is subject to provisions of Articles 311, 14 and 16. 1969 Lab IC 730 (734) (Mys) (DB).

(7) Merely because a building can be used for any purpose including that of market, a legislation regulating mainly relations between landlords and tenants does not ipso facto become legislation on markets. ILR (1969) Andh Pra 129.

(8) Cess imposed under Section 3 (2) of Produce Cess Act is a tax by way of excise duty — Levy comes under Entry 84 of List I of Sch. VII — It cannot be related to Entry 14 of List II. A 1969 Ker 176.

(9) Government's power to make law under Entries 41, 11 and 14 of List II, Sch. VII of Constitution of India is subject to provisions of Articles 311, 14 and 16 of the Constitution. 1969 Lab IC 730 (Mys).

(10) Subject-matter of the Punjab Agricultural Produce Markets Act falls within Entry 28 and not Entries 14 and 18 of List II of the VIIth Schedule to the Constitution. A 1977 Punj 347 (352) : 1977 Tax LR 2293 (2298) (Punj) (FB).

(11) Central Government's scheme and directions regarding distribution of technical grade pesticides fall within Entry 52, List I and Entry 33, List III and not within Entry 14 of List II of the Seventh Schedule to the Constitution and are binding on officers of the State Governments. 1979 MPLJ 221.

(12) Subject-matter of the Punjab Agricultural Produce Markets Act, 1961, falls within Entry 28 and not within Entries 14 and 18 of List II of Seventh Schedule to the Constitution. A 1977 Punj & Har 347 (351, 352) (FB).

(13) There is some overlapping so far as the Entries 14 and 19 are concerned. The term 'agriculture' is very wide and it includes even 'forestry'. A 1957 SC 768 (773) •• A 1954 Assam 113 (116) (SB).

15. Preservation, protection and improvement of stock and prevention of animal diseases: veterinary training and practice.
[Government of India Act, 1935, Item 20.]

16. Pounds and prevention of cattle trespass.
[Government of India Act, 1935, Item 20.]

17. Water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and water power subject to the provisions of Entry 56 of List. I.
[Government of India Act, 1935, Item 19.]

18. Land, that is to say, right in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agricutural land; land improvement and agricultural loans; colonization.
[Government of India Act, 1935, Item 21.]

Schedule 7, List 2, Entry 15

(1) It is in pursuance to the directive principles contained in Article 48 and in exercise of the powers conferred by Article 246 read with Entry 15 in List II of Sch. VII that the Legislatures of Bihar U. P. and M. P. have respectively enacted Bihar Act 2 of 1956, U. P. Act 1 of 1956 and C. P. and Berar Act 52 of 1949, as amended up to 1956. A 1958 SC 731 (736).

Schedule 7, List 2, Entry 17

(1) The Sirhind Canal Rules framed by the Punjab Government were adopted and enacted as law for the Pepsu State by the State Legislature which was well within its power under this entry. A 1956 Pepsu 40 (47) (DB).

(2) U. P. Municipalities Act (2 of 1916), Section 123 (1), Clause (x) authorising the municipal board to impose a levy for the water supplied by it is covered by Entry 17 and Entry 5 read with Entry 66 of List II and hence the provision is valid. A 1961 All 583 (586).

(3) Levy under Section 97 (1) (b) of Hyderabad District Municipalities Act (18 of 1956) is a water tax on lands and buildings and comes under Entry 49 and not under Entry 17 of List II. A 1965 Andh Pra 91 (98).

(4) Entry 17 in List II is wider in scope and includes what is contemplated in Entry 56 of List I. Unless the Parliament declares the extent to which the regulation and development of inter-State rivers and river valleys are to be expedient in public interest, the State has full power with regard to all legislation regarding water as contemplated by Entry 17 of List II. A 1956 Orissa 114 (118) (DB).

(5) It is quite clear from Entry No. 17, List II (State List) in Sch. 7 (II) of the Constitution of India that it empowers the State Legislature to pass an enactment on the subject, and make its application retrospective so as to bind even the past transactions, and this is what the Madhya Pradesh Legislature has done, in passing the Act of 1964. A 1971 Madh Pra 51 (53) : 1970 Jab LJ 318.

(6) It is quite clear from Entry No. 17 that it empowers the State Legislature to pass an enactment on the subject, and if the Legislature had the power over the subject-matter and competence to make a valid law, it could at any time make such a valid law and make its application retrospective so as to bind even the past transactions, and this is what the Madhya Pradesh Legislature has done, in passing the Act of 1964. Therefore, it cannot be said that the Act is ultra vires of the Legislature. A 1971 Madh Pra 51 (53) : 1970 MPLJ 331.

SCHEDULE 7, LIST 2, ENTRY 18

SYNOPSIS

1. Scope.
2. "Land, that is to say .... and the collection of rents."
3. "Transfer and alienation of agricultural land."
4. State Acts falling under this Entry.
5. Acts covered by Entry 18 and some other Entry of List II.
6. Acts not covered by this Entry.
7. Powers of taxation.
8. Central Acts touching this Entry but valid.

1. Scope.— (1) This entry cannot be given such an enlarged meaning as to include and override the matters included in other entries. A 1953 Pat 14 (19, 22) (FB).

(2) The legislative head under this entry has to be read as a legislative category or head comprising land and land tenures and all matters concerned therewith other than acquisition of land. A 1955 SC 504 (520) °° A 1954 SC 251 (253) °° A 1952 SC 252 (283) °° A 1951 All 674 (679) (FB) °° A 1951 Pat 91 (103) (SB).

(3) Administration of evacuee property has been treated separately in Entry 41 of List 3. Therefore, legislative competence of Parliament to enact Administration of Evacuee Property Act, 1950 cannot be questioned on the ground that it includes provisions relating to the relation of landlord and tenant. A 1953 Sau 73 (75) (DB) °° A 1952 Pepsu 12 (14).

(4) This entry must be read as not covering regulation of house accommodation in cantonment area. A 1951 All 830 (831) (DB).

(5) The expression "regulation of house accommodation" as used in Entry 3 of List 1 cannot be construed so as to include the aspect of the relation of landlord and tenant contemplated by this entry. A 1956 Nag 268 (272) (DB). (Overruled on another point in A 1969 NSC 107.)

(6) The expression "including the control of rents" in Entry 3 of List I only means that the control of rents contemplated is in relation to the house accommodation in cantonment area. A 1954 Bom 254 (255, 256) (DB).

Schedule 7, List 2, Entry 18 — Note 1 (contd.)

(7) "Relationship between landlord and tenant" in Entry 18 List 2 is limited to the matters in respect of eviction from open lands and does not extend to house accommodation. **A 1970 SC 228 (235).** (A 1954 Bom 254 and A 1961 Pat 207, **Overruled.**)

(8) East Punjab Urban Rent Restriction Act (III of 1949), is a legislation about land and relation of landlord and tenant and the collection of rents, authorised under Item 18 of State List. It has nothing to do with regulation of house accommodation in cantonment areas which is Item 3 of Union List. (1960) 62 Punj LR 142 (DB).

(9) Interest—of life tenant under the Bengal Settled Estates Act (Bengal Act 3 of 1904) is not an indivisible unit. In respect of a part of such estate in Bihar separate under the Bengal Act the Bihar legislature has power to legislate under this Entry. As such the validity of Bihar Land Reforms Act (30 of 1950) cannot be challenged on this ground. **A 1959 Cal 767 (772) (SB).**

(10) Entry 18 of List II does not contemplate making of laws regulating the relationship of landlord and tenant in respect of buildings and houses. No doubt the relationship of landlord and tenant is subject-matter of legislation entrusted to State Legislature exclusively under Entry 18 of List II but this is confined to land only. 1973 All LJ 524 (531).

(11) Maharashtra Restoration of Land to Scheduled Tribes Act is legislation relating to land, rights in and over it — Hence Act is within competence of State Legislature and is relatable to Entry No. 18 List II Schedule 7, Constitution of India. 1977 Mah LJ 564.

2. "Land, that is to say . . . . . and the collection of rents."— (1) The particular and limited specification of 'agricultural land' in this entry would show that the word 'land' in this entry relates to land in general. **A 1947 PC 72 (74)** °° A 1954 Raj 252 (254, 255) (DB).

(2) Land comprises both corporeal and incorporeal rights and interests. **A 1942 FC 27 (31) : ILR (1942) Lah 623.**

(3) Land will include permanently settled land. **A 1943 FC 9 (10).**

(4) Land will include trees standing on land, and pasture. **A 1941 Lah 177 (180) (FB).** (Trees.) °° **A 1947 PC 72 (75)** °° (1968) 2 Andh WR 273 (DB) °° A 1966 Cal 97 (98).

(5) The word 'land' is wide enough to includue buildings standing on land. **A 1952 All 703 (705) (FB)** °° A 1955 Nag 153 (156, 157) (DB) °° A 1954 Bom 204 (204, 205) (DB).

[See also (1962) 66 Cal WN 757.]

[But see A 1953 Pat 14 (19, 22) (FB) °° A 1954 Raj 252 (255) (DB).]

(6) Mortgages form a type of transaction which may properly be regarded as sui generis incidental to land and included within this entry except in so far as they fall within Entries 6 and 7 of List 3. **A 1947 PC 72 (74).**

(7) Rights in land include general rights like full ownership or leasehold or all such rights. Rights over land would include easements or other collateral rights, whatever form they might take. **A 1947 PC 72 (74).** (Mortgage rights.) °° **A 1955 Pat 1 (15) (SB).**

(8) The words which follow the expression **"that is to say" are not words of limitation but** of explanation or illustration, giving instances which may furnish a clue for particular matters. **A 1947 PC 72 (74).**

(9) The expression "rights in or over land" confers on the State Legislature wide powers to enact legislation to extinguish, restrict, transfer or convey the rights in land. A 1957 Bom 252 (259, 260) (DB).

(10) The words 'landlord and tenant' are used in this entry in their widest sense. A 1952 Mad 203 (210, 211) (DB).

(11) The words 'landlord and tenant' must be held to include an ex-landlord and ex-tenant. **A 1958 Mad 608 (615) (FB)** °° A 1956 Nag 50 (52) (DB) °° A 1954 Mad 51 (62) (DB).

(12) The power to regulate the relations of landlords and tenants is granted to the Legislature under this entry in addition to the power granted to make laws with respect to contracts and transfer of property concerning agricultural land. **A 1958 Mad 608 (615) (FB)** °° (1967) 33 Cut LT 263 (DB) °° A 1966 Cal 97 (98) °° A 1959 Assam 147 (156) (DB).

(13) The power to legislate with respect to land tenure must be held to include not merely the power to create new tenures but also to afford security to those coming on the land by reason of an existing tenure. A 1956 Nag 50 (52) (DB).

(14) The words 'land tenure' will include Jagir tenure. **A 1952 Hyd 163 (170) (FB).**

(15) The power to legislate with respect to 'the collection of rents includes the power to legislate with respect to the remission of rents as well as to their collection. **A 1941 FC 16 (25)** °° (1967) 1 Mad LJ 206 (DB).

(16) The words 'collection of rent' are wide enough to include the recovery of rents. A 1942 Cal 587 (591, 592) (DB).

(17) The provision in a statute relating to reduction of rent would come under 'relation of landlord and tenant'. A 1952 Mad 203 (210, 211) (DB).

(18) The expression 'collection of rents' can also cover collection by agents on behalf of the landlord. A 1952 Mad 203 (210, 211) (DB)

(19) Reading together the entries in the three Lists, the word 'land' in this Entry should be given its full amplitude and the use of the words 'that is to say' in it does not justify a different construction. A 1967 Mad 352 (358) (DB).

(20) Agrarian reforms to relieve concentration of agricultural lands, providing for acquisition of surplus land and its distribution to landless persons fall within this Entry. A 1967 Mad 352 (358) (DB).

(21) Section 18 of the Punjab Security of Land Tenure Act (X of 1953) which has the effect of converting the tenant into the landowner himself by virtue of the purchase, is also covered by this Entry. **A 1959 SC 519** (523).

(22) The provisions of the Punjab Security of Land Tenure Act deal with the landlord's rights in land in relation to his tenant, so as to modify the landlord's rights in land and correspondingly to expand the tenant's rights therein. **A 1959 SC 519** (522, 523).

(23) This Entry read along with Art 246 (3) has vested exclusive power in the State to make laws with respect to rights in or over land, land tenures including the relation of landlord and tenant. **A 1959 SC 519 (522, 523).**

Schedule 7, List 2, Entry 18 — Note 2 (contd.)

(24) The subject-matter of Entry 18, List II, of the VIIth Schedule i. e. 'land' covers "lands and buildings" and would therefore include 'vacant land'. The expression "urban immovable property" may mean "lands and buildings", or "buildings", or "land". It would take in lands of every description i. e. agricultural land, urban land or any other kind and it necessarily includes vacant land. When Parliament was invested with the power to Legislate on the subject, "ceiling on immovable property', it was competent for it to enact the Urban Land (Ceiling and Regulation) Act, 1976. It could not be said to be contrary to the resolution passed by the State Legislatures which had authorised the Parliament to pass a law on "ceiling on immovable property." **A 1979 SC 1415 (1425, 1426).**

(25) Entry 21 of List II of the Seventh Schedule to the Government of India Act, or the corresponding Entry 18 of List II of the Seventh Schedule to the Constitution permits legislation in respect of land and explains the scope by equating it with rights in or over land, land tenures, including the relation of landlord and tenant, and, collection of rents. The relation of landlord and tenant is mentioned as being included in land tenures and the expression "land tenures" would not, appropriately cover tenancy of buildings or of house accommodation. In fact, leases in respect of non-agricultural property are dealt with in the Transfer of Property Act and would much more appropriately fall within the scope of Entry 8 of List III in the Seventh Schedule to the Government of India Act read with Entry 10 in the same list, or within the scope of Entry 6 of List III in the Seventh Schedule to the Constitution read with Entry 7 in the same list. (Obiter.) **A 1970 SC 228 (234).**

(26) A. P. Land Reforms (Ceiling on Agricultural Holdings) Act (1 of 1973), Ss. 3 (f), (o); 4; 8, 7 (1), (4) and (5) read with S. 8 (1), Explanations 2 and 24 — Provisions are related to land and are covered by Entry 18 of List II and hence not beyond the legislative competence of the State Legislature. **A 1975 AP 315 (340, 341) (FB).**

(27) Andhra Pradesh (Lease, Eviction and Rent) Control Act (15 of 1960) has nothing to do with the various purposes for which a non-residential building may be used. It is only concerned with landlords and tenants in matters specified, i. e., lease, fixation of rent and eviction of tenants. (1968) 2 Andh WR 273.

3. **"Transfer and alienation of agricultural land."**— (1) The expression 'agricultural land' must be taken to include lands which are used or are capable of being used for raising any valuable plants or trees or for any other purpose of husbandry. **A 1951 Orissa 11 (14) (DB) •• A 1944 Mad 401 (401, 402) (DB) •• 1966 Ker LT 1149 (DB).**

(2) Pasture is sufficiently allied to agriculture generally and as such is within the general scope of an enactment dealing with agricultural land. **A 1947 PC 72 (75).**

(3) The expression 'agricultural land' does not include forest land or land used for planting trees for being used for fuel. **A 1944 Cal 421 (424, 425) (DB).**

(4) 'Agricultural land' will also cover an interest in such land or rights in or over such land. **A 1947 FC 17 (18, 19) •• A 1947 FC 12 (13).**

(5) It was held in the undermentioned case that 'transfer' would include a partition in a Hindu joint family. **A 1956 Mad 642 (650) (DB).**

(6) As the A. P. Act 1 of 1973 is on a State subject viz. Entry 18 of the State List and the Central Act (Hindu Adoptions and Maintenance Act 1956) is on a concurrent subject, preconditions for application of the constitutional doctrine of repugnancy are not attracted. **A 1979 Andh Pra 262 (264).**

(7) It cannot be said that because Entry 18 of List II of the VIIth Schedule to the Constitution does not provide for any penal provision, the State Legislature has no power to enact such a provision. Provision for forfeiture of produce in S. 19-B of W. B. Act 10 of 1956 is therefore not illegal or unconstitutional. **A 1976 Cal 388 (389).**

(8) Hindu Succession Act has no application to agricultural plots. Provisions do not apply to land tenures created under U. P. Zamindari Abolition and Land Reforms Act. **A 1970 All 238.**

(9) Framing of laws with regard to transfer of agricultural land is within exclusive power of State Legislature. If matters are not covered by State laws, parties would be governed by their personal law. 1970 All WR (HC) 78.

4. **State Acts falling under this Entry.**— (1) The following State Acts are covered by this Entry.

(a) Orissa Private Lands of Rulers (Assessment of Rent) Act (13 of 1958). **A 1961 Orissa 131 (132) (DB).**

(b) The Hyderabad Tenancy and Agriculturists Act (XXI of 1950). **A 1964 Andh Pra 514 (517) (DB).** (Overruled on another point in **A 1967 Andh Pra 148 (FB).**)

(c) Orissa Private Lands of Rulers (Assessment of Rent) Act (13 of 1958), S. 2 (h). **A 1964 SC 1195 (1199, 1200).**

(d) Provisions of Orissa Land Reforms (Amendment) Act (1965), Chap. III and Sections 33, 27 and 1. (1967) 33 Cut LT 263 : 9 Orissa J D 41.

(e) The Punjab Security of Land Tenure Act (X of 1953) as amended by Act (XI of 1955). **A 1959 SC 519 (524).**

(f) Section 17, Bombay Tenancy and Agricultural Lands (Gujarat Amendment) Act, 1960. **A 1966 Guj 183 (185) (DB).**

(g) Provisions of W. B. Non-Agricultural Tenancy Act (20 of 1949), Section 6 (2) (a). **A 1966 Cal 97 (98).**

(2) Bombay Tenancy and Agri. Lands (Amendment) Act was, broadly stated, a legislation in regard to the rights in and over land or categories specifically referred to in this Entry. It is valid. **A 1959 SC 459 (463, 472, 473).**

(3) The Legislature was competent under Entry 18 of List II, to enact Section 8 of the Ajmer Abolition of Intermediaries and Land Reforms Act (3 of 1955), even with retrospective effect. **A 1959 SC 475 (477).**

(4) Vindhya Pradesh Abolition of Jagirs and Land Reforms Act (1952), Sections 22, 7 (1) —

Schedule 7, List 2, Entry 18 — Note 4 (contd.)

Section 22 is constitutional and not colourable piece of legislation. A 1960 SC 796 (799, 800).

(5) U. P. Rampur Thekadari and Pattedari Abolition Act, 1953 (10 of 1954), Section 2 (6) — Act is within legislative competence of U. P. Legislature under this Entry — It abolishes leases granted by Ruler of erstwhile Rampur State to Thekedars and Pattedars. A 1959 SC 909 (914).

(6) Assam Land and Revenue Regulation (1886) may fall under Entry 18 of List II and not Entry 23 of List II of the Constitution as in pith and substance it is an Act relating to land. A 1966 Assam 107 (109) (DB).

(7) Section 5-A held to be a part of the whole Act viz. Estates Acquisition Act, 1953 (W. B. 1 of 1954) which is a measure of reforms of land tenure. Therefore enactment of Section 5-A is covered by Entry 18. ILR (1966) 1 Cal 495 (586) (DB).

(8) The pith and substance of Bihar Land Reforms Act (30 of 1950) (as amended by Bihar Act 20 of 1954) is with reference to land and acquisition of land. (1955) ILR 34 Pat 57 (DB).

(9) The Andhra Pradesh Buildings (Lease, Rent and Eviction) Control Act, 1950 is essentially and mainly a legislation relating to the relations between landlords and tenants of buildings in the matter of lease, rent and eviction alone. (1968) 2 Andh WR 273 (DB).

(10) The various aspects dealt with in Bombay Town Planning Act 1954 (27 of 1955) as amended by Gujarat Act (52 of 1963), Section 1 can be considered to deal with land and the State Legislature is competent to enact the measure under this Entry. A 1967 SC 1373 (1381).

(11) Madras Buildings (Lease and Rent Control) Act (18 of 1960) is valid — Subject is covered by this Entry. A 1967 Mad 57 (61) (FB).

(12) Madras Estates Land (Reduction of Rent) Act (Madras 30 of 1947) (as amended), Sec. 3 is enacted under Item 21 of List II of Sch. 7 of Government of India Act 1935 (corresponding to Entry 18 of List II) dealing with land. A 1962 SC 1687 (1690).

(13) The Bombay Land Tenure Abolition Laws (Amendment) Act 1958 was held to be within competence of the legislature under this entry. A 1962 SC 821 (842).

(14) Punjab Consolidation of Land Proceedings (Validation) Act, 1957 deals with three classes of properties. The State Legislature was competent to enact the Act. No provision of the Act goes beyond the legislative competence of that body under this Entry. A 1959 Punj 8 (11, 12, 13) (FB). (Overruled on another point in A 1959 SC 519.)

(15) The legislative competence of the Bihar legislature to introduce the second proviso to Section 10 (2) of Bihar Land Reforms Act (30 of 1950) can be found in Entry 18 of List II. A 1968 Pat 50 (57) (DB).

(16) E. P. Evacuees (Administration of Property) Act (14 of 1947) — Administration of Evacuee Property (Chief Commissioners' Provinces) Ordinance (12 of 1949) — Enactments are valid as regards property in the nature of land but are invalid so far as property other than land is concerned. A 1960 Punj 341 (345, 346) (FB).

(17) Entry 18 of List 2 is meant to confer the widest powers on the State Legislature with regard to rights in or over land and such rights are not to be measured by or limited to the rights between landlords and tenants or the collection of rents. The words which follow the expression "rights in or over land" are merely by way of illustration. If the State wants to enforce a measure of acquiring lands of people who hold areas over a certain ceiling limit so as to be able to distribute the same among the landless and other persons, to give effect to the directive principles in Art. 39 (b) and (c) such a measure does not transgress the limits of the legislative field because it serves to remove the disparity in the ownership of land. Persons who lose the ownership of lands in excess of the ceiling imposed are compensated for the lands acquired by the State and distributed among others. Acquisition of land would not directly be covered by Entry 18 of List 2 but read with Entry 42 in List 3 the State has the competence to acquire surplus land so as to give effect to the policy in Art. 39. A 1972 SC 425 (436, 437).

(18) Subject-matter of provisions of Ss. 4 and 5 of the Kannan Devan Hills (Resumption of Land) Act, 1971, is covered by Entry 18 of List II and Entry 42 of List III. State Legislature cannot be denied the power to legislate on ground that legislation will affect subject-matter of Entry 52 of List I. A 1972 SC 2301.

(19) Provisions of Section 4 (5) of the W. B. Restoration of Alienated Land Act are not repugnant to Section 91, Evidence Act, but are ancillary to the exercise of legislative powers in respect of Entry 18 of List II of the Seventh Schedule. A 1977 (NOC) 126 (Cal) : (1976) 2 Cal LJ 180.

(20) Subject-matter of Punjab Agricultural Produce Markets Act, 1961, falls within Entry 28 and not Entries 14 and 18 of List II of Schedule VII to the Constitution. A 1977 Punj and Har 347 (352) : 1977 Tax LR 2209 (2214) (FB).

(21) Entry 18 of List II of the Seventh Schedule to the Constitution gives a State Legislature widest powers to legislate on lands. Further agrarian reforms comprehend a large variety of activities of the State for the development of the rural economy, the creation of self-sufficient and self-reliant villages and improvement of the standards of living of the rural population. Taking over of orchards cannot be said to be going beyond the scope of agrarian reforms. A 1976 Cal 436 (447).

(22) A. P. Agricultural Lands (Prohibition of Alienation) Act (1972), S. 3 (c) — Definition of land in consonance with Entry 18 of List II, Sch. 7 of Constitution — Act is intra vires the State Legislature. A 1975 Andh Pra 262.

(23) Powers of State Legislature with regard to lands. A 1975 Andh Pra 315 (FB).

(24) Provisions of Section 4 (2-A) (b) of W. B. Land Reforms Act are ultra vires. A 1975 Cal 58.

(25) The pith and substance of Haryana Act 14 of 1973 being the acquisition of rights to minerals and development thereof falls within Entry 23 of State List and not Entry 18 of that list although it incidentally touches land. Hence in view of the Central Act on the subject,

Schedule 7, List 2, Entry 18 — Note 4 (contd.) Entry 18 is of no help to save the Act from invalidity. A 1975 Punj 102 (109).

(26) Section 7 of Punjab Act, 2 of 1920 (as amended by Act 12 of 1973) — The Act (2 of 1920) and the Amending Act relate to the matters covered by Entry 18 of the State List. A 1975 Punj 292 (294).

(27) Orissa Land Reforms Act (16 of 1960), Ss. 2 (5-a), 2 (13), 2 (3), 36-A, 37 (a) and (b), 37-A, 37-B, 38, 39, 40-A, 43, 45, 51, 52 and 76 (as amended by Act 9 of 1974) — Provisions are constitutionally valid except a part in Section 2 (13). ILR (1975) Cut 843 (DB).

(28) U. P. High Court (Abolition of Letters Patent Appeals) Act (14 of 1962) (as amended by U. P. High Court (Abolition of Letters Patent Appeals) (Amendment) Ordinance (U. P.) Ordinance (12 of 1972) later replaced by U. P. High Court (Abolition of Letters Patent Appeals) (Amendment) Act (32 of 1972), Section 4 — Constitutionality of Amending Ordinance and Amending Act — State Legislature was competent to make such amending laws (Per majority). A 1973 All 596 (FB).

(29) A betterment charge which is levied only because the concerned owner gets benefit from public development scheme of his lands can by no stretch of imagination be said to be a taxation measure. Such a legislation, which is not a taxation measure in its pith and substance, would clearly fall under general Entry 18 of land in List II. ILR (1973) Guj 1 (42).

(30) W. B. Estates Acquisition Act (1953), Section 5 (2) (as added by W. B. Act 22 of 1964) — Provision is valid. (1974) 78 Cal WN 44.

(31) Section 2 (d), Daman (Abolition of Proprietorship of Village) Regulation (1962) is not ultra vires the State Legislature and is constitutionally valid. A 1970 Goa 59.

5. Acts covered by Entry 18 and some other Entry of List II.— (1) Acts covered by Entries 18 and 45.

(a) Bombay Merged Territories and Miscellaneous Alienations Abolition Act (22 of 1955) — Act falls within Article 31-A of Constitution. A 1966 Guj 149 (156) (DB).

(b) Bombay Saranjam, Jahagirs and other Inams of Political Nature Resumption Rules, 1952. (1963) 2 Mys LJ 164 (FB).

(c) The Madras Inam Estates (Abolition and Conversion into Ryotwari) Act (26 of 1963). (1967) 1 Mad LJ 206 (DB).

(d) Punjab Resumption of Jagirs Act (39 of 1957), Section 2 (5) — As inserted by Amendment Act of 1959 — Amendment is intra vires. A 1962 SC 1305 (1313).

(2) Assam Fixation of Ceiling on Land Holdings Act (1 of 1957) — The State Legislature had legislative authority to enact the law under Entry 18 of List II and Entry 42 of List III read with Articles 245 and 246. A 1959 Assam 147 (152) (DB).

(3) Kerala Agrarian Relations Act (5 of 1961) has been passed under Item 18 of List II and Item 42 of List III — Act is not a colourable piece of legislation on the ground of being a device to take money from land-owners. A 1962 SC 723 (727, 728, 729).

(4) M. B. Muafi and Inam Tenants and Subtenants Protection Act (32 of 1954), Section 4, Entry 65 of List II read with Entry 18 of List II gives the State Legislature exclusive powers to create and determine powers and jurisdiction of Courts in respect of land. A 1957 Madh B 63 (63).

(5) The Bengal Tenancy Act (8 of 1885), governs land, the landlord and the tenant which is covered by Entry 18 of List II. Section 49-J incidentally trenches upon the law of registration but is not constitutionally invalid. A 1968 Pat 198 (200) (DB).

(6) Madras Land Reforms (Fixation of Ceiling on Land) Act (58 of 1961) is within the legislative competence under List 2, Entry 18 and List 3, Entry 42. A 1967 Mad 352 (359) (DB).

(7) Merely because a building can be used for any purpose including that of market, a legislation regulating mainly relations between landlords and tenants does not ipso facto become legislation on markets. ILR (1969) Andh Pra 129.

6. Acts not covered by this Entry.— (1) The United Khasi-Jaintia Hill District (Transfer of Land) Act 1953 is ultra vires of the District Council. A 1968 Assam 43 (47) (DB).

(2) Bombay Land Tenures Abolition (Recovery of Records) Act (50 of 1953) dealing with land records would not fall within scope of Entry 18, but fall within scope of Entry 45 of List II. A 1962 Guj 18 (19).

7. Powers of taxation.— (1) Entry 18 of List II does not take away the powers of the Parliament to pass an enactment imposing tax in respect of land. A 1960 Andh Pra 115 (116, 117) (DB).

(2) Taxation on land on which forest stands is permissible and legal under Entry 49 — Entry 49 and Entry 18 deal with entirely different subjects. A 1961 SC 552 (564).

(3) Gift Tax Act (1958), Section 1 — Tax on gifts of agricultural land is fully within Entry 97 of List 1, read with Article 248 and is not covered by Entries 18 and 47 of List 2 — Act held valid. A 1963 Mad 419 (422, 423) (DB) •• A 1962 Ker 97 (103) (DB).

(4) Surcharge is part of land revenue — Land Revenue can be increased by State Legislature though not by Government during settlement. Madras Land Revenue Surcharge Act (19 of 1954) and Madras Land Revenue (Additional Surcharge) Act (30 of 1955) are valid. A 1960 Mad 543 (546, 547).

(5) Power to legislate with respect to transfer of agricultural land — Does not include power to levy tax in respect of such transfer. A 1962 Ker 97 (102, 103) (DB).

8. Central Acts touching this Entry but valid.— (1) Hindu Succession Act (1956), Section 14 — Rights of Hindu female over land — Section entrenches on Entry 18 of State List — But being legislation under Entry 5 of List III is valid. A 1960 Punj 666 (669) (FB).

(2) Provisions of Section 14 of Hindu Succession Act, 1956 apply to agricultural lands as the matter is covered by Entry 5 of List III. A 1964 All 165 (166, 167).

(3) Tax on gift of agricultural land — State legislature not competent to make laws for levy of tax on transfer and alienations of agricultural land — Gift Tax Act (1958) held not ultra vires powers of Parliament. A 1965 Punj 65 (66) (DB).

19-20. {[Omitted by Constitution (Forty-second Amendment) Act, 1976 S. 57 [3-1-1977].

21. Fisheries.

22. Courts of wards subject to the provisions of Entry 34 of List I; encumbered and attached estates.

23. Regulation of mines and mineral development subject to the provisions of List I with respect to regulation and development under the control of the Union.

[Government of India Act, 1935, Item 23.]

Schedule 7, List 2, Entry 18 — Note 8 (contd.)

(4) Conflict between "existing Indian Law" (viz. Land Improvement Loans Act, 1883 and Agriculturists Loans Act 1884) which is within exclusive field of State under Entry 18 of List II and Central Act (Displaced Persons Compensation and Rehabilitation) Act 1954, Section 30 covered by Item 27 of List III) — Central Act prevails. A 1961 Punj 34 (41, 42) (FB).

(5) Mineral Concession Rules (1960) are covered by List 1, Entry 54 and not by List 2, Entry 18. A 1963 Madh Pra 213 (215) (DB).

(6) The Indian Legislature has not purported to legislate in regard to the subject covered by Item 18 of List II in enacting Section 45-B of the Banking Companies Act (1949) as amended in 1950. A 1958 Mad 403 (410).

(7) The legislative powers of the Parliament in Entry 32 of List I cannot be taken as abridged by the legislative powers under Entry 18 in List II. In this approach, the Public Premises (Eviction of Unauthorised Occupants) Act 1958 is applicable to agricultural land of the Union with the Military authorities. (1967) 69 Punj LR 76 (DB).

(8) It is not correct to say that M. P. Accommodation Control Act was passed by the legislature in exercise of power under List II, Entry 18, because Entry 18 relates to vacant lands and the relation of landlord and tenant with respect thereto does not cover tenancy of buildings or house accommodation. The said Act will fall within Entries 6 and 7 read with Entry 46 of the concurrent List. Similarly the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 in so far as it deals with eviction of lessees or licencees from premises belonging to the Government company would also fall within those entries. The Central Act being the later Act will prevail over the M. P. Act of 1961, in view of Art. 254 (2), Proviso. A 1980 MP 106 (109) : 1980 Jab LJ 183.

Schedule 7, List 2, Entry 21

(1) This entry read with Entry 57, List 1, makes it clear that the States have the competence to legislate generally on fisheries and fishing in the territorial waters. A 1954 Mad 291 (301) (DB).

(2) "Fisheries" include not only the regulation of fishing but also its prohibition in particular places or at particular times. A 1941 FC 16 (25).

(3) Santhal Parganas Tenancy (Supplementary Provisions) Act (14 of 1949), falls within Entry 21, List II, Government of India Act 1935 — Section 42 thereof is not invalid as being repugnant to Limitation Act. A 1973 Pat 1 (FB).

Schedule 7, List 2, Entry 22

(1) C. P. Court of Wards Act (24 of 1899) was covered by Entry 22 of List II. A 1961 Madh Pra 197 (198) (DB).

(2) W. B. Estates Acquisition Act (1953), Section 5 (2) (as added by W. B. Act 22 of 1964) — Provision is not ultra vires. (1974) 78 Cal WN 44.

Schedule 7, List 2, Entry 23

1. Regulation of mines and mineral development.— (1) It is competent for the State Legislature to enact laws for mining and mineral development under this entry but it is subject to the laws of the Union about the same under Entry 54 of the Union List. A 1952 Mys 84 (85) : 1952 Cri LJ 1348 (DB).

(2) To the extent that there is no such declaration, as is contemplated by Entry 54, List I "regulation of mines and mineral development" belongs to the State List under Entry 23. A 1959 Cal 222 (225) (DB) ** A 1961 SC 459 (469) ** A 1968 Madh Pra 17 (18) (DB).

(3) The Orissa Mining Areas Development Fund Act (27 of 1952) is superseded by the Mines and Minerals (Regulation and Development) Act 1957. A 1964 SC 1284 (1292). (A 1962 Orissa 24, Affirmed.)

(4) Notice of demand made on 1-8-1960 under Orissa Act 27 of 1952 for fees accruing prior to 1-6-1958 is valid and amount can be recovered notwithstanding disappearance of Orissa Act. A 1964 SC 1284 (1295). (A 1962 Orissa 24, Reversed.)

(5) The State Legislature was competent in 1952 to legislate on the subject in view of the express power under Entry 23 of List II and pass the Orissa Mining Areas Development Fund Act (27 of 1952). A 1962 Orissa 24 (28) (DB). (Reversed on another point in A 1964 SC 1284.)

(6) Bombay Municipal Corporation Act (3 of 1888) fairly and squarely falls within Entries Nos. 1, 5, 6 and 23 of List II. (1965) 67 Bom LR 484 (DB).

(7) Assam Land and Revenue Regulation (1886) may fall under Entry 18 of List II and not Entry 23 of List II of the Constitution. A 1966 Assam 107 (109) (DB).

(8) Orissa Mining Areas Development Fund Act (27 of 1952), Section 4 — Cess levied under is neither a tax nor a duty of excise but is a fee. A 1961 SC 459 (467, 468).

(9) Orissa Mining Areas Development Fund Act (27 of 1952) — Subject-matter of Act falls under List 2, Entries 23 and 66 of Sch. 7 — Validity not impaired by List 1, Entries 52 and 54 read with Central Act 65 of 1951 and Central Act 53 of 1948 respectively. A 1961 SC 459 (478).

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24. Industries subject to the provisions of [a][Entries 7 and 52] of List I.
[Government of India Act, 1935, Item 29.]

[a] Substituted for "Entry 52" by the Constitution (Seventh Amendment) Act, 1956, S. 28 (1-11-1956).

OBJECTS AND REASONS

"Although the Union List has two entries 7 and 52 relating to industries, the latter alone is referred to in Entry 24 of List II. The omission of the Entry 7 of List I appears to be due to an oversight and is sought to be rectified."—S. O. R.

Schedule 7, List 2, Entry 23 — Note 1 (contd.)

(10) Declaration by Parliament in statute that control should be vested in Central Government — State Legislature not competent under Entry 23 to enact legislation after such declaration trenching upon that field. **A 1970 SC 1436 (1443).**

(11) The plain effect of subjection of Entry 23 of List II to Entry 54 of List I is that if the Parliament by law declares it to be expedient in the public interest to assume control of regulation of mines and mineral development by enacting Mines and Minerals (Regulation and Development) Act, 1957, the ambit and coverage of Entry 23 of List II is cut down to the extent to which regulation of mines and minerals development is taken under the control of the Union. The State Legislature would then have no legislative competence to enact legislation in the field which falls within the scope of the declaration made by the Parliament. The Parliament alone would be entitled to legislate in such field. A 1973 Guj 117 (125, 126).

(12) A combined reading of Entries 23 and 50 of List II and Entry 54 in List I establishes that as long as Parliament does not make any law in exercise of its power under Entry 54, the powers of the State Legislature in Entry 23 and Entry 50 would be exercisable by the State Legislature. A 1972 Mys 299 (300).

(13) The pith and substance of the Haryana Act 14 of 1973 being the acquisition of rights to minerals and development thereof, the Act falls within Entry 23 of State list and not Entry 18 of that List, although incidentally it touches land. Hence in view of the Central Act on the subject, Entry 18 is of no avail to save it from invalidity. A 1975 Punj & Har 102 (109).

2. Minor minerals.— (1) Brick earth is mineral and its inclusion in definition of 'minor minerals' is not ultra vires the Constitution. Seventh Schedule. A 1965 Pat 491 (499) (DB).

(2) The Rajasthan Minor Mineral Concession Rules, 1955, were and are within the legislative competence of the State. A 1958 Raj 140 (142) (DB).

(3) State Government has the power to impose royalty in respect of minor minerals. A 1965 Pat 491 (496) (DB).

(4) Demand of dead rent or royalty in respect of lease granted prior to date of commencement of Bihar Mineral Rules 1964 from October 1964 was legal and justified as under this Entry. A 1968 Pat 50 (57, 58, 59) (DB).

Schedule 7, List 2, Entry 24

(1) Dhotis (Additional Excise Duty) Act, 1953, was within the legislative competence of Parliament under Entry 84 of the List 1 read with Article 369. Merely because the imposition of such a duty may have the effect of exercising control on a certain trade would not take the matter out of exclusive competence of the Union Government. A 1955 Raj 114 (119) (DB).

(2) 'Industry' in its wide sense would be capable of comprising three different aspects: (1) raw materials which are an integral part of industrial process, (2) the process of manufacture or production, and (3) the distribution of the products of an industry. The second aspect would come under List 1, Entry 52 and List 2, Entry 24. A 1956 SC 676 (695, 696).

(3) Central Excises and Salt Act (1944), Sections 6, 8 — Act is within legislative competence of Central Legislature under List 1, Item 45 of the Government of India Act, 1935 — Incidental encroachment on Item 27 or 29 of List 2 (of Government of India Act 1935) does not affect its validity. A 1960 SC 424 (429).

(4) The expression "industry" in Entry 52 of List I bears the same meaning as that in Entry 24 of List II, W B. Oriental Gas Company Act, 1960 is valid. A 1962 SC 1044 (1052).

(5) Maharashtra Industrial Development Act, 1961 (III of 1962) is within legislative competence of Maharashtra State. A 1970 SC 1771.

(6) Gujarat Industrial Development Act (23 of 1962) in its pith and substance is legislation with respect to "industries" in List II, Entry 24. ILR (1970) Guj 844.

(7) Beedi and Cigar Workers (Conditions of Employment) Act (1966), is passed competently by the Parliament. (1971) 12 Guj LR 690.

(8) Although all industries fall within Entry 24 of List II and State legislature is competent to make laws in respect of them that entry is subject to Entry 52 of List I — Rice milling is an industry which involves manufacturing in it. A 1971 Mad 245.

(9) Beedi and Cigar Workers (Conditions of Employment) Act (1966) does not fall within Entry 24. (1972) I Mys LJ 450.

(10) The subject-matter of the Gwalior Rayons Taking-Over of Management Ordinance 1979 falls fairly and squarely within Entry 52 of List I of the VIIth Schedule to the Constitution and not either within Entry 24 or 27 of List II of the said Schedule or within Entry 23 or 33 of List III of that Schedule. Being so the State Legislature had no competence in regard to the subject-matter of the Ordinance, and ex-hypothesi the Governor had no authority to promulgate the same. A 1979 Ker 56 (68).

(11) Entry 14 of List II has not to be read in isolation. It has to be read along with Entries 24, 26 and 27 of List II and corresponding entries relating to a Scheduled industry i. e. Entry 52 of List I and Entry 33 of List III of the Schedule to the Constitution. 1979 MPLJ 221 (DB).

(12) The power of the State under Entry 24 of List II is subject to the provisions of Entry 52 of List I. But the courts have to take into account Entry 26 of List II and Entry 33 of

25. Gas and gas-works.

[Government of India Act, 1935, Item 26.]

26. Trade and commerce within the State subject to the provisions of Entry 33 of List III.

[Government of India Act, 1935, Item 27.]

Schedule 7, List 2, Entry 24 (contd.)

List III for determining the scope of the legislative power of the Parliament and the State. A fair scrutiny of the relevant entries makes it clear that the power to regulate the notified industries is not exclusively within the jurisdiction of Parliament as List III Entry 33 in the concurrent list enables a law to be made regarding production, supply, distribution of products of a notified industry. **A 1980 SC 614 (622) : 1980 All LJ 258.**

Schedule 7, List 2, Entry 25

(1) Gas and gas works are within exclusive field allotted to States under Entry 25 of List II. W. B. Oriental Gas Company Act, 1960 is constitutionally valid. **A 1962 SC 1044 (1052).**

Schedule 7, List 2, Entry 26

(1) An Act which in pith and substance relates to the subject-matter of this entry is within the competence of the State Legislature to enact. **A 1955 SC 182 (188) ** A 1953 Cal 458 (460) (SB).**

(2) Under this entry the State Legislature can regulate the hours, place, date and the manner of sale of any particular commodity or commodities. It can prohibit sales of particular commodities on particular days or make a provision to the same effect in a different manner. **A 1951 SC 315 (315) : 52 Cri LJ 1237.**

(3) Regulation for controlling production and distribution — Provision placing embargo on export outside province is within the ambit and scope of the regulation. **A 1953 SC 83 (86) : 1953 Cri LJ 525.**

(4) The State Legislature has power to make laws to regulate the movement of goods inside the State itself by the issue of permits. A 1952 Orissa 260 (266) : 1952 Cri LJ 1354 (DB).

(5) The Bombay Price Competitions Control and Tax Act (54 of 1948) is a law with respect to betting and gambling under Entry 34 of this list and therefore no question of its invalidity on the ground of over-stepping the limits of this entry can arise. **A 1957 SC 699 (710, 721, 722). (A 1956 Bom 1, Reversed.)**

(6) Activities commonly known as "hoarding" and "black-marketing in food and cloth," even assuming they are activities which can properly fall under Entry 26 or 27 of List II only, are not excluded from the ambit of the words "supplies and services" in either Entry 3 List 3 or Section 3 of the Preventive Detention Act, 1950. A 1951 Pat 47 (51, 52) : 52 Cri LJ 406 (DB).

(7) Central Excises and Salt Act (1944), Sections 6, 8 — Act is within legislative competence of Central Legislature under List 1, Item 45 of the Government of India Act, 1935 — Incidental encroachment on Item 27 or 29 of List 2 does not affect its validity. **A 1960 SC 424 (429).**

(8) Provisions of Hyderabad General Sales Tax Act (14 of 1940), Sections 11 (2), 20 (c), not covered by Entry 54 of List II nor justified as ancillary provision. Entry 26 of List II also not applicable. The provisions are ultra vires the State Legislature. **A 1964 SC 922 (924, 925).** (A 1960 Andh Pra 395 (DB), Reversed; A 1963 Mad 111, Overruled.)

(9) Andhra Pradesh General Sales Tax Act (VI of 1957), S. 5 (c) (as amended by Act XVI of 1963) held ultra vires of the Constitution being in pari materia with Section 11 (2) of the Hyderabad General Sales Tax Act 1950. (1968) 22 STC 222 (Andh Pra).

(9a) Section 8-A (4) of U. P. Sales Tax Act (1948) is ultra vires. A 1968 All 193 (195, 196).

(10) This Entry, which invests the States with exclusive authority to legislate in respect of trade and commerce within the State does not derogate from the authority conferred by Entry 21 of List III. **A 1960 SC 1073 (1078).**

(11) Ajmer Shops and Commercial Establishments Act (4 of 1956) — Sections 11 and 12 of the Act fell both within Item 24 of List III and Item 26 of List II. A 1959 Raj 257 (258, 259) (DB).

(12) Though a law in Forward Contracts would also be a law with respect to trade and commerce coming under Entry 26 in List II, Entry 48 in List I being a specific one must be excluded from the general Entry 26 in List II. Thus the Forward Contracts (Regulation) Act (1952) falls under Entry 48 in List I or Entry 7 of List III and is valid. **A 1963 SC 90 (94, 95) **** A 1964 Ker 92 (96) (DB).

(13) Field of "Banking" cannot be extended to include trading activities which, not being incidental to banking encroach upon the substance of the Entry 26 "trade and commerce" in List II. **A 1970 SC 564.**

(14) Emblems and Names (Prevention of Improper Use) Act, 1950 is not void for want of legislative competence of Parliament. **A 1975 SC 1172.**

(15) Pith and substance of subject-matter of Mysore Agricultural Produce Marketing (Regulation) Act falls within Entries 26 and 28 of State List. A 1970 Mys 114.

(16) Kerala Essential Articles Control (Temporary Powers) Act, 1962, falls under Entries 26 and 27 of List II of Schedule Seven to the Constitution. **A 1976 SC 1031 (1044).** (ILR (1970) 1 Ker 116, Reversed.)

(17) Chit Funds not within Entry 26 of List II of the Seventh Schedule to the Constitution. Money-lending and money borrowing are different. (1973) 2 Mad LJ '72 (84, 85) (DB).

(18) T. N. Debt Relief Act, 1976, does not violate the provisions of Part XIII of the Constitution, which relate to trade, commerce, and intercourse within the territory of India. The State is empowered to legislate on trade and commerce under Entry 26 of List II of the Seventh Schedule. A 1977 Mad 153 (157).

(19) Entry 14 of List II has to be read with Entries 24, 26 and 27 thereof and corresponding entries relating to Scheduled industry, that is to say, Entry 52 of List I and Entry 33 of List III. 1979 MPLJ 221 (MP).

(20) State's power to regulate distribution of intoxicating liquor — Neither explicitly nor impliedly taken away by the order passed under Section 18 (b) (1) of the Industries (Develop-

27. Production, supply and distribution of goods subject to the provisions of Entry 33 of List III.

[Government of India Act, 1935, Item 29.]

28. Markets and fairs.

[Government of India Act, 1935, Item 27.]

Schedule 7, List 2, Entry 26 (contd.)

ment and Regulation) Act, 1951 — Courts, however, have to take into account Entry 26 in List II and Entry 33 in List III, for determining the scope of legislative power of the Parliament and the State. **A 1980 SC 614 (622) : 1980 All LJ 258.**

Schedule 7, List 2, Entry 27

(1) This entry confers on the State Legislature power to restrict the movement of goods within the State by issue of permits. A 1952 Orissa 260 (266) : 1952 Cri LJ 1354 (DB).

(2) The State Legislature can fix prices for goods. A 1946 Cal 197 (204) (DB).

(3) The State Legislature can lay an embargo on export out of the State in order to effectively control the production and distribution of goods for the purpose of maintaining or increasing their supply within the State itself. **A 1953 SC 83 (86) : 1953 Cri LJ 525.**

(4) A law which enables orders to be made for regulating the distribution of articles by requiring them to be sold to specified persons and to provide for incidental matters and entering and searching premises and for the issue of licences is a law relating to distribution of goods. A 1946 Cal 197 (203) (DB).

(5) Cloth is an article and therefore 'goods' within the meaning of the definition in Article 366 (12) and a law can be made with respect to its distribution. A 1946 Cal 197 (203) (DB).

(6) Sugarcane being 'goods' fell directly under this entry and within the exclusive jurisdiction of the State Legislature when it passed the U. P. Sugarcane (Regulation of Supply and Purchase) Act, 24 of 1953. **A 1956 SC 676 (691).**

(7) Central Excises and Salt Act (1944), Sections 6, 8 — Act is within legislative competence of Central Legislature under List 1, Item 45 of the Government of India Act, 1935 — Incidental encroachment on Item 27 or 29 of List 2 does not affect its validity. **A 1960 SC 424 (429).**

(8) The pith and substance of the Forward Contracts (Regulation) Act, 1952 is to regulate 'future market' which comes under Item 48 of List I. It incidentally affects 'supply and distribution of goods' covered by Entry 27 of List II. Act is valid. A 1959 Cal 89 (91, 92) (DB). (Reversed on another point in A 1963 SC 90.)

(9) Kerala Essential Articles Control (Temporary Powers) Act, 1962, falls under Entries 26 and 27 of List II of the Seventh Schedule to the Constitution. **A 1976 SC 1031 (1044). (ILR (1970) 1 Ker 116, Reversed.)**

(10) The subject-matter of the Kerala Gwalior Rayons Ordinance (Ker. Ordn. 14 of 1978) falls fairly and squarely within Entry 52 of List I of the VIIth Schedule to the Constitution and not either within Entry 24 or 27 of List II or Entry 23 or 33 of List III of the said schedule. **A 1979 Ker 56 (66).**

(11) Entry 14 of List II of the Seventh Schedule to the Constitution has to be read with Entries 24, 26 & 27 of the said list and corresponding entries relating to Scheduled industry, that is, Entry 52 of List I and Entry 33 of List III of the said schedule. 1979 MPLJ 221 (DB).

Schedule 7, List 2, Entry 28

(1) Central Excises and Salt Act (1944), Sections 6, 8 — Act is within legislative competence of Central Legislature under List I Item 45 of the Government of India Act, 1935 — Incidental encroachment on Item 27 or 29 of List 2 of the Government of India Act does not affect its validity. **A 1960 SC 424 (429).**

(2) The State Legislature has been given power to legislate on markets under this Entry. A 1958 Assam 156 (159) (DB).

(3) The power to regulate mines and minerals development belongs to the State Legislature. A 1968 Madh Pra 17 (18) (DB).

(4) Punjab State Legislature is competent to enact Punjab Cattle Fairs (Regulation) Act (6 of 1968) by virtue of Entry 28 of List 2 of 7th Schedule. **A 1969 SC 1100 (1103). (A 1968 Punj 391, Overruled.)**

(5-6) Merely because a building can be used for any purpose including that of market, a legislation regulating mainly relations between landlords and tenants does not ipso facto become legislation on markets. (1968) 2 Andh WR 273 (281) : ILR (1969) Andh Pra 129 (DB).

(7) Pith and substance of subject-matter of Mysore Agricultural Produce Marketing (Regulation) Act falls within Entries 26 and 28 of State List. A 1970 Mys 114.

(8) Bihar Act 16 of 1960 is covered by Entry 28 — 'Markets & Fairs' of the State List and as such there is no question of legislative incompetence on the part of the State Legislature. A 1977 Pat 136 (142) ** 1975 BBCJ 1 (30) (Pat).

(9) Subject-matter of the Punjab Agricultural Produce Markets Act, 23 of 1961, falls within Entry 28 and not Entries 14 and 18 of List II of the VIIth Schedule of the Constitution. **A 1977 Punj 347 (351, 352) : 1977 Tax LR 2209 (2213, 2214) (Punj) (FB).**

(10) Bihar Agricultural Produce Markets Act, 1960 never purports to regulate trade and commerce in general, but in pith and substance purports to make provision for establishment of markets for agricultural produce, and for providing services in such markets. The market fee which is to be realised, is to be spent for facilities to be provided in such markets. The State Legislature was thus competent to legislate over those matters under Entry 28 of List II of Seventh Schedule to the Constitution. **1979 BLJR 560 (567) (DB).**

29. [Omitted by Constitution (Forty-second Amendment) Act, 1976, S. 57 (3-1-77).]

30. Money-lending and money-lenders; relief of agricultural indebtedness.

[Government of India Act, 1935, Item 27.]

31. Inns and inn-keepers.

[Government of India Act, 1935, Item 28.]

32. Incorporation, regulation and winding up of corporations, other than those specified in List I, and universities, unincorporated trading, literary, scientific, religious and other societies and associations; co-operative societies.

Schedule 7, List 2, Entry 30

(1) Where an Act passed by a State Legislature deals, in pith and substance, with money-lending and money-lenders, the fact that it incidentally invades the Union field with regard to promissory notes does not make it ultra vires the State's Legislative competence. A 1947 PC 60 (63, 64, 65) ** A 1952 Pat 39 (40) (DB).

(2) The pith and substance of the Madras Agriculturists' Relief Act (4 of 1938) cannot be said to be legislation with respect to negotiable instruments or promissory notes. A 1941 FC 47 (51).

(3) Subject-matter of Section 9, Evacuee Interest (Separation) Act 1951, falls within the ambit of Entries 18 and 30 of State list and is valid. A 1954 Punj 261 (263) (DB).

(4) Central Excises and Salt Act (1944), Sections 6, 8 are within legislative competence of Central Legislature under List I, Item 45 of the Government of India Act, 1935 — Incidental encroachment on Item 27 or 29 of List 2 does not affect its validity. A 1960 SC 424 (429).

(5) The pith and substance of Bombay Agricultural Debtors Relief Act (28 of 1939), Section 52 is to relieve the agricultural debtors from their indebtedness. This is covered by Entry 30 of List II. A 1961 Mys 259 (262, 263).

(6) If, in pith and substance, the provisions of Foodgrains Dealers Licencing Order (1966) made under Essential Commodities Act (1955) are to be treated as made for supply and distribution of food stuffs they cannot be said to be unconstitutional merely because there is incidental encroachment on right of a money lender. A 1968 Pat 346 (350) (DB).

(7) Kerala Agriculturists Debt Relief Act (31 of 1958) is constitutionally valid as relief of agricultural indebtedness is covered by List 2, Entry 30. 1961 Ker LJ 504 (DB).

(8) State Financial Corporations Act is within the competence of the Parliament under Entries 43 and 45 of Sch. 7, List I of Constitution. A 1973 Gauhati 136.

(9) Section 20 of Kerala Act (11 of 1970) providing for restoration of land to agriculturist even after confirmed execution sale thereof, is within the legislative competence of the State. 1972 Ker LT 1031.

(10) Pondicherry Chit Funds Act falls under Entry 7 of List III and not under Entry 45 of List I or Entry 30, List II. It is within the legislative competence of the State legislature. A 1972 Mad 99.

(11) Maharashtra Debt Relief Act 1976 — Not ultra vires the State Legislature — Article 246 (3) read with Entry 30 in List II of the Seventh Schedule to the Constitution empowers the State to make the impugned law A 1977 SC 1825 (1844).

(12) Kerala Agriculturists Debt Relief Act (2 of 1970), Section 20 — Act providing for relief of indebted agriculturists in Kerala is valid. A 1978 SC 771.

(13) Kerala Debt Relief Act (1977), Pre. — Act is within the legislative competence of the State under Entry 30, List II of the 7th Schedule to the Constitution. It is an Act designated to provide relief to agricultural indebtedness. A 1979 NOC 135 (Ker) (DB).

(14) Entry 30 of List II of the Seventh Schedule must be read as a whole so that the word 'agricultural' must be interpreted to harmonise it with money-lending and money-lenders. 'Relieve agriculturists of their indebtedness' — Relief to agriculturists must be the true import of the expression. Irrespective of whether the indebtedness be agricultural or non-agricultural, all debts fall within the scope of Entry 30, if they are incurred by an agriculturist, whether in connection with agriculture or otherwise. A 1977 Madh Pra 21 (24).

(15) A money-circulation scheme or a chit fund scheme is that several people pool their contribution out of which a loan is advanced to a lowest bidder, who may be in need of money in praesenti. He then repays the loan in the form of instalments. Therefore Entry 30 of List II would apply. A 1977 Madh Pra 74 (77, 78).

(16) T. N. Debt Relief Act, 1976, is within the competence of the State Legislature. It may fall under Entry 30 of List II "money-lending and money-lenders"; "relief of agricultural indebtedness" and Entry 20 — Trade and commerce. A 1977 Mad 153 (155).

(17) Bihar Money-lenders' Act, 1975, is covered by Entry 30 of List II of the Seventh Schedule to the Constitution. A 1978 Pat 172 (184).

(18) Chapter III-B of Reserve Bank of India Act (1934) — Validity — Provisions in pith and substance relate to control of currency and fall under Entries 38 and 36 of List I of Seventh Schedule to the Constitution — They do not anywise entrench upon Entry 30 of List II of the 7th Schedule — Provisions of Chap. III are valid. (1973) 2 Mad LJ 72 (84, 85) (DB) (Mad).

Schedule 7, List 2, Entry 32

(1) It is not necessary that there must be a voluntary society of individuals united together by mutual agreement for common purposes before a corporation could come into existence. Section 113, U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), establishing a

33. Theatres and dramatic performances; cinemas subject to the provisions of Entry 60 of List I; sports, entertainments and amusements.
[Government of India Act, 1935, Item 35.]

34. Betting and gambling.
[Government of India Act, 1935, Item 36.]

Schedule 7, List 2, Entry 32 (contd.)

Gaon Samaj as a body corporate cannot therefore be challenged on this ground. A 1951 All 674 (698) (FB).

(2) Tibbia College Act (Delhi Act 5 of 1952), Section 1 falls under Entry 32 of List 2 and is within competence of State Legislature. A 1962 SC 458 (471).

(3) Madras Commercial Crops Market Act (20 of 1933) comes within the purview of Entry 32, List II. A 1959 Andh Pra 398 (403) (DB).

(4) Bombay Public Trusts Act (29 of 1950) — Act is intra vires of State Legislature — Society registered under Societies Registration Act (1860) — Not a corporation or quasi-corporation but an unincorporated society contemplated by List 2, Entry 32. A 1962 Bom 12 (21) (DB) •• A 1968 Bom 91 (94) (DB).

(5) The State Legislature is competent to make provision like Section 9 of the Orissa Co-operative Societies Act, 1951 under this Entry. (1968) 34 Cut LT 745 (DB).

(6) Legislation with regard to non-trading company in Part B State which falls under Entry 32 of List II, is within the exclusive jurisdiction of the State. 1958 Ker LT 1178.

(7) The old Cochin Companies Act (Cochin Act XII of 1122) is unaffected either by the Central Act 3 of 1951 or Central Act 1 of 1956 (both Companies Acts), so far as non-trading companies are concerned. 1958 Ker LT 1178.

(8) Newly constituted Hindi Sahitya Sammelan not declared as institution of national importance — Parliament incompetent to legislate in respect of it. A 1971 SC 966.

(9) U. P. Co-operative Societies Act, 1965 (11 of 1966) falls under Entry 32 of List 2 of Schedule 7 and not under Entry 43 or 45 of List I. A 1972 All 159.

(10) Merely because a building can be used for any purpose including that of market, a legislation regulating mainly relations between landlords and tenants does not ipso facto become legislation on markets. ILR (1969) Andh Pra 129.

(11) Interpretation of — Competency of State Legislature to enact Section 115, A. P. Co-operative Societies Act (7 of 1964) — It is intra vires. (1973-74) 9 Co-op LJ 109 (Andh Pra).

(12) "Co-operative Societies" — These are excluded by List I, Entry 43. A 1971 Bom 365.

(13) No conflict between Entry 32 and Entry 45 of List I. A 1971 Bom 365.

(14) Registrar, Co-operative Societies has power to issue notice under S. 78 of Maha. Co-op. Societies Act, 1961, to any co-operative society. Banking co-operative society is not excluded on ground that "banking" is governed by Central Legislature. A 1971 Bom 365.

(15) Co-operative Societies doing banking business are taken out of Entry 43 of List I and deliberately put in Entry 32 of List II — State Legislature is competent to regulate functioning of such co-operative societies. A 1970 Punj 528 (531).

(16) M. P. Viswavidyalaya Adhiniyam (Act 22 of 1973), Section 46 — Hindi Sahitya Sammelan Prayag is not a body which is "incorporated by law as a University". A 1976 Madh Pra 98 (100).

(17) Section 14-A of the Karnataka Co-operative Societies Act (11 of 1959) as amended by Act 70 of 1976 and Karnataka Ordn. 7 of 1977 is primarily concerned with the co-operative societies, with regard to its amalgamation, division or re-organisation, and thus fairly and squarely falls within Entry 32 of List II of the Seventh Schedule. A 1978 Kant 148 (157, 172).

(18) A. P. (Agricultural Produce and Live Stock) Markets Act (16 of 1966) is not invalid on ground of repugnancy of State law to law made by Parliament. The establishment of markets is within the competence of the State Legislature and establishment of a Market Committee which shall be a body corporate for the purpose of regulating marketing of agricultural produce and livestock does not in any way encroach upon the occupied field. A 1975 Andh Pra 58 (81).

Schedule 7, List 2, Entry 33

(1) The entertainments and amusements contemplated by this entry are not the subjective entertainments or amusements which a person may receive by solving a cross-word puzzle or by indulging in any other mental or intellectual pleasure. The entertainment or amusement contemplated is something objective outside the person amused or entertained. A 1956 Bom 1 (11) (DB).

(2) The Madras Entertainment Tax (Andhra Amendment) Act, 1955, Sec. 4-A is not ultra vires the power of provincial Legislature. A 1959 Andh Pra 461 (463) (DB).

(3) The word 'Cinemas' is mentioned in Entry 33. The word 'Amusement' includes Cinemas. Tax on Cinema shows is covered by List 2, Entry 62 and is valid. Mysore Cinematograph Show Tax Act (16 of 1951), Sec. 3. A 1959 SC 894 (896) •• A 1959 Andh Pra 461 (463).

(4) Held on facts, reasons for or basis of Theatre Tax imposed by Allahabad Nagar Mahapalika is not possession of particular profession or calling but giving of one or more shows or exhibitions and the tax is covered by Entries 33 and 62 of this list — Therefore, it is not hit by Article 276. 1969 All LJ 295.

(5) Imposition of theatre tax by Allahabad Nagar Mahapalika — Graduation of tax in accordance with value of cinema building is based on rational and intelligible grounds. 1969 All LJ 295.

Schedule 7, List 2, Entry 34

(1) Gambling would include any activity or undertaking whose determination is controlled or influenced by chance or accident and which undertaking is undertaken or activity entered

35 Works, lands and buildings vested in or in the possession of the State.

[Government of India Act, 1935, Item 8.]

36. [Omitted by the Constitution (Seventh Amendment) Act, 1956, S. 26 (1-11-1956).]

37. Elections to the Legislature of the State subject to the provisions of any law made by Parliament.

[Government of India Act, 1935, Item 11.]

38. Salaries and allowances of members of the Legislature of the State, of the Speaker and Deputy Speaker of the Legislative Assembly and, if there is a Legislative Council, of the Chairman and Deputy Chairman thereof.

[Government of India Act, 1935, Item 12.]

39. Powers, privileges and immunities of the Legislative Assembly and of the members and the committees thereof, and, if there is a Legislative Council, of that Council and of the members and the committees thereof; enforcement of attendance of persons for giving evidence or producing documents before committees of the Legislature of the State.

[Government of India Act, 1935, Item 12.]

40. Salaries and allowances of Ministers for the State.

[Government of India Act, 1935, Item 12.]

Schedule 7, List 2, Entry 34 (contd.)

into with consciousness of risk. A 1956 Bom 1 (6) (DB).

(2) A lottery has been described as a scheme for distributing prizes by lot or chance and constitutes gambling. A 1956 Bom 1 (6) (DB).

(3) A prize competition, success wherein does not depend to a substantial degree upon the exercise of skill, is of a gambling nature. A 1957 SC 699 (710) •• A 1959 Cal 141 (145) : 1959 Cri LJ 307.

(4) The West Bengal Prize Competition Act (32 of 1957) and rules framed thereunder came within purview of this entry and were perfectly valid. A 1959 Cal 141 (145) : 1959 Cri LJ 307.

(5) Resolutions by State Legislatures surrendering control and regulation of prize competitions to the Parliament — Power to tax betting and gambling cannot be said to have been surrendered to Parliament. A 1962 SC 594 (599).

(6) The subject of betting and gambling in Entry 34 of List II and the taxes on betting and gambling as given in Entry 62 of List II have to be read separately as separate powers. A 1962 SC 594 (599).

(7) Power of State to tax income from betting, gambling and lotteries — The provision does not authorise the State to levy tax on such income. 1974 Tax LR 885 (All).

(8) There is an apparent overlapping between Entry 40 in List I and Entry 34 in List II. A 1975 Andh Pra 50.

(9) A. P. (Agricultural Produce and Live Stock) Markets Act, 1966 is not invalid on ground of repugnancy of State law to law made by Parliament. A 1975 Andh Pra 58.

(10) There is overlapping between Entry 34, List II and Entry 40, List I but List I will prevail over List II. A 1971 Bom 332.

(11) When a State lottery is not lawfully organised by the State it amounts to betting and gambling and falls within Entry 34 of the State list. The State Government is therefore competent to legislate in respect of the same. It can also take even executive action in respect of the unlawful lottery of another State. A 1971 Bom 332 (341).

(12) Pondicherry Chit Funds Act falls under Entry 7 of List 3 and not under Entry 45 of List I or Entry 30, List II. It also does not fall within Entry 34 of List II of Sch. 7 of the Constitution. It is within the legislative competence of the State Legislature. A 1972 Mad 99.

(13) The Entry, gambling and betting in the State List as a subject of legislative power, can be invoked by the Legislature in prohibiting betting simpliciter on horse races or betting and gambling on horce races. A 1976 Mad 238 (244).

Schedule 7, List 2, Entry 35

(1) The word 'building' is a word of different meanings in different contexts. It may include a railway embankment though in ordinary language this would not be spoken of as building. A 1951 Cal 294 (295, 296) (DB).

(2) A building need not be a completed structure; it is sufficient that it should be a connected and entire structure. A 1951 Cal 294 (296) (DB).

(3) Maharashtra State Agricultural Lands (Ceiling on Holdings) Act (27 of 1961 as amended by Act, 13 of 1962), Section 28 — Section 28 falls under Entry 35, List 2 of 7th Schedule to Constitution and is valid. A 1968 SC 1395 (1401) : 1968 Lab IC 1525.

(4) Bihar Land Reforms Act (30 of 1950). The pith and substance of the Act falls within Item 35 of List II. A 1953 Pat 337 (337, 338) (DB).

Schedule 7, List 2, Entry 37

(1) The words "subject to the provisions of any law made by Parliament" occurring in this entry only mean that the Parliamentary statute would have preference over a State law in case of repugnancy and that whenever a law is made by the State Legislature in exercise of its legislative powers under this entry, that law will be subject to the provisions of a Parliamentary statute. The Representation of the People Act, 1951, is such a Parliamentary statute. A 1954 Madh B 111 (112) (DB).

41. State public services; State Public Service Commission.
[Government of India Act, 1935, Item 6.]

SCHEDULE 7, LIST 2, ENTRY 41

SYNOPSIS

1. Scope.
2. Powers Re: State Public Services.
3. Integration of Services.
4. Integration of Services among new States.

1. Scope.— (1) University of Rajasthan Act (46 of 1956) falls under Entry 11 and not under Entry 41. (1970) 2 SCR 559.

(2) The scope of Entry 41 of List II of the Seventh Schedule is wider than the matter of regulating the recruitment and conditions of service of public servants under Article 309. By virtue of Arts. 246, 309 read with Entry 41, List II, therefore, the State Legislature had legislative competence not only to change the service conditions of the State Civil Servants with retrospective effect but also to validate with retrospective force invalid executive orders retiring the servants, because such validating legislation must be regarded as subsidiary or ancillary to the power of legislation on the subject covered by Entry 41. A 1976 SC 2250 (2256).

(3) Entry 41 thereof confers exclusive jurisdiction on State Legislature to enact laws regulating public servants as well as to State Public Service Commission. 1978 Lab IC 7 (8) (All).

(4) State Government in exercise of executive powers under Article 162 read with Entry 41 of List II, can frame rules for recruitment to different services. Once statutory rules are made, they prevail over previous executive instructions or rules in case of inconsistency. 1971 Lab IC 1029 (1035) (Guj).

(5) The age of retirement of an official in the service of the State is a condition of service and hence it squarely falls within Art. 309 read with Entry 41 of List II of the VIIth Schedule. 1975 Lab IC 799 (811, 812) (Kant).

(6) As the State Legislature has overriding power under Article 309 and Entry 41 of List II, the Governor's power to make rules under Article 309 on a matter relating to conditions of service continues only until provision in that behalf is made by or under an Act of the State Legislature. 1977 Lab IC 1134 (1140) (Madh Pra).

(7) In view of Entry 41 in List II, the State Legislature can make law not only in respect of matters on which the Government is empowered to make regulations or which have been specifically mentioned in the Constitution but also in respect of matters on which there is no provision in the Constitution. 1976 Lab IC 1603 (1606) (Raj).

(8) The power under Article 309 to regulate recruitment and conditions of service could be exercised in respect of cadres or posts created until they are abolished. But the power to create or abolish the posts is not a power which falls under Article 309 of the Constitution. The said power is included in Entry 41 of the State List. Therefore under Entry 41, the State Legislature has the power to make laws regulating the creating and abolition of posts and all other matters relating to public services and posts, which also includes matters relating to recruitment and conditions of service. The executive power of the State is co-extensive with that of the Legislature in view of Article 162 of the Constitution. Therefore in the absence of any law made by the Legislature, the executive has the power to create or abolish any post or posts. (1980) 1 Kant LJ 394 (396).

2. Powers Re: State Public Services.— (1) By virtue of Article 372, until Parliament has made a law under Art. 16 (3) the existing laws continue to be in force and are not hit by Art. 16 (3). A 1955 Orissa 113 (115) (DB). (Orissa Administrative Service and the Orissa Subordinate Administrative Service (Recruitment) Rules, 1950, Rule 5 — Does not violate the Fundamental Rights guaranteed by the Constitution in Article 16.)

(2) Prescribing a language qualification is not covered by Art. 16 (2) and such a qualification may be laid down by the rules made under Article 309, or continued in force under Article 372. A 1955 Orissa 113 (115) (DB).

(3) There is nothing in terms of Article 309, Proviso, which abridges power of executive to act without a law under Article 162 in respect of State Public Services. A 1966 SC 1942 (1944) °° A 1969 Mys 186 (191) : 1969 Lab IC 681 (DB).

(4) The State Government, in view of Article 162 and Entry 41 of List II read with Article 309, has power to equate one or more posts in the State services as well as the power to fix seniority amongst its officials. A 1966 Mys 95 (97) (DB).

(5) The Legislature of a State, having exclusive powers under Article 246 to make laws with respect to public services of that State, has ordinarily also power to legislate on all matters incidental and ancillary to such services. A 1961 Mys 210 (214, 215) (DB).

(6) State Legislature is competent under Entries 41 and 5 in List 2 to enact Chap. 14 of Maharashtra Zilla Parishads and Panchayat Samitis Act (5 of 1962) relating to "provisions as to services' — It is entitled to authorise the Government to constitute services for each Zilla Parishad. Zilla Parishads are obliged to accept allotted Government servants on terms not disadvantageous to such allotted servants. A 1967 Bom 482 (503) : 1968 Lab IC 368 (DB).

(7) Articles 245 and 246 of the Constitution read with Entry 41 of the State List authorise legislation both for creation and abolition of posts subject to restraints and limitations imposed by the Constitution. A 1964 Mys 84 (106) (DB).

(8) Rule 3, Mysore State Civil Services (General Recruitment) Rules, 1957, no bar for making appointments under State's executive power, without framing of statutory rules. A 1966 SC 1942 (1945).

(9) The State Government has executive power in respect of "State Public Services". A 1966 SC 1942 (1944) °° 1968 Lab IC 1605 (1617) (DB) (Raj).

(10) Rajasthan Medical Services (Collegiate Branch) Rules (1962) (as amended on 22-8-

Schedule 7, List 2, Entry 41 — Note 2 (contd.)

1966) made under proviso to Article 309, therefore, do not transgress the field covered by the University of Rajasthan Act (46 of 1956). 1968 Lab IC 1605 (1617) (DB) (Raj).

(11) The Governor is competent to make rules regulating the recruitment to the posts and the conditions of service of persons appointed to Rajasthan Medical Services "Collegiate Branch". 1968 Lab IC 1605 (1617) (DB) (Raj).

(12) Mysore Public Works Engineering Department Services (Recruitment) Rules, 1960 (as amended on 23-8-1961) though assumed void so far they were made to operate retrospectively, appointments of Assistant Engineers made by Mysore Government Notification No. P. W. 10 SAG 59, D/- 31-10-1961, considered validly made in exercise of executive power under Article 162. **A 1966 SC 1942 (1944).**

(13) Article 309 is subject to the other provisions of the Constitution. The Parliament has power by a law referred to under Art. 4 to vest in the Central Government power which might ordinarily form an element of executive powers of the State so as to bring about diminution of that power. (1967) 2 Mys LJ 544 (DB).

(14) Government's power to make law under Entries 41, 11 and 14 of List II, Schedule 7 of Constitution of India is subject to provisions of Arts. 311, 14 and 16 of the Constitution. 1969 Lab IC 730 (734) (DB) (Mys).

(15) Mysore University of Agricultural Science Act (22 of 1963), S. 7 (5) is unconstitutional. The legislature had no competence to substitute for the Government servants working in the institutions referred to in Sec. 7 (4) a new master or to terminate their services in civil posts. 1969 Lab IC 730 (737, 738) (DB) (Mys).

(16) A rule regulating promotion is a condition of service. When there is provision for promotion any variation of the rules regulating promotion will amount to a variation of the condition of service. (1967) 2 Mys LJ 544 (DB).

(17) Entry 41 of List II stands subordinate to Arts. 4, 73 and 162 and cannot avail to give the State, the exclusive power in the matter of integration. Nor does Article 309 give such power. State Government's powers in the matter are to be exercised in subordination to those of the Central Government. **A 1970 Ker 110 (115) (FB).**

3. **Integration of services.**— (1) The executive power of the State Government normally includes the power to make an integration of its services as per Article 162 and Entry 41 in List II. A 1961 Mys 210 (215) (DB) ** **A 1965 Guj 23 (35) (FB).**

(2) Section 115 (5) of the States Reorganisation Act, 1956, does not imply that the 'power' of the State Government in connection with the integration of services is thereby wholly taken away or that the same is wholly and solely conferred on the Central Government. **A 1965 Guj 23 (37, 38) (FB).**

[See also A 1969 Punj 34 (40).]
[But see A 1961 Mys 210 (218) (DB).]

4. **Integration of services among new States.** — (1) Inter-State seniority list of new State Government servants is to be prepared only by Central Government and not by State Government — State Government can prepare a provisional list — States Reorganisation Act (1956), Section 115 (5). A 1966 Mys 95 (97, 98) (DB).

(2) Provisions of Section 115 (5) of the States Reorganisation Act, 1956 would be fully satisfied if power of the State under Article 162 is made subject to any directions which the Central Government may give to the State Government in connection with the integration of services. **A 1965 Guj 23 (35) (FB).**

(3) The State Government had the right and authority to frame the Punjab Service Integration Rules, 1957 in exercise of the powers conferred on it by the proviso to Article 309 and to equate the two units of the services in question in exercise of its executive power under Article 162 read with Entry 41 of List II subject to the control and direction of the Central Government. A 1969 Punj 34 (41, 42).

(4) Integration of services on reorganisation of States — Central Government taking help of State Government in the matter was held to be valid — States Reorganisation Act (1956), Sec. 115 (5). **A 1968 SC 850 (856, 857).** (A 1964 Madh Pra 307, **Reversed.**)

(5) Questions whether the power of integration is exclusively conferred upon the Central Government under Section 115 of the States Reorganisation Act (1956) and whether the power of the State Government in the matters of integration under Article 162 read with Entry 41, List II remains unaffected except to the extent that the State Government must carry out the directions of the Central Governmen were left open. **A 1968 SC 850 (854, 855).**

(6) The power given to the Central Government to ensure fair and equitable treatment continues to be available until the last of the official allotted to the new State retires. (1967) 2 Mys LJ 544 (DB).

(7) Senioriy list prepared by the State Government would continue to be valid and enforceable till the Central Government prepares a seniority list under Sec. 115 (5) of the States Reorganisation Act, 1956 unless the same is revised according to law by the State Government. A 1966 Mys 95 (98) (DB).

(8) Appointment of official by transfer from one Department to another is no part of process of integration — Transfer is not dependent on completion of integration by Central Government — Mysore Government Servants (Seniority) Rules (1957), Rule 6. A 1968 Mys 73 (81) (DB).

(9) The decision regarding integration relates back to the 'Appointed Day' under the Act. The exclusive power of the State vested by the Constitution under Entry 41 of List II of Schedule VII on the subject of 'State Public Services' has been curtailed only to the limited extent of the power of integration conferred by

42. State pensions, that is to say, pensions payable by the State or out of the Consolidated Fund of the State.
[Government of India Act, 1935, Item 7.]

43. Public debt of the State.
[Government of India Act, 1935, Item 5.]

44. Treasure trove.
[Government of India Act, 1935, Item 21.]

45. Land revenue, including the assessment and collection of revenue, the maintenance of land records, survey for revenue purposes and records of rights, and alienation of revenues.
[Government of India Act, 1935, Item 39.]

Schedule 7, List 2, Entry 41 — Note 4 (contd.) the Parliament under S. 115 (5) on the Central Government. A 1968 Mys 73 (81) (DB).

(10) Preparation of inter-State Seniority Lists by the Central Government, constitutes part of the function of division and integration of services vested in the Central Government by virtue of Sec. 115 (5). A 1968 Mys 73 (80) (DB).

Schedule 7, List 2, Entry 42

(1) A State law made under this entry which deprives a person of his property without payment of compensation would be hit by Article 31 of the Constitution and would be unconstitutional. A 1955 Hyd 44 (48) (DB). (Hyderabad (Abolition of Cash Grants) Act (33 of 1952), Sec. 3 (1) — Abolitions of rusums under Section 3 is invalid as infringing Art 31.)

(2) The power of the State Legislature to enact a law under this entry cannot be fettered or limited by any obligation which had been undertaken by the State. Therefore, the Pensions Act, 1871, which was validly brought into force in the State of Saurashtra from 15-3-1950, by virtue of this entry cannot be impugned only because it is in violation of any clause in the covenant. A 1956 Sau 119 (120) (DB).

SCHEDULE 7, LIST 2, ENTRY 45

SYNOPSIS

1. "Land revenue".
2. Scope.
3. "Maintenance of land records".
4. This entry and Article 31 (1) and (2).
5. Acts falling under this entry — Instances.

1. "Land revenue".— (1) The definition of land revenue given in Section 2 of the Bengal Land Revenue Sales Act (11 of 1859) and Section 1 of the Bengal Land Revenue Sales Act (7 of 1868) include 'malikana". (1904) 31 Ind App 52 (PC).

(2) The expression as defined in the Bombay Revenue Jurisdiction Act (10 of 1876) was held not to include the duties leviable on the manufacture of spirits or the taxes on the tapping of toddy trees. (1885) 9 Bom 462 (466, 467) (FB). (Per Birdwood J.)

(2-A) Cess customarily levied as public revenue due to Government referred to in Section 12 of the T. C. Land Tax Act (15 of 1955) is land revenue under Entry 45. A 1963 Ker 31 (42).

(3) There is now a general consensus of opinion that land revenue should be regarded as a tax and not a rent. Any chunk or slice cut off from profits of an individual is a tax. All bits of income or profits taken by the State in the exercise of its sovereign powers are in reality taxes, no matter under what name they appear. A 1956 Assam 33 (43) (SB). (Per Ram Labhaya, J.) ** A 1960 Andh Pra 461 (464) (DB). (Expression "revenue assessment" connotes tax.)

(4) The expression "land revenue" in Entry 45 means a share in the produce of land. Given that meaning it only empowers the State to charge a share in computed money value of the produce of land. The entire entry deals with the characteristic of this tax. (1967) 1 Andh WR 399. (Andhra Pradesh Land Revenue (Additional Assessment and Cess Revision) Act (22 of 1962) (as amended by A. P. Act 23 of 1962) — No indication in Acts that additional assessment is share of produce of land — Sections 3 to 5 of Act 22 of 1962 also unconstitutional as offending Articles 14 and 19 (1) (f).)

(5) Land Revenue — Surcharge on land revenue being merely enhancement of land revenue and not a tax on land revenue it is within legislative competence to levy surcharge on existing land revenue. A 1971 SC 2377.

(6) Enactment passed with primary object to regulate, control and restrict particular activity — Revenue collected in exercise of that power — Collection is neither tax nor fee — Primary purpose of S. 18-A of Cochin Abkari Act (1 of 1077) being to restrict sale of liquor, revenue collected to achieve that purpose does not become tax or fee. A 1971 Ker 146 (FB).

(7) While computing income from property, amount of Urban Land Tax levied under T. N. Act 12 of 1966 cannot be allowed as deduction. Urban Land Tax is wholly different from land revenue under Land Revenue Act. 1978 Tax LR 279 (280) (Mad).

2. Scope.— (1) This entry empowers the State Government to legislate in regard to land revenue, acting directly in the matter and enacting in respect of all or some existing assessments that the same should be increased as from a specified date to a specified amount. A 1944 FC 62 (65).

(2) No grant, whether with or without consideration, can affect the legislative power of the State, nor can any legislative Act bind the same or the succeeding Legislatures. A 1956 Assam 33 (38, 47) (SB) ** A 1960 Madh Pra 372 (374) (DB). (C. P. and Berar Revocation of Land Revenue Exemptions Act (37 of 1948) is valid.)

[See 1960 Ker LJ 112. (Imposition of land tax on Edavagai lands under T. C. Land Tax Act (15 of 1955).)]

46. Taxes on agricultural income.
[Government of India Act, 1935, Item 41.]

Schedule 7, List 2, Entry 45 — Note 2 (contd.)

(3) The State has a sovereign right to impose land revenue on the proprietors who are full and absolute owners of their lands and this revenue is a part of a statutory liability. **A 1956 Assam 33 (44) (SB).** (Per Ram Labhaya, J.)

(4) Legislation on resumption of Jagirs is one relating to lands and land revenue and falls under Entries 18 and 45 of List II. **A 1962 SC 1305 (1313).** (Punjab Resumption of Jagirs Act (39 of 1957).) °° (1963) 2 Mys LJ 164 (FB). (Bombay Merged Territories and Areas Jagirs Abolition Act (1953).) °° A 1966 Guj 149 (157) (DB). (Bombay Merged Territories and Miscellaneous Alienations Act (22 of 1955).)

(5) The power to legislate on a subject includes power to repeal, modify or amend any previous law on the subject. A 1960 Madh Pra 372 (374) (DB). (C. P. and Berar Revocation of Land Revenue Exemptions Act (37 of 1948).) °° A 1962 SC 1305 (1313). (Punjab Resumption of Jagirs Act (39 of 1957) — Amendment of, by Amending Act of 1959 — Amendment held intra vires.)

(6) Taxes on lands and buildings — Interpretation of Statute imposing tax on lands only — Falls under Entry 49 and not under Entry 45. **A 1970 SC 169 (176, 177).**

(7) Taxes on lands and buildings — Interpretation of statute imposing tax on lands only — Falls under Entry 49 and not under Entry 45. **A 1970 SC 169.**

3. "Maintenance of land records".— (1) It would be within the scope of Entry 45 to enact the law relating to records showing how the lands have been dealt with in the past; what are the rights and liabilities pertaining to these lands, how the records are to be maintained and preserved, where they should be kept and in whose custody they should be lodged. The expression "maintenance of land records" would mean not only the act of maintaining them but all things incidental to the keeping and maintenance of such land records. A 1962 Guj 18 (19).

4. This entry and Article 31 (1) and (2).— (1) The mere increase of an assessment for land revenue does not involve any acquisition of the land or any right in or over immovable property. In such a case there is no transference to the State Government or any other person of any land or rights in or over immovable property, which remain in the same possession or ownership as immediately before the increase of the assessment. **A 1944 FC 62 (65)** °° A 1960 Andh Pra 461 (464) : 1960 Andh LT 251 (DB).

(2) The right to enjoy land free from land revenue is not property in the eye of law. There can therefore be no acquisition of the right to enjoy landed property free of land revenue and no question of paying compensation arises when the land is assessed to land revenue. **A 1956 Assam 33 (36, 38, 45, 48) (SB).** (ILR (1953) 5 Assam 200, Affirmed.) °° A 1960 Madh Pra 372 (375) (DB).

5. Acts falling under this entry — Instances. — (1) The following are some other instances of Acts falling within this entry :

(a) Kerala Plantations (Additional Tax) Act (17 of 1960). A 1964 Ker 141 (142, 143).

(b) Bombay Land Tenures Abolition (Recovery of Records) Act (50 of 1953). A 1962 Guj 18 (20).

(c) Bengal Public Demands Recovery Act (1913). A 1964 Cal 165 (172) (DB). (Act is covered by Entries 3 and 45.)

(d) Bengal Public Demands Recovery (Validation of Certificates and Notices) Act (11 of 1961). A 1964 Cal 165 (172) (DB).

(e) Saurashtra Local Development Fund Act (26 of 1956). A 1959 Bom 43 (47).

Schedule 7, List 2, Entry 46

(1) This entry and Entry 82 of List 1 are complementary to each other. **A 1942 FC 8 (14).**

(2) Taxation is considered as a distinct matter for the purpose of legislative competence and the power to tax cannot be deduced from a general legislative entry as an ancillary power. A 1969 Mys 23 (35) (DB).

(3) The imposition of agricultural income-tax by the Bihar Agricultural Income-tax Act (7 of 1938) on income derived from permanently settled estates does not in any manner whittle down or derogate from the assurances given to the zamindars and landholders by the Bengal Permanent Settlement Regulation (1 of 1793). The reason is that the two pieces of legislation do not deal with the same subject-matter. **A 1942 FC 8 (13, 14)** °° **A 1930 PC 209 (214).** (A 1925 Cal 598, Affirmed.)

(4) For the meaning of the term 'agricultural income', the Courts have got to look to the terms of the definition in Sec. 2 (1), Income-tax Act, 1922, and construe the same regardless of any other considerations. **A 1957 SC 768 (773).** (A 1954 Cal 225 (231), Affirmed.) °° A 1964 SC 572 (574) °° A 1962 Ker 110 (115) (DB) °° A 1958 Cal 585 (591).

(5) The income derived from the sale of tea grown and manufactured by the seller is not solely derived from agriculture. It is partly derived from land by agricultural operations and partly from business. The power of State Legislature to make law in respect of taxes on agricultural income arising from tea plantations is limited to legislating with respect to agricultural income determined in accordance with Rule 24 of the Income-tax Rules (1922). Explanation added to definition of "agricultural income" in Section 2 of Kerala Agricultural Income-tax Act (22 of 1950) in substance adopts what has been provided in Rule 24 **A 1963 SC 760 (764, 765).**

47. Duties in respect of succession to agricultural land.
[Government of India Act, 1935, Item 43.]

48. Estate Duty in respect of agricultural land.
[Government of India Act, 1935, Item 43-A (as inserted by the India Estate Duty) Act, 1945 (8 and 9 Geo. VI, C. 7).]

49. Taxes on lands and buildings.
[Government of India Act, 1935, Item 42.]

Schedule 7, List 2, Entry 46 (contd.)

(6) Taxes on agricultural income would comprise within their scope even income from forestry operations provided it falls within the definition of agricultural income in Sec. 2 (1), Income-tax Act, 1922. **A 1957 SC 768 (772).** (Affirming on appeal A 1954 Cal 225.)

(7) A State Legislature is entitled to impose a tax on some categories of agricultural income and not impose it on others.. **A 1942 FC 8 (10).**

(8) A State law relating to agricultural income-tax cannot be held to be invalid merely because the definition of 'agricultural income' in that Act is narrower than the one given in the Income-tax Act, 1922. **A 1942 FC 8 (10).**

(9) The Bengal Agricultural Income-tax Act (4 of 1944) does not increase the jurisdiction of the Legislature which it does not possess. It does not provide for assessment of an income which is not agricultural income. A 1958 Cal 585 (591).

(10) The levy of agricultural income-tax on the income derived from the cultivation of tobacco under the T. C. Agricultural Income-tax Act (22 of 1950) is not beyond the powers of the State Legislature. **A 1961 Ker 111** (112) (DB).

(11) Section 65 (4) of the Madras Agricultural Income-tax Act (5 of 1955) is not beyond the legislative competence of the State, provision is also not unconstitutional on ground of being repugnant to Article 19 (1) (f). **A 1964 Mad** 556 (559) (DB).

(12) Parliament has committed no trespass whatever on the State field of legislation in imposing a tax on net wealth under Wealth Tax Act (1957), part of which may have sprung from agricultural income. **A 1962 Ker 110** (115) (DB).

(13) The words 'any law relating to taxation of income or profits' in Wealth Tax Act (1957), Section 2 (m) (iii) are wide enough to include the Bihar Agricultural Income-tax Act. It cannot be presumed by reference to Entry 46 of List II of Schedule 7 of the Constitution that the Parliament could not have intended to include the Bihar Agricultural Income-tax Act, in the said words. **1972 Tax LR 1753 (FB)** (Pat).

(14) There is nothing in the Scheme of the Act or the objects and reasons which goes to indicate that it was intended by the Legislature to give the phrase 'agricultural income' a wider meaning than given to it under the Income-tax Act, 1961. The Act is therefore not beyond the legislative competence of the State Legislature. ILR 1974 Bom 649 (665, 666).

Schedule 7, List 2, Entry 47

(1) The words "devolution" or "succession" imply passing of property to another on death of a person and cannot apply to transfers inter vivos. Tax on gifts of agricultural land sought to be levied by the Gift Tax Act (1958) does not come within the ambit of either Entry 18 or Entry 47. A 1962 Ker 97 (104) (DB) •• A 1963 Mad 419 (423) (DB) •• A 1960 Andh Pra 115 (119) (DB).

Scheduule 7, List 2, Entry 48

(1) The expression "agricultural land" has not been defined either in the Estate Duty Act (1953) or in the Constitution. "Agricultural land" is a land on which a prudent owner will undertake any of the processes of farming in its widest sense. The fact that a particular area is being used for agriculture may indicate that the land is agricultural in character. But the current user is by no means conclusive. 1966 Ker LT 1149 (DB).

(2) There is no warrant for the assumption that Entries 86, 88 of List 1 and Entry 48 of List II form a special group embodying any particular scheme. **A 1970 SC 169 (175).**

(3) Acts relating to taxation on lands and buildings — Competency of State Legislature to enact — Madras Act (XII of 1966) is not beyond competence of State Legislature. **A 1970 SC 169.**

SCHEDULE 7, LIST 2, ENTRY 49

SYNOPSIS

1. Tax on land and buildings.
2. Basis of Tax.
3. Entry 49, List 2 and Entry 86, List 1 — Distinction.

1. Tax on Land.— (1) In order to see under what entry a particular tax falls, Courts must examine the essential features of the tax and consider the pith and substance of the legislation. **A 1949 FC 81** (86) •• **A 1940 Bom 65** (70) (FB) •• A 1954 Bom 188 (191, 192) (DB).

(2) It is not the name of the tax but its real nature which determines into what category the tax falls. **A 1948 All 382 (386, 389) (FB).**

(3) Taxes on lands and buildings — Scope of entries — Statute imposing tax on lands only — Falls under Entry 49 and not under Entry 45. **A 1970 SC 169 (177).**

(4) A tax on property is confined to immovable property and clearly falls within the jurisdiction of the State Legislature by virtue of Item 49, List II U. P. Town Areas Act (2 of

Schedule 7, List 2, Entry 49 — Note 1 (contd.)

1914) is within the competence of State Legislature. A 1969 All 40 (42) (FB).

(5) The word 'lands' in Entry 49 of List 2 is wide enough to include all lands whether agricultural or not, and it would be plainly unreasonable to assume that it includes non-agricultural lands but does not include agricultural lands. A 1962 SC 1563 (1568) ** A 1964 Mad 556 (560) (DB) ** A 1960 Andh Pra 115 (118) (DB).

(6) Land in Entry 49 includes land on which forest stands — Taxation on land on which forest stands is permissible and legal under Entry 49 — Entry 49 and Entry 18 deal with entirely different subjects. A 1961 SC 552 (564) ** A 1963 Ker 31 (42).

(7) Imposition under Section 62, Assam Local Self Government Act of tax on land used as market is tax on land though its incidence which falls upon land depends upon the use of land as a market and is within competence of State legislature. A 1965 SC 1561 (1563) ** A 1959 Assam 221 (226) (SB).

(8) If the State Legislature had power to levy a tax only on land and buildings the same could not be levied on machinery contained in or situate on the building even though the machinery was there for the use of the building for a particular purpose. Therefore, R. 7 (2) of the rules framed under the Bom. Act LIX of 1949 was beyond the legislative competence of the State. A 1961 SC 1801 (1814).

(9) Whether tax on lands and buildings has acquired the special meaning as tax on buildings for local purposes imposed by local authorities only (Quaere). A 1966 Ker 14 (16).

(10) It cannot be contended that property tax be levied on lands and buildings from which owners derive gains and profits only. A 1969 Punj 354 (357) (DB).

(11) Section 128 (1) (x) of the U. P. Municipalities Act makes it clear that a water-tax is imposed on buildings or lands or both. The fact that water-tax under the Municipalities Act is in reality a tax on land and buildings finds further support from the provisions of Cl. (a) of Section 129 of the Act. The State Government has power under Entry 49 in List 2 of Sch. VII to the Constitution of India to make laws in respect of such tax. A 1962 All 83 (86) (DB).

(12) As agricultural lands are included in Entry 49 of List 2, the validity of the U. P. Large Holdings Tax Act would be beyond challenge, as in substance and in fact, it imposes a tax on land holding and as such, is within the competence of the State Legislature. A 1962 SC 1563 (1569).

(13) Power to tax lands and buildings — Cannot be used arbitrarily and in a manner inconsistent with fundamental rights. A 1969 SC 378 (379). (Kerala Buildings Tax Act (19 of 1961), Section 4 is ultra vires.)

(14) A tax on lands and buildings is distinctly different from a tax on gift of lands and buildings with the result that legislation in respect of the latter cannot fall under Entry 49, List 2. A 1967 All 19 (23) (DB) ** A 1965 Punj 65 (67, 68) (DB) ** A 1960 Andh Pra 115 (117) (DB).

[But see A 1962 Mys 269 (275) (DB). (A 1960 Andh Pra 115, Dissented from.)]

(15) 'A' taking agricultural land on lease and giving it for cultivation to various tenants and was thus working as contractor — Punjab District Board levying Professional Tax on 'A' for this — Held the tax could not be regarded as a tax in respect of any property within the meaning of Section 30 (b) of the Punjab District Boards Act. It was essentially a tax on profession, trade or calling. (1959) 61 Pun LR 309 (313).

(16) Fee under Section 284 of Indian Railways Act, 1890 cannot be considered as tax on land under Entry 49, List 2 of Sch. 7 of Constitution of India. 1967 Ker LT 848 (DB).

(17) Travancore Cochin Land Tax Act (15 of 1955), Sections 11 and 12 — Levy referred to in Section 12 is under Entry 45 of List 2 of the Seventh Schedule to Constitution and not under Entry 49. A 1963 Ker 31 (42).

(18) There are no words to suggest that a tax on land and buildings is to be levied only for the purpose of local Government. A 1967 Madh Pra 268 (271) (DB).

(19) Not worded to suggest that tax must be paid only by occupier or by both. A 1967 Madh Pra 268 (275) (DB).

(20) The tax under this entry may be levied either on the owner or the occupier of the land and building. A 1949 FC 81 (84). (Case under Government of India Act, 1935, Sch. VII, List 2, Entry 42.)

(21) If the tax contemplated under Entry 49 could be levied either on the occupier or the owner the number of buildings owned by the owner cannot be taken into account in charging the tax. A 1965 Mys 170 (206).

(22) See the undermentioned cases where tax was held to be on land. A 1965 SC 177 (182). (Madras District Boards Act (1920).) ** (1969) 1 Andh WR 505. (Andhra Irrigation (Levy of Betterment Contribution) Act 1955.) ** (1969) 1 Mad LJ 44. (Madras District Municipalities Act (5 of 1928).) ** (1966) 2 Mad LJ 172 (DB). (Madras Urban Land Tax Act 34 of 1963.) ** A 1970 SC 169 (176). (Madras Urban Land Tax Act (12 of 1966) is entirely within the ambit of Entry 49.) ** 1965 All LJ 201. (U. P. Nagar Kshetra Bhumi Aur Bhawan Kar Adhiniyam (12 of 1962).) ** A 1965 Andh Pra 91 (95) (DB). (Hyderabad District Municipalities Act (18 of 1956), Sections 97 (1) (b); 101 and 230 (2) — Levy of general water-tax under Section 97 (1) (b) is a tax on lands and buildings.) ** 1964 All WR (HC) 583. (Uttar Pradesh (Nagar Kshettra) Bhumi Aur Bhawan Kar Adhiniyam, (U. P. Act 12 of 1962).) ** A 1963 Andh Pra 379 (380) (DB) ** A 1963 Punj 354 (359) (DB). (Punjab Urban Immovable Property Tax Act (17 of 1940.) ** A 1960 Andh Pra 461 (464). (Andhra Inams (Assessment) Act (17 of

Schedule 7, List 2, Entry 49 — Note 1 (contd.)

1955).) °° A 1959 Bom 43 (46). (Saurashtra Local Development Fund Act (26 of 1956), Section 4.)

(23) "Land" includes not only the face of the earth but everything under it or over it. Hence the State Legislature can enact a law for levying tax in respect of the area beneath the surface of the earth, occupied by underground supply lines of electric power. **A 1975 SC 1234 (1250) : 1975 Tax LR 1540.**

(24) "Taxes on lands and buildings" — Taxes levied on buildings constructed by Respondent — House tax levied by Gram Panchayat under Andhra Pradesh Gram Panchayats Act, 1964 as amended by Amending Act of 1974 to include factory within the definition of "house" for purpose of taxation — Rule 6 of the Rules relating to house tax under Act providing that machinery and furniture are to be excluded from consideration for the purpose of assessment of house tax — The tax is only on "buildings" and does not transgress the scope of Entry 49. **A 1975 SC 2037 (2042, 2043) : 1975 Tax LR 2013.**

(25) Merely because a statute imposes tax on land alone it cannot be said that the statute does not fall under Entry 49. The legislative history of Entry 49 does not show that Entry 49 relating to tax on lands and buildings cannot be separated. Entry 49 "Taxes on lands and buildings" should be construed as taxes on land and taxes on buildings and there is no reason for restricting the amplitude of the language used in the entry. Consequently, it cannot be said that as Madras Urban Land Tax Act (XII of 1966) imposes tax on lands alone, it falls under Entry 45 and not Entry 49 of List 2. **A 1970 SC 169 (176).**

(26) Taxes on land and buildings — Imposition by State Legislature within Cantonment Areas by M P. Act 14 of 1964 — Valid — Not barred by Entry 3, List I of Schedule 7 and Section 60 of Cantonments Act. A 1979 Madh Pra 188 (190, 191).

(27) The W. B. Multi-storeyed Buildings Tax Act of 1975 as well as the amendments introduced in 1977 are clearly covered by Entry 49 of List II of the 7th Schedule. (1979) 1 Cal LJ 863 : 1979 Tax LR NOC 133.

(28) State Legislature can impose taxes and not merely fees on lands and buildings belonging to a factory. **A 1975 SC 2037 (2043) : 1975 Tax LR 2013.**

(29) Land cess imposed under Sections 78 and 79 of Tamil Nadu District Boards Act (1920) is a 'tax on lands' within Entry 49 of State List. State Legislature is competent to levy such tax. 1973 Tax LR 1666 (Andh Pra).

(30) Levy of cess under Section 27 of the Bombay Buildings Repairs and Reconstruction Board Act (47 of 1969) on residential buildings even though they are in sound and good condition and even though they will not require structural repairs for the entire period of the Act does not amount to an unreasonable restriction 349 (355).

and therefore does not violate Article 19 (1) (f). **A 1972 SC 845.**

(31) Madras Urban Land Tax Act, though within Entry 49 of List II, Section 6 violates Arts. 19 and 14. **A 1971 Mad 61 (77, 78, 136) (FB).**

(32) Imposition under Maharashtra Education (Cess) Act (1962) is tax on lands and buildings — Tax is authorised by Entry No. 49 of List II of Schedule VII — Fact that tax has no relation to services rendered is immaterial. A 1970 Bom 154.

(33) Levying and collecting cess for purpose of promoting education will be covered by term "education" — Incidence of this tax falls on lands and buildings — State Legislature is competent to impose this tax under Entry 49 even assuming tax is not covered by Entry 11. A 1970 Bom 154 (158).

(34) Gift of land is taxable under Gift Tax Act, 1958, S. 15 (3) — Subject-matter of gift tax falls under Entry 97 of List I and not under Entry 49, List II. A 1970 Andh Pra 126 (130).

(35) Claim for deduction of amount levied as urban land tax under T. N. Urban Land Tax Act (12 of 1966) cannot be allowed. Urban land tax is entirely different from land revenue under Madras Act of 1851. 1978 Tax LR 279 (281) (Mad).

(36) J. & K. Urban Immovable Property Tax Act is not beyond the competence of State Legislature and is valid. Entry 49 of List II is wide in amplitude and clothes State Legislature with the power to tax capital value of lands and buildings. Taxes levied by the State under Entry 49 cannot only be for the benefit of municipalities and local bodies but also for the benefit of general revenues of the State. 1974 Tax LR 1814 (1816) (J & K).

(37) Inclusion of water cess in definition of the term "land revenue" is not unconstitutional. Word 'revenue' is of wider connotation than the word 'tax'. **A 1976 Mad 318 (319, 320).**

(38) The legislature derives the power to impose tax on holdings by virtue of Entry 5 read with Entry 49 of List II of the Seventh Schedule. If the legislature has power to impose tax it can delegate such power to other authority by legislation. Both the Municipal Act and the Improvement Trusts Act are constitutional inasmuch as the legislature conferred power on the Municipality to collect tax on holdings and makes provision in S. 85 (1) of the Improvement Trust Act read with S. 115 of the Municipal Act that a portion of the collection is payable by the Municipality to the Trust to meet the expenditure incurred by the latter for development, improvement and expansion of the municipal area. ILR 1974 Cut 865.

(39) Water tax is always made relatable to land or building. Such a tax is not only authorised, but is also legal one. The Legislature had the competence to impose such a tax in exercise of legislative power derived from Entry 49 of the State List of the Seventh Schedule to the Constitution. (1979) 92 Mad LW

Schedule 7, List 2, Entry 49 (contd.)

2. Basis of Tax.— (1) Validity under Items 49 and 60 of List 2 of Constitution. State cannot legislate in respect of tax on sources other than those mentioned therein — But U. P. Act 10 of 1922 which was valid under Government of India Act, is valid under the Constitution by virtue of Art. 277 and Item 82 of Union List — Sections 108 and 44 are not void. 1955 All WR (HC) 520 (523) (DB).

(2) This entry which confers power on the State Legislature to levy tax introduces no terms of limitation and does not provide for any particular manner in which the tax should be levied. A 1954 Bom 188 (191) (DB). (Case under Entry 42, List 2, Government of India Act, 1935).

(3) A tax on land may be based on the annual value of the land and would still be a tax on land and would not be beyond the competence of the State Legislature. A 1965 SC 1561 (1562) ** A 1960 All 136 (149) (FB) ** A 1966 Ker 14 (17).

(4) There is nothing in Entry 49 which indicates that the tax is limited only to the rateable values i. e. annual letting values of lands and buildings — Under the entry tax can be levied on a variety of bases — The extent of lands, floor areas, number of storeys etc. A 1968 Guj 124 (140) (DB).

(5) Where on a plain reading of a section it can be gathered that the tax which it levies is a tax on lands and buildings the fact that either the annual value or its market value is taken as the basis for calculation of the tax cannot make any difference to the essential character of the tax itself. (1968) 1 Mys L 524 (DB).

(6) The unit of taxation under Section 4, Mysore Buildings Tax Act (4 of 1963) is building and is levied on the basis of total floorage of all buildings owned by an assessee in the same rating area. The tax levied is a tax on buildings and the State Legislature had full competence to enact the same. A 1965 Mys 170 (178) (DB).

(7) The use to which the land is put can be taken into account in imposing a tax on it within the meaning of Entry 49, List 2. A 1965 SC 1561 (1562).

(8) The power of a Municipal Corporation to levy a tax on open land is similar in extent to the power of the local Legislature. A 1954 Bom 188 (191) (DB).

(9) The yard-stick for computation of rates and taxes imposed by municipalities and other public bodies is primarily based upon the value of the property which the assessee has within the jurisdiction of the public body concerned. A 1964 Cal 590 (592).

(10) It is open to a Municipal Corporation to take into account the value of the land as such without reference to encumbrances and levy rate on the value of land so determined. Municipal tax is not concerned with real economic value of land but to find out its market-value from its real capital value in the economic sense. A 1954 Bom 188 (191) (DB).

(11) Annual letting value can be adopted as an artificial standard for determining, for purpose of income-tax, the income derived from lands and buildings or for measuring the capital value of the assets for imposition of a tax on capital income. But from this it does not follow that every tax imposed in relation to annual letting value of lands and buildings is a tax on income or on the capital value of the assets. A 1967 Madh Pra 268 (271) (DB) ** A 1968 J & K 105 (109) (DB).

(12) Entry 49 of the State List has imposed constitutional limitations on the legislative power of the State to impose tax on buildings except on the normal basis of the annual value based on the rent at which the building may reasonably be expected to be let, or any other reasonable standard of apportionment of tax burden, and such tax could be levied only for the exclusive utilisation of the local Governments (Municipalities). A 1965 Mys 170 (206) (DB).

(13) Imposition of tax on lands and buildings on basis of percentage of their capital value — State legislature is competent — Gujarat Imposition of Taxes by Municipalities (Validation) Act 1963 (2 of 1964) is validly enacted. A 1970 SC 192 (196).

(14) Section 24 of the Finance Act, 1969, which amends the relevant provisions of the Wealth Tax Act, 1957 so as to include capital value of agricultural land for computing net wealth is not beyond the legislative competence of the Parliament and is intra vires the Constitution. A 1972 SC 1061 : 1972 Tax LR 449. (Per Majority.)

(15) Imposition of tax on lands and buildings on basis of percentage of their capital value — State Legislature is competent. A 1970 SC 192.

(16) Scope — Gift Tax Act (1958) does not fall under Entry 49. A 1970 SC 999 (1001, 1002). (A 1962 Mys 269, Reversed.)

(17) M. P. Nirashriton Ki Sahayata Adhiniyam (12 of 1970), Ss. 1 (3), 4 to 7, 9 — Except Section 4 (1) (i) which is ultra vires other provisions are not open to challenge. Ultra vires Section 4 (1) (i) being separable, validity of other parts of the Act is not affected. A 1972 Madh Pra 95.

(18) Maharashtra Education (Cess) Act (27 of 1962), Sections 3, 4 — Education tax covered by Entry 49 — There is no limit fixed in so far as taxes falling under Entry 49 are concerned — Hence, education tax cannot be limited to Rs. 250 — Article 276 (2) has no application. A 1970 Bom 154.

(19) Levy of Cess on Land on basis of capital value is not a tax on capital value and is justified with reference to Entry 49. 1975 Ker LT 102 (DB).

(20) The Haisiyat tax is a tax on a man's financial position as reflected by his "circumstances and property" i. e. upon his capacity to pay. The word "circumstances" in Section 66 (n) is equivalent to "means" so that the taxation has to be according to the means and property of the tax-payer within the Municipality. Since the tax is a combination of the property tax and the profession tax it falls within the ambit of Entries 42 and 46, List II of Sch. 7 of the Government of India Act and Entries 49 and 60, List II of Sch. 7 of the Constitution. Hence the imposition of the Haisiyat tax by Section 35 (a) (ii) is a valid one. Distinction between tax on income and tax on profession pointed out. 1973 Tax LR 2341 (2432, 2434) (Madh Pra).

(21) Circumstances and property tax levied under Section 119 of the U. P. Kshetra Samitis and Zilla Parishads Act is not a tax on income. It is valid and falls under Entries 49, 60 and 58 of the State List of the Seventh Schedule.

50. Taxes on mineral rights subject to any limitations imposed by Parliament by law relating to mineral development.

[Government of India Act, 1935, Item 44.]

51. Duties of excise on the following goods manufactured or produced in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India :—

(a) alcoholic liquors for human consumption;

Schedule 7, List 2, Entry 49 — Note 2 (contd.) A 1980 SC 1088 (1093, 1094) : 1980 All LJ 483.

(22) The levy of circumstances and property tax is valid and is covered by Entries 49 & 60 of the State List of the Seventh Schedule. It is not a tax on income. It is not necessary to resort to Art. 277 to uphold its validity. **A 1980 SC 1088 (1095) : 1980 All LJ 483.**

3. **Entry 49, List 2 and Entry 86, List 1 — Distinction.**— (1) For the purpose of levying a tax under Entry 49, List 2 State Legislature may adopt for determining the incidence of tax the annual or the capital value of the lands and buildings. But that will not make the field of legislation under Entry 49, List 2 and Entry 86, List 1 overlapping. **A 1969 SC 59 (61).**

(2) A construction of the two entries does not reveal a conflict in the legislative fields. The fields appear to be separate and well-defined. If lands and buildings are totally unburdened, then, they may have to bear the burden of a tax, not only under Entry 86, but also under Entry 49. But, the fact that such a thing can happen cannot change the real character or nature of the tax under one or the other entry. A 1968 Guj 124 (141) (DB).

(3) To allocate the legislative power to impose a tax on capital value of lands and buildings treating them assets entirely to the Entry 86, List 1 is not to rob Entry 49, List 2 of its contents. The field is still open under Entry 49 for legislation for other taxes on lands and buildings. There is therefore no conflict and no overlapping of jurisdiction in the case of Entry 86, List 1 and Entry 49, List 2. A 1962 Ker 110 (114) (DB) •• ILR (1960) 1 Ker 268.

(4) The pith and substance of Entry 49, List 2 and Entry 86, List 1 are fundamentally different. Entry 86 deals with capitalised value of assets whereas Entry 49, List 2 is not directly concerned with the capitalised value of lands and buildings though in a particular piece of legislation the capital value may be taken as a basis for levying tax. A 1964 Orissa 128 (131) (DB).

(5) Tax on lands and buildings under Entry 49, List 2 is not the same as, but quite different and distinct from, the tax on capital value of the assets referred to in Entry 86 of List 1. The former is imposed directly on lands and buildings which are the object of taxation whereas in the case of the latter what is taxed is not the asset but the capital value of the assets of an individual as a company. (1968) 1 Mys LJ 524 (DB) •• A 1969 SC 59 (61) •• A 1962 Ker 110 (114) (DB).

(6) Levy of tax on capital value of non-agricultural lands and buildings — Parliament can legislate therefore under List 1, Entry 86 — Imposition of Wealth tax on non-agricultural lands and buildings under Wealth Tax Act (1957) is constitutional — Not conflicting with Entry 49 of List 2. **A 1969 SC 59 (62).** (Observations made in A 1960 All 136 held were obiter and did not correctly interpret Entry 86 of List 1.) •• A 1963 Mys 111 (111) (DB) •• A 1962 Ker 110 (113) (DB).

(7) Entry 86, List I does not conflict with Entry 49 of List II. **A 1971 Punj 155 : 1971 Tax LR 61 (FB).**

(8) State Legislature is competent to impose tax on buildings under Entry 49 of List II — Entry 86 of List I not attracted — A tax directly on one's lands and buildings will not be tax under Entry 86 of List I. **A 1980 SC 271 (275).**

Schedule 7, List 2, Entry 50

(1) Land cess imposed under provisions of Sections 78 and 79, Madras District Boards Act is in truth a 'tax on lands' within Entry 49 and not a tax on minerals within Entry 50. In a very remote sense it has relationship to mining as also to the mineral won from the mine under a contract by which royalty is payable on the quantity of mineral extracted. But that does not stamp it as a tax on either the extraction of the mineral or on the mineral rights. **A 1965 SC 177 (181).** (Sections 78 and 79 do not stand repealed after passing of Central Act (53 of 1948) or Central Act (67 of 1957) — There is no question of overlapping between the two.)

(2) Land cess imposed under Sections 78 and 79 of Tamil Nadu District Boards Act (1920) is a 'tax on lands" within Entry 49 and not a tax on mineral rights within Entry 50 of State List. State Legislature is competent to levy such tax. 1973 Tax LR 1666 (Andh Pra).

(3) Royalty is not a tax. Subject-matter of Section 9 of the Mines & Minerals (R. & D.) Act is not covered by Entry 50 in the State List. It falls squarely under Entry 54 of the Union List. Section 9 is thus not ultra vires the legislative competence of the Parliament. A 1979 Guj 180 (184).

(4) A combined reading of Entries 23 and 50 in List II and Entry 54 in List I establishes that as long as the Parliament does not make any law in exercise of its powers under Entry 54, the powers of the State Legislature in Entry 23 and Entry 50 would be exercisable by the State Legislature. A 1972 Mys 299 (300).

Schedule 7, List 2, Entry 51

(1) Excise tax and sales tax are two different taxes which under Entries 51 and 54 of List 2 the State Legislature is empowered to levy and there is no prohibition against the imposition, at one and the same time, of an excise tax and a sales tax. A 1951 All 858 (858) (DB).

(2) One of the essential characteristics of an excise duy is uniformity of incidence. Secondly, the duty must be closely related to production or manufacture of goods. It does not matter if the levy is made not at the moment of production or manufacture but at a later stage. Thirdly, if a levy is made for the privilege of selling an excisable article and the excisable article has already borne the duty and the duty

(b) opium, Indian hemp and other narcotic drugs and narcotics;
but not including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry.
[Government of India Act, 1935, Item 40.]

Schedule 7, List 2, Entry 51 (contd.)

has been paid, there must be clear terms in the charging section to indicate that what is being levied for the purpose of privilege of sale is in fact a duty of excise. A 1967 SC 1512 (1521) •• 1967 Cur LJ 460 (DB).

(3) Shop rent for exclusive privilege of selling toddy or arrack from certain shops is not excise duty — Levy of health cess on shop rent under Mysore Health Cess Act (28 of 1962) does not fall within Item 1 of Sch. A of the Act or within Entry 51 of List 2 of Sch. VII — State of Mysore had no authority to levy or collect the same. A 1967 SC 1512 (1522, 1523). (Per Majority (Hidayatullah J. Contra) (1966) 1 Mys LJ 554, Reversed.)

(4) As chloral hydrate is a narcotic drug or a narcotic within the meaning of Entry 51 and is an intoxicating drug and narcotic substance within Section 2 (1) (iv) of A. P. (Telangana Area) Intoxicating Drugs Act (4 of 1333 F) (as amended by Hyderabad Act 22 of 1953), it could be notified under the amended Act and the A. P. (Telangana Area) Chloral Hydrate (Chloral) Rules (1962) which provide for the manufacture of chloral hydrate under a licence and for payment of excise duty on such manufacture could be validly framed. A 1966 SC 713 (717).

(5) The introduction of the Dangerous Drugs Act (1930) in the Part B State of Hyderabad in 1950 did not result in complete effacement of the Andhra Pradesh (Telangana Area) Intoxicating Drugs Act (4 of 1333F). It remained alive even so far as opium, charas, bhang and ganja were concerned for the purpose of collection of duties of excise thereon. It also remained alive with respect to other substances which could be notified as intoxicating drugs under 1333F Act. A 1966 SC 713 (717).

(6) The Drugs Act (1940) which controls the manufacture, sale and distribution of drugs has nothing to do with duties of excise and with their imposition on narcotics and narcotic drugs. The fact that the Drugs Act was introduced in the Part B State of Hyderabad in 1951 would not, therefore, affect in any way that part of Andhra Pradesh (Telangana Area) Intoxicating Drugs Act (4 of 1333F) which dealt with collection of duties of excise and provided for licences in respect of any drugs which are narcotics or narcotic drugs. The 1333-F Act thus continued in existence and could be amended by Hyderabad Act 22 of 1953. A 1966 SC 713 (717).

(7) The excise duty, if any, imposed before the Constitution came into force by the Provincial Government on medicinal preparations containing alcohol is saved by Article 277 of the Constitution and Section 29-A of the Bengal Excise Act (5 of 1909) as amended by the West Bengal Adaptation of Existing Laws Order. Accordingly, if any duty on medicinal preparations was lawfully leviable by the West Bengal Government before the Constitution came into force, it will continue to be leviable and any evasion of such duty will be punishable under the provisions of the Bengal Excise Act. ILR (1956) 2 Cal 22.

(8) The Bengal Excise Act (5 of 1909) and the Rules thereunder do not deal with international trade or inter-State trade. The Act and the Rules and the notifications thereunder even after the Constitution are covered by the State subjects in Sch. 7, List 2, Entries 8 and 51. A 1958 Cal 203 (207).

(9) The duty under the Punjab Excise Act (S. 3 (6-b)) is, under the Constitution confined to alcoholic liquors for human consumption under Entry 51, Denatured spirit indisputably does not fall in this category and cannot constitutionally be subject to excise duty. ILR (1967) 1 Punj 525 (DB).

(10) (Majority view, Hidayatullah J. dissenting)—The expression "countervailing duties" means a duty levied with a view to equalise the burden on alcoholic liquors imported from outside the State and the burden placed by excise duties on alcoholic liquors manufactured or produced in the State. It means that countervailing duties can only be levied if similar goods are actually produced or manufactured in the State on which excise duties are being levied. A 1966 SC 1686 (1690).

(11) Notification issued in 1937 under S. 27, Bihar and Orissa Excise Act (2 of 1915) imposing countervailing duty on foreign liquor imported into State — Later notification in 1961, enhancing the duty — Held, existence of countervailing duty was made dependent upon manufacture of foreign liquor in State — But the Act and previous notification being "existing law" were saved by Arts. 305 and 372 and notification was valid — Later notification was not 'existing law' and must be struck down as invalid as it violated Arts. 301 and 304. A 1966 SC 1686 (1690, 1691). (Per Majority (Hidayatullah J. dissenting); ILR (1963) Cut 93 partly Reversed.)

(12) Since the levy imposed by Rule 36 (23-A) of the Punjab Liquor Licence Rules and condition No. 8 of the conditions of the licence is in respect of sale and not production of country liquor the same must be struck down as being ultra vires Entry 51. ILR (1967) 2 Punj 757 (DB).

(13) In so far as incorporeal movable property is concerned, there might be difficulties in levying the appropriate tax under the entry, but that cannot control the definition of "goods" in Art. 366 (12). The word "goods" in that article has not been defined in an exhaustive manner so as to exclude incorporeal movable property. A 1969 Mad 284 (291) (DB).

(14) Excise duty is primarily a duty on the production or manufacture of goods, produced or manufactured within the country. It is an indirect duty which the manufacturer or producer passes on to the ultimate consumer. Therefore, subject always to the legislative competence of the taxing authority, the said tax can be levied at a convenient stage so long as the character of the impost is not lost. A 1977 SC 1459 (1463) : 1977 Tax LR 1944.

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52. Taxes on the entry of goods into a local area for consumption, use or sale therein.

[Government of India Act, 1935, Item 49.]

Schedule 7, List 2, Entry 51 (contd.)

(15) Punjab Bonded Warehouse Rules (1957), Rr. 8, 9 are within the scope of Ss. 16, 23 and 31 of the Punjab Excise Act, 1914 and Entry 51 of List II of the Seventh Schedule to the Constitution. A 1976 SC 2020 (2026).

(16) Levy of education cess on excise revenue — "Shop rent" paid by toddy contractor is not excise duty and therefore not excise revenue. A 1971 SC 152.

(17) State Legislature cannot levy excise duty on Methanol. Entry 51 of List II empowers the State Legislature to levy excise duty on the manufacture and production of "alcoholic liquors for human consumption" and that too if they are not medicinal preparations. 1976 Raj LW 338 : 1977 Tax LR (NOC) 47.

(18) Rectified spirit is not an article meant for human consumption State Legislature has therefore no competence to impose excise duty on rectified spirit. Under Entry 51, the State Legislature has powers to levy duty on alcoholic liquors meant for human consumption. 1977 UPTC 166 : 1977 Tax LR (NOC) 130 (DB).

(19) Licence fee levied under R. 8 of Karnataka Excise (Sale of Indian and Foreign Liquor) Rules 1968 — Cannot be regarded as excise duty. 1975 Tax LR 1377 (DB) (Kant).

(20) The State Legislature is competent to legislate on the topic of licensing and regulating possession, sale and transport of spirituous medicinal and toilet preparations. ILR (1975) Kant 908 (FB).

(21) Duty imposed on toddy trees is duty of excise and hence is not outside legislative competence of State Legislature. 1974 Tax LR 1642 (Ker).

(22) 'Excise duty' should be construed as a duty leviable on the manufacturer or producer of excisable articles or at least at the stage of or in connection with the manufacture thereof. It is tax upon goods and not upon sales of goods. 1974 WLN 367 (Raj).

(23) Section 3 (1) & (4) of U. P. Excise (Amendment) Ordinance 1972 is ultra vires so far as it makes the provisions of Section 30 of the U. P. Excise Act applicable to the grant of licence for foreign liquor. The auction money which would be realised for grant of exclusive privilege for sale of foreign liquor cannot be said to be excise duty within the meaning of Entry 51 of List II of the 7th Sch. 1973 Tax LR 2271 (2276, 2283, 2284) (All).

(24) The sums realised under Section 29 of B. & O. Excise Act 1915, is neither fee nor excise duty nor a tax. It is revenue incidentally got by the State in the course of exercise of its regulatory power to control the manufacture and sale of liquor. 1972 Tax LR 1981 (1990, 1992) (Orissa).

(25) M. P. Excise Act (2 of 1915), S. 25 — Notification issued under the section imposing duty on rectified spirit or pure alcohol — Notification would be ultra vires the provisions of the Constitution as well as the Act 1972 Tax LR 2058 (Madh Pra).

(26) License fee fixed by auction is not excise duty. A 1971 Orissa 158.

(27) Enhancement of consumption duty — Enhancement falls within Entry 51 of List II of Seventh Schedule of Constitution and therefore within competence of State Legislature. A 1970 Mad 152.

(28) Parliament can impose a special duty on import of liquor into the Union territory of Delhi, without such duty being the countervailing duty. The subject-matter of this duty does not fall under Entry 51 of the State List. The argument that merely because the duty is on import it must fall under Entry 51 of List II is not correct. The basis of the new duty is that it is a mere import duty and not a countervailing duty. If the basis of the new duty is different from that of the old one, the ground on which the old one was held to be invalid cannot apply to the validity of the new one. Under Article 246 (4) it is the Parliament has the power to legislate for the Union territories and that power is untrammelled by the limitations of Entry 51 of List II. ILR (1979) 1 Delhi 712 (718, 719, 720) (DB).

Schedule 7, List 2, Entry 52

(1) A State law imposing octroi duty on entry of goods in a municipal area in the public interest would be valid under Articles 304 read with this entry. A 1954 Raj 260 (262) (DB).

(2) The existence or non-existence of a provision or system of refunds is not an essential criterion of the tax under this entry. A 1947 FC 14 (17).

(3) Although the term 'octroi' is not used in the Constitution, the tax itself, which goes by that name, is covered by Entry 52. A 1967 Andh Pra 363 (365).

(4) Entry 52 differs from Entry 54 in many respects. Under Entry 52 tax can be imposed on the entry of goods not only for sale, but also for consumption and use; while under Entry 54 only on sale or purchase. Entry 54 is not restricted to local areas. It can be imposed for areas or units similarly placed. (1969) All LJ 218 ** A 1953 Mad 116 (127) (DB).

(5) The aim and object of Entries 41 and 42 of List 1 is altogether different from that of Entry 52 of List 2. Taxation was intended to be included in those items which deal with general subjects. A 1960 Andh Pra 234 (242) (DB).

(6) Octroi duty comes under List 2, Item 52 and is unconcerned with List 1, Item 83. A 1960 Andh Pra 234 (241) (DB).

(7) Under Section 11 of Madras Commercial Crops Markets Act (20 of 1933), the market committee is empowered to levy fees on the notified commercial crop or crops brought and sold in the notified area at such rates as it may determine and ordinarily they are to be paid by the purchaser of the commercial crop concerned. It is not, therefore, a tax on the entry of goods into a local area, within the meaning of Entry 52. A 1959 Andh Pra 398 (401) (DB).

(8) The levy of tax on refunds of octroi upon exportation of imported goods is illegal after 15-2-1950 when the Bombay Provincial Municipal Corporation Act (59 of 1949) came into force. Section 127 of the Act does not authorise the corporation to impose tax on refunds of octroi duty paid. Nor is it a tax which the State Legislature has power under the Con-

Schedule 7, List 2, Entry 52 (contd.)

stitution to impose. A 1965 SC 555 (558). (62 Bom LR 71, Affirmed.)

(9) A mere customs unrelated to anything else by which a village community makes collections in respect of goods brought for the sale within its limits or goods taken out of its limits for sale outside cannot be said to be valid. A 1968 Mad 271 (274).

(10) Article 276 has no effect on Entry 52. A 1962 SC 562 (565).

(11) Section 126 of Calicut City Municipal Act is not ultra vires of the entry. A 1970 SC 264 (266).

"Goods"

(12) In so far as incorporeal movable property is concerned, there might be difficulties in levying the appropriate tax under the entry but that cannot control the definition of "goods" in Article 366 (12). The word "goods" in that article is not defined in an exhaustive manner so as to exclude incorporeal movable property. A 1969 Mad 284 (291) (DB).

Terminal tax and octroi tax

(13) The essential features of an octroi tax under this entry are (a) the entry of goods into a definite local area and (b) the goods should enter for the purposes of consumption, use or sale therein. But there is no limitation on the manner by which goods may be imported into a local area. A 1958 SC 341 (349, 350) ** A 1947 FC 14 (16).

(14) The terminal tax and octroi tax are so distinct that they may be imposed simultaneously on the same goods. A 1958 SC 341 (349, 350) ** A 1947 FC 14 (16).

(15) Terminal tax and octroi tax cannot be imposed on goods in transit which are only carried across the limits of a local area. A 1958 SC 341 (349, 350).

(16) Octroi and terminal taxes were different taxes though they resembled in one respect, namely, that they were leviable in respect of goods brought into a local area. While terminal taxes were leviable on goods 'imported or exported' from the Municipal limits denoting thereby that they were connected with traffic of goods, octroi were leviable in respect of goods brought into a Municipal area for consumption or use or sale. A 1963 SC 906 (910) ** A 1967 Bom 413 (416) (DB).

Excise duty and octroi tax

(17) In the case of octroi duty or tax the levy is because the goods enter a particular area and in the case of excise duty the tax is on the manufacture of goods. A 1950 SC 11 (14) ** A 1957 All 159 (172) (DB).

(18) The imposition of cess under Section 29 (2), U. P. Sugar Factories Control Act (1 of 1938) (since repealed) on the entry of sugarcane in a local area was a tax falling under this entry and not an excise duty and was valid. A 1942 All 156 (169) : 43 Cri LJ 674 (2). (Overruled on another point in A 1961 SC 652.)

Local area

(19) Majority view (Ayyangar J. contra) : The proper meaning to be attached to the words "local area" in Enry 52 (when the area is a part of the State imposing the law) is an area administered by a local body like a municipality, a district board, a local board, a union board or the like. The premises of a factory is not a local area. A 1961 SC 652 (658, 662). (U. P. Sugarcane Cess Act (22 of 1956), S. 3 not within entry and is ultra vires — A 1942 All 156, Overruled; Writ Petn. No. 327 of 1956 D/- 29-10-1956 (All), Reversed.)

"Consumption, use of sale".

(20) The coupling of three words "consumption", "use" and "sale" connotes that the underlying common idea was that either the title of the owner is transferred to another or the thing or commodity ceases to exist in its original form. The onus that octroi is leviable upon the entry of wool brought by a person to his dyeing factory lies upon the notified area committee. The question has to be decided on evidence whether by the process of dyeing a new commodity is brought into existence. The question is one of fact and largely depends upon the intention of the person importing wool and his dealings therewith. A 1969 NSC 37 : 1969 Cur LJ 458.

(21) The goods must be regarded as having been brought in for purposes of consumption when a person brings them either for his own use or consumption, or to put them in the way of others in the area, who are to use and consume. In this process the act of sale is merely the means for putting the goods in the way of use or consumption. So, even though the word 'sale' was not used in Section 73 (1) (iv) of the Bombay Municipal Boroughs Act (18 of 1925) (as it stood before amendment by Bombay Act 35 of 1954), the sale by a person did not save him from liability to tax if he brought the goods into the local area for consumption or use. A 1963 SC 906 (912).

(22) Word 'use' in the context of octroi does not only mean 'using up' or consumption. A 1969 Guj 344 (348) (DB).

(23) Levy of cess on sugarcane brought in a factory — Factory cannot come within the term 'local area' within Entry 52 of the State List of Schedule Seven to the Constitution — Imposition of cess on sugarcane so brought is not within the legislative competence of the State. A 1979 SC 537 (539).

(24) Entry 52 of List II of the Seventh Schedule to the Constitution does not exclude power of Parliament to levy special duty on import of country liquor into Union territory of Delhi. A 1979 SC 1550 (1554, 1555).

(25) Bombay Municipal Boroughs Act (18 of 1925) — Words "use or sale therein" — Person bringing goods into taxable territory and selling it there for being taken outside the territory for consumption or use — Liability to pay tax — Interpretation of the words "use or sale therein" as put by Supreme Court in Burmah Shell Case (1963 Supp 2 SCR 216) — Further clarification necessary — Case deserving consideration by a larger Bench. 1975 SCC (Tax) 166.

(26) Levy of octroi duty on weight of beverages, contained in bottles, held not illegal or in contravention of S. 172 (2) (b), U. P. Nagar Mahapalika Adhiniyam 1959. 1980 Tax LR (NOC) 23 (DB) (All).

(27) Orissa Municipal Act (23 of 1950), Sections 131 (1) (kk), 388 (3) — Puri Municipality Bye-laws, Bye-law 11 (2) — Imposition of octroi tax at exit check post — Validity of. (1978) 46 Cut LT 387 : 1979 Tax LR (NOC) 51 (DB).

(28) If the carrier carries the goods into Calcutta Metropolitan Area for transit either through the entire such area or part thereof, then it cannot be said that the vehicle 'enters

53. Taxes on the consumption or sale of electricity.

[Government of India Act, 1935, Item 48B.]

[a][54. Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of Entry 92A of List I.]

[a] Substituted for the original Entry 54 by the Constitution (Sixth Amendment) Act, 1956, S. 2 (11-9-1956).

OBJECTS AND REASONS

See under Art. 269.

Schedule 7, List 2, Entry 52 (contd.)

into' the Metropolitan Area for user. In such a contingency levy of entry tax on the vehicle would be bad in law. (1979) 2 Cal HN 234 (237, 238).

(29) Entry 52 of List II of the Seventh Schedule entitles the State Legislature to make laws in respect of taxes on the entry of goods in a local area for consumption, use or sale therein. Octroi is such a tax. The taxing even, however, is clearly the entry of the goods in the municipal area and not the event of the delivery of goods from the bonded warehouse. A 1979 Raj 133 (136).

(30) Raw materials imported by the Mill in the limits of Nagar Mahapalika used in manufacturing textiles, are "consumed, used or sold" within the meaning of expression 'for consumption, use or sale therein' in S. 172 (2) (b) of the Mahapalika Act. Hence octroi on those raw materials was validly imposed. A 1976 All 274 (275).

(31) City of Bangalore Municipal Corporation Act (69 of 1949), S. 98, Sch. III, Part 5 — Levy of octroi on machinery brought into Corporation limits for repairs — Such machinery is not brought for "Use" and hence not taxable to octroi. (1975) 1 Kant LJ 233.

(32) A local area in Sch. 7, List II, Entry 52 is equal to an area like the Panchayat, District Board and the like. If that local area is notified and the entry of the goods into that area is subject to levy of cess, its validity cannot be assailed merely because the entry of sugarcane into the factory was actually the point at which the cess was collected. Thus the levy of cess on sugarcane under Section 14 of the Madras Act must be held to be valid. 1972 Tax LR 1933 (1936) (Mad).

(33) Terminal Tax and Octroi — Distinction between pointed out. 1971 All LJ 1303.

(34) The term 'goods' is to be understood as defined in Art. 366 (12) of the Constitution. The words contained in the definition clause (12) of the Article 366 clearly show that all kinds of goods, articles and materials are envisaged by the Constitution in the Entry 52 of List II of Seventh Schedule. If wide interpretation is put to the word 'goods' in List II, Entry 52 it covers both raw material as well as finished goods and hence brass, aluminium, zinc, carbon rod, chemicals, lubricants, glass tubes, glass beeds, machinery and spare parts thereof will be goods within the item liable to octroi to be levied by local authority. 1971 All LJ 1303.

(35) Tax imposed under the U. P. Sugarcane (Purchase Tax) Act comes under Entry No. 54, List II of Sch. VII of Constitution — Act was within competence of State Legislature and is valid. (1969) All LJ 218.

(36) Bottles and shells carrying beverage — Are containers as such as are used at the time of consumption of the beverage — Liable to octroi duty. 1980 UPLT (NOC) 92 (DB).

Schedule 7, List 2, Entry 53

(1) The word "consumption" should be interpreted in a broad way. A producer consuming electrical energy generated by him is also a consumer, that is to say, he is a person who consumes electrical energy supplied by himself. Such a person is liable to pay duty under Section 3, C. P. and Berar Electricity Duty Act (10 of 1949) (as amended by M. P. Act 7 of 1956). Such duty cannot be regarded as duty of excise falling within Entry 84 of List I. **A 1963 SC 414 (416). (A 1959 Madh Pra 365, Affirmed.)**

(2) The entry confers powers on State Legislature to make laws for imposition of taxes on consumption or sale of electricity — But the laws will be operative in the territory of that State only — Punjab Electricity (Duty) Act (1958). Section 3 — Operation of Punjab Act cannot be extended to the territory of Himachal Pradesh — Mere fact that petitioners are employees of Punjab State Electricity Board is insufficient for establishing territorial nexus as levy is not pertaining to the connection of employment — Levy and collection of electricity duty, under Section 3 of Punjab Act on the petitioners, in Himachal Pradesh, being violative of Article 265, is illegal. A 1966 Him Pra 59 (61).

(3) The separate mention in Items 53 and 54 of List 2 cannot by itself justify a conclusion that the Constitution intended to draw any distinction between electricity and goods. A 1970 Cal 75 (77).

(4) Electric energy is goods for purposes of Sales Tax — Statutory body like Electricity Board is 'dealer' in respect of its principal activity of sale and supply of Electricity. **A 1970 SC 732. (A 1968 Madh Pra 163, Reversed.)**

(5) 'Goods' in Entry 54 includes electricity — Separate mention of electricity in Entry 54, is not meant to draw any distinction between electricity and goods. A 1970 Cal 75.

(6) Kerala Electricity Duty (Validation) Act (3 of 1965) is not beyond competence of State Legislature. 1974 Tax LR 1818 (Ker).

(7) Section 3 (1) (c) of U. P. Electricity Duty (Amendment) Act 1970 (2 of 1971) is covered by Entry 53 of List II of the Seventh Schedule to the Constitution. Electricity generated in a factory and consumed by it may be charged electricity duty under Entry 53 of List II, which has to be given its widest amplitude. 1972 Tax LR 1916 (1917) (All).

SCHEDULE 7, LIST 2, ENTRY 54

SYNOPSIS

1. Taxes on the sale or purchase of goods.
2. Excise duty and sales tax.

Schedule 7, List 2, Entry 54—Synopsis (contd.)

3. Provisions incidental to levy of sales tax.

4. Enactments held constitutional.

5. Enactments held unconstitutional.

1. Taxes on the sale or purchase of goods.— (1) This entry authorises the imposition of a tax only when there is a complete sale involving transfer of title and not when there is a mere agreement to sell. **A 1958 SC 909 (912) ** A 1958 SC 682 (685) ** A 1958 SC 560 (577) ** A 1953 SC 274 (276) : 1953 Cri LJ 1105 ** A 1958 SC 452 (458) ** A 1954 SC 459 (460, 461, 462) ** A 1958 Assam 169 (170) (FB) ** A 1968 SC 599 (602, 603).**

(2) Entries must be given widest possible interpretation — Legislature is competent to enact provisions to check evasion of tax. **A 1968 SC 59 (64).**

(3) Explanation to Section 2 (12) of the Assam Sales Tax Act (14 of 1947) is within legislative competence. The Act only taxes completed sale, the Explanation only locates the sale and does not enlarge the meaning of the word 'sale', so as to tax transactions which are mere agreements to sell and not sales. A 1960 Assam 116 (119) (DB).

(4) Expression 'taxes on sales or purchase of goods' must be interpreted in broad sense. A 1967 Mys 25 (28) (DB).

(5) Item 54 authorises the imposition of taxes on the sale and purchase of goods. (1955) 59 Cal WN 872 (876).

(6) The sales tax is a levy on the price of the goods and such a levy should not be made unless the stage has been reached when the seller can recover the price under the contract. **A 1954 SC 459 (460, 461, 462).**

(7) Having regard to the definition of 'sale', 'goods' and 'sale price' in the C. P. and Berar Sales Tax Act, the consideration is a part and parcel of sale of goods. In fact, the definition of turnover read in the light of the above definition shows that what is taxed is the amount of the sale price or part of sale price in respect of the sale or supply of goods and therefore the consideration is inseparably a part of the transaction which is sought to be taxed. A 1960 Bom 470 (476) (DB).

(8) Definition of sale cannot be enlarged so as to include within it forward contracts. **A 1954 SC 459 (460, 461, 462).**

(9) The definition of the term 'sale' in Section 2 (h) of the U. P. Sales Tax Act (15 of 1948) is ultra vires of the Provincial Legislature in so far as it includes transfer of property in goods for "other valuable consideration" also within its purview. A 1964 All 284 (287) (DB).

(10) What under Entry No. 54 the State Legislature can tax are transactions which are in substance sales. It cannot by extending definition of sale include transactions which are not sales. (1965) 67 Bom LR 138 (163) (DB).

(11) The supply of goods by a co-operative society to its members amounts to sale of goods within Section 2 (g) of Orissa Sales Tax Act (14 of 1947) and the society being a 'dealer' as defined in the Act is liable to be assessed to sales tax. (1968) 34 Cut LT 745 (748) (DB).

(12) The expression 'taxes on the sale of goods' is very general and means taxes upon the event of sale of proceeds thereof, taken individually or collectively. It cannot be confined to a turnover tax on the gross sale proceeds only. **A 1939 FC 1 (27)** ** A 1957 Andh Pra 297 (298) (DB) ** A 1952 Nag 378 (383) (DB).

(13) Expression 'sale of goods' in Entry 54 has same meaning as in Sale of Goods Act — Hire purchase agreement is not 'sale' — Legislation by State legislature making agreement or transaction in which property does not pass from seller to buyer, a sale, is beyond legislative competence. **A 1965 SC 1082 (1089).** (A 1958 Mad 561, **Reversed.**)

(14) Consumption by owner of goods in which he deals is not a sale within the meaning of Sale of Goods Act and therefore it is not 'sale of goods' within the meaning of Entry 54. **A 1964 SC 1037 (1039).**

(15) Goods include 'standing trees' agreed to be severed before sale — Section 2 (d) of U. P. Sales Tax Act held valid. ILR (1964) 2 All 506.

(16) In a building contract which is entire and indivisible there is no sale of goods, and it is not within the competence of the State Legislature under this entry to impose a tax on the supply of materials used in such contract treating it as a sale **A 1958 SC 909 (912) ** A 1958 SC 560 (577) ** A 1958 Assam 169 (170) (FB)** ** A 1957 Cal 283 (292, 293) ** A 1956 Hyd 79 (86, 87) (DB).

(17) There might be contracts which might consist of two distinct agreements, one for the sale of materials and another for work and labour, and in such a case, it would be competent to the State to impose tax on the sale of materials even construing that word in its narrow sense. **A 1958 SC 909 (912) ** A 1958 Assam 169 (170, 171) (FB).**

(18) The sales-tax is a tax on a transaction of sale and not a tax on trade and the fact that the incidence of the tax is laid on the purchaser does not render it other than a tax upon a transaction of sale. A 1957 Andh Pra 297 (298) (DB) ** A 1957 Assam 61 (63, 64) (DB) ** A 1957 Mad 301 (304) (DB).

(19) It is not an essential feature of a tax on the sale of goods that the burden thereof must be capable of being passed on to the consumer. **A 1958 SC 452 (462, 463) ** A 1958 All 478 (481) (FB) ** A 1957 All 475 (481) (FB) ** A 1958 All 478 (481) (FB).**

(20) A sales tax can be imposed with retrospective effect. **A 1958 SC 452 (462, 463) ** A 1957 All 475 (481) (FB) ** A 1961 SC 1534 (1538, 1539, 1540, 1541)** ** A 1958 Andh Pra 558 (562) (DB).

(21) Where a registered dealer collects a certain amount by way of tax from the purchaser vis-a-vis the dealer, it is in reality a part of the price which the purchaser has to pay for purchasing the goods and a tax on such payment is within the ambit of this entry. A 1956 Mad 298 (300) (DB).

(22) The amended definition of dealer under Section 2 (c) Bihar Sales Tax Act (19 of 1947) (Amended by Bihar Finance Act 1950) means any person who sells or supplies any goods in connection with his business. Any casual sale of another kind

Schedule 7, List 2, Entry 54—Note 1 (contd.)

will not make the seller a 'dealer'. 1966 BLJR 438 (442) (DB).

(23) This entry does not entitle the State Legislature to tax a broker who may have assisted at a sale but has not sold the goods either as principal or agent. A 1957 Nag 61 (62) (DB).

(24) A law which is in pith and substance a law imposing taxation on sale of goods cannot be held to be invalid if it incidentally trenches upon Entry 7 in the Concurrent List. A 1953 Pat 87 (91) (DB).

(25) If an Act is within the purview of this entry, then no question of repugnancy under Article 254, on the ground that the definition of 'sale' in the Act is in conflict with the definition in the Sale of Goods Act can arise. **A 1958 SC 560 (575).**

(26) Where the levy is really a sales tax it is not invalid merely because it is labelled as 'fee'. **A 1954 Mad 621 (634) (DB).**

(27) The right to tax sales is given to the States under this entry and therefore, the Centre cannot prevent them from taxing sales that are otherwise taxable either by a Central Act or by Rules made under it. **A 1958 SC 1002 (1004).**

(28) Mysore Sales Tax Act (25 of 1957) (as amended by Acts 9 and 31 of 1958), Section 8 (2), Schedule V, Item 31-B — Inclusion of Item 31-B in Schedule V taking out sugar-candy from category of sugar by Mysore Sales Tax Amendment Act 31 of 1958 is valid — Still, sugar-candy is exempt from sales tax under Section 8 (2). (1963) Mys LJ 118 (DB).

(29) The Madras General Sales Tax Act (9 of 1939) falls squarely within Item 54 of List II. Section 16-A of the Act is within the competence of the legislature. **A 1958 Mad 544 (551, 552) : 1958 Cri LJ 1413 (FB).** (A 1937 Mad 291; A 1947 Mad 321; A 1947 Mad 397 and A 1954 Mad 833, **Overruled.**)

(30) Assuming animals and birds in captivity are not moveable property and therefore not goods within Article 366 (12) of the Constitution — Sale of them will not fall within Entry 54 but within Entry 97 of List I. A 1960 Ker 360 (360).

(31) Sales effected between 11th September 1956 and 4th January, 1957 in which goods moved from outside into Mysore State were inter-State sales as understood in its ordinary natural sense unaided by any other statutory provision — State of Mysore had no power to tax such sales in view of Article 269 (1) (g) read with Schedule 7, List I, Item 92-A and List II, Item 54. **A 1967 SC 585 (587).**

(32) Taxing authorities under the Sales Tax Acts have power to select commodities for taxation — Discrimination to be shown before the Act can be struck down. 1968 All LJ 802 (DB).

(33) As tax on sale of goods is a matter entirely within Entry 54 of the State List the amendment made in the definition of the word 'dealer' in Section 2 (c) of Bihar Sales Tax Act (19 of 1947) by the Bihar Finance Act (17 of 1950) did not require the assent of the President. **A 1962 SC 660 (663).**

(34) Imposition of interest on arrears of sales tax — Validity — Though Schedule VII, List II, Entry 54 of Constitution does not refer to interest, power to charge interest on arrears is incidental to power to impose sales tax. 1968 All LJ 970 (DB).

(35) Sale of iron and steel products in pursuance of orders of Controller — Transactions constitute sale — Levy of Sales Tax on such sales not outside powers of State Legislature. **A 1968 SC 478 (480, 483, 484, 485).**

(36) Sale to be assessed must be sale of goods as contemplated by Sale of Goods Act, 1930 — Assessee company manufacturing and distributing iron and steel products — Production and distribution regulated and controlled under Iron and Steel (Control of Production and Distribution) Order, 1941 — Sales by assessee not voluntary — Assessee held not liable to pay sales tax. (1964) 68 Cal WN 998 (1006).

(37) Tax imposed under the U. P. Sugarcane (Purchase) Tax Act comes under Entry No. 54, List II of Schedule VII of Constitution — Act was within competence of State Legislature and is valid. 1969 All LJ 218.

(38) The authority to levy sales tax on motor spirit is given to the States by this entry and enacting a law for imposing sales tax on petroleum and petroleum goods the State legislature does not transgress on the domain allotted to the Centre. A 1959 Andh Pra 225 (230) (DB).

(39) Impost under Section 11 of Madras Commercial Crops Markets Act (20 of 1933) is not a tax falling under Entries 52, 54 and 60 of List 2 of the Constitution. A 1959 Andh Pra 398 (401) (DB).

(40) Transaction lacking element of transfer of property — Legislature incompetent to make it 'sale' by deeming clause in taxing statute. **A 1968 SC 838 (840, 841).**

(41) Bihar Sales Tax (Definition of Turnover and Validation of Assessment) Act (13 of 1958) is a legislation which falls within Entry 54. The tax imposed is a tax on sale of goods and the identity or character of the tax is not changed. **A 1959 Pat 551** (554) (DB).

(42) Inter-State sale — The provision of Article 286 (1) (a) is only in the way of restriction or fetter on the legislative power of taxation — The affirmative grant of power is contained in Article 246 (3) and in Entry 54. A 1957 Pat 288 (292) (DB).

(43) Monthly Law Journals publishing verbatim decisions of Courts is not a newspaper under the S. T. Act — Registration of journal as newspaper for purposes of Post Office Act and Press and Registration of Books Act does not make it a newspaper. A 1960 Orissa 221 (223) (DB).

(44) Cotton fabrics declared goods of special importance — Imposition of sales tax under Section 5 (1) of Bengal Act 8 of 1941 in excess of 2 per cent laid down in Section 15 of Central Act, was ultra vires, till the time the former section was amended to conform with latter section. A 1965 Cal 203 (206).

(45) Surcharge contemplated by Act is really enhancement of sales-tax in certain circumstances and is tax on aggregate of sales effected by dealer during year — Same is justified by Entry 54 — Same cannot be construed as tax on sale tax itself. 1966 Ker LT 809 (811).

Schedule 7, List 2 Entry 54 — Note 1 (contd.)

(46) Transaction between hotelier and resident customer — Hotelier making consolidated charge for residence, services and supply of food — No rebate allowed if food is not taken — **Held**, on facts that transaction was indivisible contract of multiple service and did not involve any sale of food — Authorities not empowered to split up composite contract so as to make out an agreement of sale, where non-existed — Such splitting up is beyond Entry 54. A 1966 Punj 449 (457, 458).

(47) A taxing statute covered by Item 54 cannot be challenged on the grounds of its contravening rules of estoppel or of contracts or being contrary to an earlier undertaking of another Act. A 1961 Ker 36 (38) (DB).

(48) Co-operative Society supplying refreshments to members for price — Property in refreshments with society — Transaction amounts to sale — Turnover is taxable. **A 1968 SC 838 (841).** (A 1964 Mad 63, **Overruled.**)

(49) The effect of the Explanation to Article 286 (1) is to remove the limitation imposed by Articles 245 and 286 (1) on the power of a State to enact extra-territorial legislation and permit the State to levy sales tax on an extra-State sale, provided goods thereunder are delivered within State. A 1953 Mad 116 (127) (DB).

(50) Section 17 of Bengal Finance (Sales Tax) Act (6 of 1941) as amended by Bengal Act (14 of 1954) is not a law with respect to Entry 88 of Union list — It falls within purview of Entry 54 State List — State competent to enact section. A 1963 Cal 578 (580) (DB).

(51) It is not correct to draw any distinction between the normal power of legislation by Parliament with respect to matters in the Union list and the power conferred by the opening words of Article 286 (2). Both are legislative powers. Hence Parliament in enacting Sales Tax Validation Act (1956) did not transgress power conferred by Article 286 (2). A 1957 Mad 368 (371, 372) (DB).

(52) Word 'goods' includes electricity. A 1970 Cal 75 (77).

(53) Control and regulation of declared Industries under Entry 52 of List I does not include power to tax those industries. Taxation is a distinct matter and is reserved to the State under Entry 54 of List II of the Seventh Schedule. 1976 Tax LR 1907 (1917) (All).

(54) A transaction which is effected in compliance with the obligatory terms of a statute may nevertheless be a sale in the eye of law, so long as mutual assent, express or implied is not totally excluded. The transaction of supply of cement by a distributor to a permit holder in terms of the W. B. Cement Control Act amounts to sale within the meaning of Sec. 2 (g) of the Bengal Finance Act, 1941 and the turnover is accordingly exigible to sales tax. **A 1978 SC 449 (461, 464, 471).** (A 1963 SC 1207 **Overruled;** A 1973 SC 668 Partly **Overruled.**)

(55) Orissa Sales Tax Act (14 of 1947) Sec. 3-B — Section authorises the State Government to impose tax at the purchase point on certain goods or class of goods, and in that event, those goods should not be made liable to tax at the sale point the Act envisaged single point taxation, and therefore, if certain goods were liable for sales tax, then no purchase tax was leviable in respect of the same goods. (1980) 45 STC 170 (179, 183) (DB) (Orissa).

(56) Sheep and goats fall within expression 'movable property' — Sale thereof can be taxed. 1975 Tax LR 1719 (1720) (Andh Pra).

(57) A sale to be liable to taxation by a State Legislature in exercise or its powers under Entry 54 must be sale in the legal sense and not sale in the popular sense. To constitute sale in the legal sense it must be the result of contract. A seller who offers himself as a seller of goods when compelled to effect a sale under statutory control as a seller on a contract cannot be said to be exercising no volition or has no assent whatsoever to render the transaction a sale in the legal sense. (1974) 34 STC 161 (Cal). ((1973) 32 STC 181. **held not good law** in view of A 1963 SC 1207).

(58) 'Sale of goods' — Expression has same meaning which it bears in the Sale of Goods Act, 1930. **A 1970 SC 1212 (1216) ** A 1971 SC 908 : 1971 Tax LR 405 ** A 1973 SC 376.**

(59) "Sale" to be assessed under the Sales Tax Act must be sale of goods as contemplated by Sale of Goods Act. (1973) 77 Cal WN 141.

(60) 'Goods' — 'Goods' includes animals. 1971 Tax LR 1332 (Punj).

(61) 'Goods' — 'Goods' include electricity. A 1970 Cal 75.

(62) Provisions in Sch. VII List II, Entry 54; List I Entry 92-A. Central S. T. Act, Sections 2 (1), 8 & 9 were intended to restrict multiple taxation on a single inter-State transaction by different States — States in collecting taxes under Central Sales Tax Act, act as agents to Central Govt. and tax collected is assigned to the State collecting it. A 1970 Mys 259 (262).

(63) The words 'tax on sale or purchase of goods' as used in Entry 54 would only have a limited meaning so as to be confined to pure contract of sale and would not embrace within its ambit transactions which are coupled with the cost of labour and transaction of sale, that is to say, an individual contract of sale. A 1970 J and K 85 (87, 89).

(64) Legislative competence to levy tax under this entry is referable only to completed transaction of sale — Legislature can, therefore, deal with all those who are competent to accomplish result of sale — Legislature has not gone beyond its competence in amending Sec. 11 of A. P. General Sales Tax Act (6 of 1957). ILR (1969) Andh Pra 517.

(65) Having regard to the provisions of the Cotton Ginning and Pressing Factories Act, 1925 (as amended by the Rajasthan Amendment Act X of 1957) the use of Hessian cloth and iron hoops for packing the pressed cotton is an integral part of the work of pressing of cotton and it cannot be said that there is a sale of such material

Schedule 7, List 2 Entry 54 — Note 1 (contd.) and that it is a severable part of the contract for pressing cotton. The fact such materials can be sold by the buyers after the cotton has been used does not affect the question. A 1970 Raj 1, A 1957 Madh Pra 40, (1964) 15 STC 598 (Bom) and (1956) 7 STC 486 (Andh) and (1968) 21 STC 505 (MP) and (1968) 22 STC 22 (MP). **Dissented from.)**

2. Excise duty and sales tax.— (1) In the case of a sales-tax the liability to pay taxes arises on the transaction of a sale, but in the case of an excise duty the liability arises in respect of the manufacture or production of the commodity taxed. **A 1958 SC 452 (459): A 1945 PC 98 (101).**

(2) A tax levied on the first sale of goods must in the nature of things be a tax on the sale by the manufactuer or producer. It is levied upon him qua seller and not qua manufacturer or producer. **A 1958 SC 452 (459) ** A 1945 PC 98 (101) **** A 1957 Mad 325 (329) (DB).

(3) Excise duty on tobacco — Recovery from person storing tobacco in his licensed warehouse is valid. 1962 (2) Cri LJ 407 (408) (All).

(4) 'Litre fee' imposed under Act 5 of 1901 on sale of country beer in bar, though named as fee, is special tax falling under Entry 54 — Act V of 1901 is not repealed by Act XXV of 1957 and litre fee is not inconsistent with tax imposed on first sale of country beer under Act 25 of 1957. (1966) 2 Mys LJ 190 (198) (DB).

(5) It cannot be held that by the imposition of an additional excise duty on tabacco, Act 58 of 1957 took away the power of the States under Entry 54 to levy sales tax on the intra-State sale of tobacco. A 1965 Cal 498 (506).

(6) No tax could be levied on the declared goods such as tobacco under Bengal Act of 1941 until Sec. 5 (1) of that Act was amended with effect from 28-10-59 so as to incorporate the ceiling of two per cent as required by the Central Sales Tax Act read with Act 58 of 1957. A 1965 Cal 498 (504).

(7) Sale of goods — Works contract — Materials used need not get transformed — Contract for pressing and packing cotton — Packing is integral part of pressing — Sale of packing material cannot be implied — Packing materials used not liable for sales tax. A 1970 Raj 1 (11) (DB).

(8) Cost of packing material does not form part of value of excisable goods — Parliament is not competent to legislate in this respect because tax on them falls within Entry 54 of List II of the Seventh Schedule. 1980 Tax LR 2251 (2257) (DB) (Guj).

(9) If normal price in S. 4 of the Excise Act were to be construed as to take within its ambit anything except the manufacturing cost and manufacturing profit, the impost ceases to be excise duty and the rational nexus between the duty and the person on whom it is imposed ceases to exist, as it amounts to tax on sale, which under Entry 54 of List II of Seventh Schedule to the Constitution exclusively falls within the domain of the State Legislature and the Parliament has no legislative competence to make any law with regard to it. 1979 ELT (J) 334 (367) (DB) (Andh Pra).

3. Provisions incidental to levy of sales tax.— (1) The power to levy a tax extends to the enactment of all incidental provisions for ensuring the collection or preventing the evasion of the tax. A 1958 Mad 158 (169) (DB).

(2) The provisional assessment levied is merely a machinery employed for securing to the State the tax due and payable to it and cannot be termed a tax on an anicipated sale. A 1957 Mad 325 (330) (DB).

(3) The power to validate illegal assessments made by executive authorities is incidental to the power to levy the tax. A 1956 Mad 298 (300) (DB).

(4) Legislature can prescribe what acts or conduct would be regarded as offences in relation to taxes on the sale or purchase of goods. **A 1958 Mad 544 (551): 1958 Cri LJ 1413 (FB).**

(5) Power to confiscate goods under Section 42 (3) of Madras General Sales Tax Act (1 of 1959) is not ancillary or incidental to power to check evasion of tax on sale or purchase of goods. A 1970 Mad 25 (27) (DB). (1968 (2) Mad LJ 112, **Reversed.)**

(6) Provisions for confiscation under Section 28 (6) of Andhra Pradesh General Sales Tax Act (6 of 1957) are not ultra vires of the State Legislature. (1967) 2 Andh WR 71.

(7) Haryana General Sales Tax Act (20 of 1973), S. 49 — Is well within the area of ancillary or incidental power of legislation under Entry 54 of List II and is a competent piece of legislation. ILR (1979) 1 Punj 80: 1979 Tax LR (NOC) 76.

(8) Levy of penalty for attempt to evade tax is within constitutional sanction. It cannot possibly be disputed that prevention of evasion of sales tax is a power ancillary or incidental to the levy of sales tax and falls within Entry 54 of List II. **A 1978 Punj 35 (38) (FB).**

(9) An entry relating to tax confers power upon the legislature to legislate in respect of matters ancillary or incidental including provisions for preventing evasion of tax. 1978 All LJ 1054 (1057).

(10) Confiscation of goods while in transit — Power to confiscate — Sec. 16-A of Orissa Sales Tax Act (1947) held intra vires. 1975 Tax LR 1412 (DB) (Orissa).

(11) Madras Act (3 of 1969) is well within the power of the State Legislature to enact a law on sales tax under Entry 54, List II of Schedule 7. In exercise of that power it is always open to the legislature to provide for ancillary or incidental matters. It can provide for exemptions, deductions etc., or withdraw the same in its discretion and the wisdom of the legislature in permitting exemptions and deductions or in withdrawing the same cannot at all be questioned. When the State Legislature withdrew the provision for deduction in the State Act by Madras Act (3 of 1969) it was not legislating on any inter-State sale which comes into Entry 92-A of List I in Sch. 7. The fact that it had an impact on the law made by the Parliament, would not affect the Power of the State Legislature to enact a law with reference to an entry exclusive-

Schedule 7, List 2, Entry 54—Note 3 (contd.)

ly falling within its legislative competence. The impact on the Central Act was only due to a provision made in the Central Act itself attracting the provisions of the State Act and not as a result of a provision made by the State Legislature. (1974) 2 Mad LJ 418.

(12) The words of Entry 54 of the State List designate the centre and not the circumstance of the power. Every legislative power carries with it authority to legislate in relation to acts, matters and things the control of which is found necessary to effectuate its main purpose and thus carries with it the power to make laws governing or affecting many matters that are incidental or ancillary to the subject-matter. Provisions of Sec. 7 (2A) of Raj. Sales Tax Act being incidental to minimising evasion of tax are not ultra vires. 1973 Tax LR 2234 (2240) (Raj).

(13) Inhibition in Sec. 2 (2) of T. N. Act 14 of 1970 of collection of additional tax payable under sub-sec. (1) is incidental or ancillary to the power of State Legislature under Entry 54 of State list. 1972 Tax LR 2613 (Mad).

(14) Power to seize and confiscate and levy penalty in respect of goods carried in a vehicle whether sold or not — Not incidental or ancillary to power to levy sales tax and hence is unconstitutional. **A 1971 SC 792: 1971 Tax LR 4.**

(15) Doctrine of incidental and ancillary powers — How far applies to entry relating to taxation — Power of confiscation whether incidental to power of taxation under Entry 54. **A 1970 Ker 218 (FB).**

(16) Provision for charging interest at 18% on tax not paid in time under Sec. 8 of U. P. Sales Tax Act (1948) is incidental to provision for sales tax and is not ultra vires — Rate of 18% interest is neither arbitrary nor usurious and is not ultra vires Art. 14 of the Constitution. (1969) 23 STC 324 (All).

4. Enactments held constitutional.— (1) Orissa Sales Tax Act (1947) as amended by Act (28 of 1958) Section 14-A — Amendment is not beyond legislative competence nor does it contravene Art. 19 (1) (f) of the Constitution. **A 1961 SC 1438 (1439, 1440).**

(2) Section 14, Orissa Sales Tax Act (14 of 1947) was not ultra vires. **A 1962 SC 1320 (1322).**

(3) Madras General Sales (Definition of Turnover and Validation of Assessments) Act (17 of 1954). Sections 2 and 3 — Act is not constitutionally invalid. **A 1962 SC 1037 (1043).**

(4) Imposition of sales tax on goods — Provisions of section inserted by Andhra Pradesh General Sales Tax (Amendment) Act (16 of 1963) and Rule 45 (A) are not ultra vires the powers of State Legislature. (1968) 21 STC 291 (Andh Pra) (DB).

(5) A P. General Sales Tax Act (6 of 1957), Sec. 2 (1) (n), Expl. III — Not ultra vires of powers of State Legislature. **A 1968 SC 784 (787).**

(6) Bihar Sales Tax Act (9 of 1959). Section 20-A — Dealer has no right to challenge validity of Sec. 20-A of Bihar Sales Tax Act (9 of 1959) on ground of violation of Art. 19 (1) (f) of the Constitution — Section 20-A is valid and intra vires the State legislature. A 1966 Pat 54 (59) (DB).

(7) Section 52 (1) of Assam Sales Tax Act (17 of 1947) is not invalid. A 1959 Assam 216 (219) (DB).

(8) Amendment of Court-fees Act (1870) by addition of Article 11 (c) in Schedule II has no effect of repealing Rule 74, Assam Sales Tax Rules (1947) by implication. A 1959 Assam 216 (220) (DB).

(9) Imposition of sales tax under Section 19 of Mysore Sales Tax Act (25 of 1957) on sale of arrack and special liquor by Government to licencee is valid. (1965) 6 LR 641.

(10) T. C. Sales Tax Act (1125). Secs. 2 (j); 2 (k) and Rules 7 (1) (k) and 20 (2) — Do not contravene Article 303 (1). A 1955 Trav-Co 126 (129) (DB).

(11) The power conferred upon State Government under Sec. 3-D of U. P. Sales Tax Act (15 of 1948), to select the goods to be subjected to purchase tax and the rates at which they are to be taxed does not amount to unconstitutional delegation of legislative power — Section does not infringe Art. 14. (1966) 18 STC 204 (All).

(12) Constitution of India, Schedule 7, List 2, Entry 54 does contemplate that State Legislature is competent to enact law imposing tax on departmnet of State Government — Section 2 (c) of U. P. Sales Tax Act held valid ILR (1964) 2 All 506.

(13) Section 11 (1) of Madras Com. Crops Market Act (1913) as amended in 1955 is not colourable legislation and is valid. A 1960 Mad 160 (163).

(14) Levy of sales tax on incorporeal moveable property like copyright is not ultra vires Article 336 (12). A 1969 Mad 284 (291) (DB).

(15) That the State Government has chosen to exercise its power in part only does not deprive it of its legislative competence to legislate with respect to matters affecting its taxing power with respect to other sales and purchases. (1979) 44 STC 102 (112) (DB) (Bom).

(16) Section 29A of the Kerala General Sales Tax Act (15 of 1963) is only a provision to punish those dealers who attempt to evade tax or violate any provision of the Act which are aimed at checking evasion and they are part of the incidental or ancillary powers of the power of taxation. 1980 Tax LR 1679 (DB) (Ker).

(17) Bombay Sales Tax Act (51 of 1959) (as applicable to Gujarat State) Ss. 37 (1) and 46 (2) — Provisions to forfeit sums collected by dealers by way of sales tax, though not exigible, to the public exchequer punitively — Not ultra vires — It is incidental and ancillary to the power under Entry 54 of the State List. **A 1977 SC 2274 (2292, 2303).** (S. C. A. Nos. 421 and 508 of 1971 (Guj). **Reversed.)**

Schedule 7, List 2, Entry 54—Note 4 (contd.)

(18) Levy of penalty for attempt to evade tax is within constitutional sanction. **1977 Tax LR 2415 (2417) (FB) (Punj).**

(19) The legislature has power to provide for search and seizure in connection with taxation laws in order that evasion may be checked. (1977) 2 Cal Tax C 37: 1977 Tax LR (NOC) 19.

(20) Provisions of Section 24B of the Raj. Sales Tax Act (1954) are ultra vires the powers of the State Legislature. 1976 Tax LR 2142 (2148) (Raj).

(21) Additional tax is really a tax on sale of goods. The fact that the quantum of additional tax is determined with reference to the sales tax imposed would not alter its character. Imposition of additional tax is not beyond the competence of the State Legislature. 1976 Tax LR 1810 (1811) (Kant).

(22) A. P. Sales Tax Act (6 of 1957) Section 5 (1), First Proviso — Sales tax on turnover of restaurants as provided in the section — State Legislature is competent to levy such tax and section is not unconstitutional. 1975 Tax LR 1721 (1727) (DB) (Andh Pra).

(23) Karnataka Sales Tax Act (25 of 1957), Section 19 — Provision not ultra vires. **A 1975 SC 1007 : 1975 Tax LR 1523.**

(24) Tamil Nadu Additional Sales Tax Act (14 of 1970) is not beyond legislative competence of State Legislature — Additional tax under the Act is a tax on the sale of goods. **A 1974 SC 2272 : 1974 Tax LR 2220.**

(25) U. P. Sugarcane Purchase Tax Act (9 of 1961), Pre. — Act is intra vires of U. P. Legislature. 1974 Tax LR 2242 (All).

(26) Section 21 (6) of A. P. General Sales Tax Act is within legislative competence of State. 1973 Tax LR 2017 (Andh Pra).

(27) Bombay Sales Tax Act (51 of 1959), Section 37 — Section 37 is not ultra vires. 1973 Tax LR 2243 (Bom).

(28) Power of State Legislature to make laws having retrospective effect — Section 5 (5-A) of Mysore Sales Tax Act (25 of 1957) as amended by Mysore Act 9 of 1974 is not invalid. **A 1972 SC 217 (220, 221).**

(29) Section 5-A of Kerala Act 15 of 1963 is intra vires the State legislature under Sch. 7, List II, Entry 54. Fact that tax liability under Section 5-A does not arise on the occasion of purchase but depends on future contingencies mentioned therein does not make it beyond legislative competence. 1972 Tax LR 2202 (Ker).

(30) Section 8 (2) of M. P. General Sales Tax Act is within legislative competence of the State. 1972 Tax LR 2416 (Madh Pra).

5. Enactments held unconstitutional.— (1) Hyderabad General Sales Tax Act (14 of 1940), Sections 11 (2), 20 (c) — Provides for recovery of amounts collected as tax though not eligible as tax under the Act — Provision not covered by Entry 54 nor justified as ancillary provision — Section 11 (2) and Section 20 (c) held ultra vires the State Legislature. **A 1964 SC 922 (923 to 925).** (A 1960 Andh Pra 395, **Reversed;** A 1963 Mad 116, **Overruled.**)

(2) Section 8-A (4) of the U. P. Sales Tax Act, 1948, is ultra vires. A 1968 All 193 (195, 196).

(3) Bombay Sales Tax Act (5 of 1946), Section 12-A (4) is violative of Article 19 (1) (f) of the Constitution and is void. **A 1968 SC 445 (448).**

(4) Liability of dealer to pay illegal collection of tax to Government — Sec. 5 (c) of Andhra Pradesh General Sales Tax Act (6 of 1957) as amended by Act (16 of 1963) is ultra vires the State Legislature. (1968) 22 STC 222 (Andh Pra).

(5) Explanation 1 to Section 2 (n) of M. P. General Sales Tax Act (2 of 1959) is ultra vires as it attempts to enlarge the definition of 'sale' by bringing within its scope hire-purchase transactions. A 1964 Madh Pra 242 (246) : 1967 MPLJ 799 (DB).

(6) Amendment in 1964 of Section 18 (3) of Mysore Sales Tax Act (25 of 1957) converting into tax what is not a really tax, is unconstitutional. A 1965 Mys 120 (121) (DB).

(7) Section 22, Mysore Sales Tax Act (46 of 1948) is not ultra vires of Article 14 of Constitution. A 1958 Mys 143 (147) : 1958 Cri LJ 1327 (DB).

(8) Explanation (1) to Section 2 (g) of the W. B. Sales Tax Act (as extended to Delhi) is unconstitutional inasmuch as it seeks to bring within the meaning of the word 'sale' hire purchase agreements with an option to purchase to the hirer, which are not sales within the word as used in Entry 48 of List 2, Government of India Act, 1935. A 1956 Punj 177 (181) (DB).

(9) Section 26 (3), Bombay Sales Tax Act (3 of 1953) is ultra vires the State Legislature in so far as it purported to tax allotment of goods of a firm amongst partners on dissolution. A 1965 Guj 60 (69) (DB).

(10) U. P. Sales Tax Act (15 of 1948) Sections 28, 28A, 28C, 28D and 15A (o) — These provisions are outside the purview of Entry 54 of List II of the 7th Schedule to the Constitution. 1978 All LJ 1054 (1057).

(11) The State Legislature is not competent to enact law contained in Sec. 22 (3) of Kerala Sales Tax Act in so far as it related to payment of an amount collected as tax on transactions not liable to tax under the Act or in excess of the tax leviable under the Act. **A 1975 SC 1991 (1992)** ** 1973 Tax LR 2460 (2462) (Orissa).

(12) Declaration under sub-sec. (3) false in some particulars — Power under sub-sec. (8) of Sec. 14-B of P. G. S. T. Act to seize such goods and impose penalty — Power is not covered by Entry 54 List 2 of Schedule 7 of the Constitution — Sub-section (8) of Sec. 14-B is invalid. (1974) 33 STC 168 (DB) (Punj).

(13) Himachal Pradesh General Sales Tax Act (24 of 1968), Sec. 22 (6) and (8). Provides for seizure of goods. Provision is not covered by Entry 54 and not also justified as ancillary provision — Sec. 22 (6) and (8) held ultra vires legislature. ILR (1974) Him Pra 936.

(14) Bihar Sales Tax Act (19 of 1959), Section 2 (P), Expln. I is ultra vires the Bihar Legislature. 1973 Tax LR 1900 (Pat).

(15) Section 14-B (8) of Punjab Sales Tax Act is ultra vires the State Legislature's

55. Taxes on advertisements other than advertisements published in the newspapers [a][and advertisements broadcast by radio or television].

[a] Inserted by Constitution (Forty-second Amendment) Act, 1976, S. 57 (3-1-77).

56. Taxes on goods and passengers carried by road or on inland waterways.

[Government of India Act, 1935, Item 52.]

Schedule 7, List 2, Entry 54—Note 5 (contd.)

powers — Action taken thereunder is null and viod. 1973 Tax LR 2142 (Punj).

(16) Where a State Legislature proceeds on the basis that certain amount in question is not a tax exigible under law made under Entry 54 of List II of the Seventh Schedule to the Constitution, but even so makes a provision that it shall be paid over to the Government merely because some dealers by mistake or otherwise have collected it as tax, such a provision is not ancillary or incidental to the collection of tax due under the law. Hence Secs. 9-B (3) & 14-A of Orissa Sales Tax Act are unconstitutional. 1973 Tax LR 2460 (2162) (Orissa).

(17) A. P. General Sales Tax Act (6 of 1957), Sec. 29 (3) and (4) — Power to seize and confiscate goods — Power is not ancillary or incidental to the power to tax sale or purchase of goods under Sch. 7, List II, Entry 54 — Sub-secs. (3) and (4) of Sec. 29 are beyond legislative competence of the State. (1972) 29 STC 649 (Andh Pra).

(18) Section 20-A (3) is ultra vires State Legislature. Therefore the order of Superintendent of Commercial Taxes directing dealer to deposit in Government treasury the amount said to have been collected by it as sales tax on account of sale of mica and which amount had not been refunded to the purchasers is bad. 1972 Tax LR 2213 (2214) (Pat).

(19) Sections 30-A and 30-B of Andhra Pradesh General Sales Tax Act (6 of 1957) are invalid in toto and void since they contravene Entry 54. 1972 Tax LR 1891 (Andh Pra).

(20) Bihar Sales Tax Act (19 of 1959) (as amended by Act 20 of 1962), Sec. 20-A — Sub-secs. (3), (4) and (5) are ultra vires State Legislature — Sub-secs. (6) and (8) as corollary thereto, are invalid. **A 1971 SC 946: 1971 Tax LR 414.**

(21) Madras General Sales Tax Act (1 of 1959), Sec. 42 (3) — Provision for confiscation of goods and levy of penalty by check-post officer — Ultra vires the Constitution. A 1970 Mad 25.

(22) Sub-secs. (2) and (3) of Kerala General Sales Tax Act are ultra vires powers of State legislature. 1969 Mer LR 85 (Ker).

Schedule 7, List II, Entry 55

(1) Section 126, Kerala Municipalities Act (14 of 1961) which authorises the Municipality to levy tax on advertisements is perfectly valid. A 1965 Ker 237 (238).

SCHEDULE 7, LIST 2, ENTRY 56

SYNOPSIS

1. Scope.
2. Taxes on goods and passengers.
3. "Carried."
4. "Roads or inland waterways."

1. Scope.— (1) This entry and Entry 89 of the Union List distribute the field of taxation between the Union and the States with respect to taxes on goods and passengers carried by different modes of transport. **A 1955 Assam 249 (262) (SB).**

(2) The words of this entry have to be given their full effect and have to be construed in a natural and liberal sense. But at the same time they have not to be so construed as to destroy the very significance of the context in which they appear. **A 1955 Assam 249 (256) (SB).**

(3) Kerala Motor Vehicles (Taxation of Passengers and Goods Amendment) Act (18 of 1971) is within legislative competence under Entry 56 of the State List. **A 1974 SC 436: 1974 Tax LR 1691.**

(4) U. P. Motor-Gadi (Mal Kar) Adhiniyam (15 of 1964) Secs. 3 & 8 — Imposition of liability for tax on operator of goods vehicles under Adhiniyam — Operators of goods vehicles collecting goods from booking agencies for transportations — Operators and not agencies are liable for tax — Liability on operators is justified under Entry 56. 1976 Tax LR 1349 (1352, 1353) (All).

(5) U. P. Vehicles Taxation Act (5 of 1935), Sec. 5-A — Intra vires. 1973 UPTC 376 (All).

2. Taxes on goods and passengers.— (1) The term "goods" would mean trade goods or goods of a commercial character and would not include in its ambit luggage and personal effects. **A 1955 Assam 249 (260) (SB).**

(2) The entry is an enabling one and empowers the Legislature to tax goods and passengers either individually or collectively. The use of the word "and" between the two objects does not mean that the tax cannot be levied on one to the exclusion of the other. **A 1955 Assam 249 (256) (SB).**

(3) The nature or the quality of the tax would not depend on what measure is adopted for fixing the amount payable in each case — It may be the distance travelled or the weight as the measure for purposes of taxation. **A 1955 Assam 249 (273) (SB).**

(4) The fact that the tax is to be measured in proportion to the fares and freight realised does not alter the nature of the tax upon the goods and passengers or affect its intrinsic character. **A 1952 Pat 359 (364) (SB) ** A 1945 PC 98 (101).**

(5) The mere fact that the State has decided to charge a heavy tax when it easily could have charged a lighter one would not detract from the validity of the tax. A 1954 Punj 264 (267) (DB).

(6) Taxation under this entry is of the indirect variety. It ultimately falls on the consumer. The tax can be collected through the carrier or the producer and the manufacturer. **A 1955 Assam 249 (262) (SB).**

(7) The tax levied by the Assam Taxation (On Goods Carried by Roads or Inland Waterways) Act (13 of 1954) is a tax on the

Schedule 7, List 2, Entry 56—Note 2 (contd.) transportation of goods and not in the nature of excise duty. There is, therefore, no encroachment on Entry 84 of List 1 and the Act is not ultra vires on that ground. **A 1955 Assam 249 (255) (SB).**

(8) Where the pith and substance of the Assam Act 10 of 1961 is the levy of a tax on tea which is carried in the State of Assam, the right to levy such a tax cannot be said to have been taken away merely by the fact that a Tea Act had been passed by the Central Legislature which is referable to the relevant Entry in List 1 of Schedule 7. The power to levy a tax which has been conferred on the State Legislature by Entry 56 cannot, therefore, be said to be controlled by the Tea Act in question. There is, therefore, no substance in the argument that the State Legislature has no power to levy a tax on tea which is carried over a part of the area of the State of Assam, because one of the objects taxed under the Assam Act has been covered by the Central Tea Act of 1953. **A 1964 SC 925 (943).**

(9) A tax on motor vehicles entering or leaving the limits of a municipality is not a tax on passengers carried by road within the meaning of this entry though the amount of the tax is to be calculated with reference to the number of passengers. A 1958 All 430 (431) (DB).

(10) Power of Municipality to levy toll tax is limited to cases covered by Sec. 128 (1) (vii). U. P. Municipalities Act (2 of 1916) — Municipality cannot levy toll tax on passengers under its delegated authority either under Sec. 128 (1) (vii) or (xiv). 1968 All WR (HC) 438.

(11) Power to levy toll on vehicles limited by Sec. 128 (1) (vii) and cannot be extended by resort to residuary clause (Sec. 128 (1) (xiv)). **A 1966 SC 1502 (1506).**

(12) Instances of Acts falling under this entry, are :

(a) Assam Taxation (On Goods Carried by Roads or Inland Waterways) Act, 13 of 1954. **A 1955 Assam 249 (258) (SB).**

(b) Part III of the Bihar Finance Act, 17 of 1950. **A 1952 Pat 359 (364) (SB).**

(c) Punjab Passengers and Goods Taxation Act, 16 of 1952. 57 Pun LR 304 (306) (DB).

(d) Madras Motor Vehicles (Taxation of Passengers and Goods) Act (XVI of 1952). A 1954 Mad 569 (572) (DB).

(e) Punjab Passengers and Goods Taxation Act (16 of 1952). A 1954 Punj 264 (267) (DB).

(f) Punjab District Boards Act (20 of 1883). **A 1962 Punj 350 (353) (FB).**

(g) Bihar Taxation on Passengers and Goods (Carried by Public Service Motor Vehicles) Act (Bihar Act 17 of 1961). Sec. 3. **A 1963 SC 1667 (1674, 1675).** (Act is retrospective.)

(h) Kerala Motor Vehicles (Taxation on Passengers and Goods) Act (25 of 1963) is within the competence of State Legislature. A 1969 Ker 130 (136) (DB).

(i) Rajasthan Passengers and Goods Taxation Act (18 of 1959) — Tax levied by Act is tax on passengers and goods and not on income or on fares and freights — It is not ultra vires. **A 1961 SC 1480 (1484, 1485).**

(j) Mysore Motor Vehicles (Taxation on Passengers and Goods) Act (10 of 1961). A 1963 Mys 49 (58) (DB).

(13) The nature of the tax as defined by the entry is wholly different and the mere imposition of such tax does not amount to interference with the freedom of trade and commerce given by Art. 301 of the Constitution. **A 1955 Assam 249 (253, 254) (SB).**

(14) Power given to Legislature to levy taxes on goods and passengers — It is competent for Legislature to devise machinery for recovery of said taxes. **A 1963 SC 1667 (1672, 1673).**

(15) Terminal tax on export and import of articles under S. 66 (1) (o) of C. P. and Berar Municipalities Act (2 of 1922) — Tax did not fall within this entry. A 1967 Bom 413 (415, 416) (DB).

(16) Andhra Pradesh Motor Vehicles (Taxation on Passengers and Goods) (Amendment and Validation) Act 34 or 1961) Section 8 — S. 8 is not beyond competence of State Legislature as it validates only the Act which was declared invalid on ground of violation of constitutional provisions and not on ground of lack of legislative competence. ILR (1964) Andh Pra 1338 (DB).

(17) Levy of tax on public carrier permit holders for carriage of goods on National Highway falling in the territory of Haryana — Constitutional validity — Not beyond competence of State Legislature. **ILR (1971) 1 Punj 720 (FB).**

3. "Carried."— (1) All that the entry requires is that the goods should be carried by road or inland waterways. It makes no mention of the agency through which goods are carried. **A 1955 Assam 249 (260) (SB).**

(2) Goods carried in State only for short distance — Does not render tax under Section 3 Assam Taxation (on Goods Carried by Roads or on Inland Waterways) Act (10 of 1961) invalid on ground of extra territoriality. **A 1964 SC 925 (942).**

(3) Carried — Meaning of — Goods carried not joining mass of goods — Tax levied under Assam Act 10 of 1961 held not invalid. **A 1964 SC 925 (942, 943).**

(4) U. P. Town Areas Act (2 of 1914), Section 14 (2) (b) — Levy of 'Teh-bazari tax' on motor vehicles passing over the public streets within limits of town area when they leave town area is not covered by Entry 56, List 2 of Sch. 7. 1974 All LJ 231.

(5) Imposition of terminal tax on passengers carried by road under clause (e) — State Legislature is competent to legislate and impose tax. ILR (1973) Cut 1174.

4. "Roads or inland waterways."— (1) The word "roads" refers to public roads as used for traffic, both vehicular and pedestrian, as of right and inland waterways must evidently refer to waterways which are used for navigation by public boats or crafts. **A 1955 Assam 249 (256) (SB).**

57. Taxes on vehicles, whether mechanically propelled or not, suitable for use of roads, including tramcars subject to the provisions of Entry 35 of List III.

[Government of India Act, 1935, Item 48A.]

58. Taxes on animals and boats.

[Government of India Act, 1935, Item 47.]

59. Tolls.

[Government of India Act, 1935, Item 53.]

Schedule 7, List 2, Entry 57

(1) An Act which in no way interferes with the freedom of trade, commerce and intercourse within the State and which is only a fiscal measure falling under this entry does not not require for its validity and Presidential sanction under the Proviso to cl. (b) of Art. 304. A 1958 Ker 52 (53): 1958 Cri LJ 380 (DB).

(2) Assam Motor Vehicles Taxation (Amendment) Acts (XV of 1963) and (XII of 1966) are not unconstitutional under Art. 254 (2). **A 1967 SC 1575 (1577).** (ILR (1966) 18 Assam 494 (DB), **Reversed.**)

(3) Motor Vehicles Rules (1940), R. 160-C (under Sec. 5 of Madras Act 3 of 1931) — Validity of — Does not encroach upon field of State Legislature. A 1956 Andh Pra 129 (139) (DB).

(4) M. P. Motor Vehicles Taxation (Amendment) Act (15 of 1965) falls under Entry 57 of List 2 and not Entry 35 List 3 and is not ultra vires for want of assent of the President. A 1966 Madh Pra 131 (133) (DB).

(5) Travancore-Cochin Vehicles Taxation Act (14 of 1950) is not a legislation dealing with respect to trade or commerce but enacted by virtue of powers conferred on State Legislature under Entry 57. A 1958 Ker 398 (398, 399) (DB) ** A 1960 Ker 58 (63) (DB).

(6) It cannot be said that the legislature has no power, under Entry 57 of List 2, to impose a tax on motor vehicles kept for use within the State unless those vehicles are intended to be used or are used on public roads maintained by the State. 1969 Ker LJ 373.

(7) Tax on vehicles — Entry 57 only requires that the vehicles should be suitable for use on roads. 1972 Ker LT 760.

(8) The higher tax imposed on contract carriages by G. O. Ms. 923. Home, D/- 19-4-69 & G. O. Ms. No. 434 Home, D/- 27-2-1970 is compensatory in character and, therefore, the Government, in exercise of its delegated power was competent to impose the same without in any way restricting the freedom of trade, commerce or intercourse. Since the Government had power to impose tax, the purpose behind it, viz. to eliminate unhealthy competition was immaterial. **A 1975 SC 1006: 1975 Tax LR 1360.** [1971 Tax LR 1498 (1501) (Mad) **Reversed.**)

(9) U. P. Town Areas Act (2 of 1914), Sec. 14 (2) (b) — Rules framed under — Rules 2, 3 — "Teh-bazari traffic tax" levied under — Validity of — Tax levied on motor vehicles for merely passing over public streets and places within the limits of town area when leaving the town area territory cannot be supported as 'Teh Bazari, under Sec. 14 (2) (b). 1974 All LJ 231 (234).

(10) The dumpers and shovels, which are admittedly being used solely upon the premises of the owner, are excluded from the purview of the Punjab Act 4 of 1924 as applied to Goa, Daman & Diu and cannot be subjected to taxation under the Act as the State Government cannot impose, under Entry 57 of the State List any compensatory tax in respect of roads which are not built and maintained by it. 1978 Tax LR 2242 (2243) (Goa).

(11) Expression 'vehicle' or 'motor vehicle' in Secs. 6 and 8 (as amended in 1977) in B. & O. Motor Vehicles Taxation Act (1930) ought to be interpreted as motor vehicle using public road. So interpreted it is not ultra vires the Legislature under Entry 57 of the State List of Seventh Schedule to the Constitution. 1979 BLJR 502: A 1979 (NOC) 186.

Schedule 7 List 2 Entry 58

(1) The circumstances and Property tax levied under Sec. 119 of the U. P. Kshetra Samitis and Zilla Parishads Act 1961, is a tax on status of the individual and not a tax on income. It is covered by Entries 49, 60 and 58 of Sch. VII, List II of Constitution. **A 1980 SC 1088 (1092, 1094) : 1980 All LJ 483.**

Schedule 7, List 2, Entry 59

(1) A toll is a payment taken in return for some benefit and it is not necessary to collect it at the very moment when the person from whom it is collected commences to enjoy the benefit. It can be collected even when the person is about to leave after enjoying the benefit. The only limitation that lies on the power to collect tolls is that they cannot be collected twice for the same benefit. Therefore, where a municipality imposes toll tax on motor vehicles entering or leaving the municipal limits with passengers the levy cannot be condemned on the ground that it was ultra vires the powers of the municipality to collect tolls from vehicles going out of municipal limits. A 1958 All 430 (432) (DB).

(2) Consideration for imposition — Specific advantage from every toll levied not necessary — Factory connected with main railway line by its own side line for carrying materials — Enjoyment of amenities provided by Municipality is sufficient consideration — Imposition of tolls on wagons held valid under Section 128, U. P. Municipalities Act (2 of 1916). A 1962 All 25 (42) (DB).

(3) Cantonments Act (1924), Sec. 60 — Section was a law in force at the time of commencement of Constitution and is saved by Article 372 — Power to impose tolls given to State Legislature under Item 59, List 2, Sch. VII of Constitution — Mere fact that Central Legislature cannot now impose

60. Taxes on professions, trades, callings and employments.
[Government of India Act, 1935 — Item 46.]

Schedule 7, List 2, Entry 59 (contd.)
tolls cannot have the effect of depriving Cantonment Boards of the power to impose tolls which had been conferred by valid enactment. A 1967 All 15 (19).

(4) Entries 59 and 66 give power to State Legislature to legislate on tolls and fees respectively and hence it cannot be said there is no legislative competence to enact Section 140 of the Assam Municipal Act (1 of 1923). A 1958 Assam 156 (159) (DB).

(5) Toll imposed by Municipal Committee on vehicles entering its Municipal limits under Sec. 61 (2), Punjab Municipal Act (3 of 1911) covered by the term "toll" — "Stand tax" already being charged for parking vehicles at stand — No double taxation — Toll being on vehicles and not on goods, no infringement of Art. 301 — Toll imposed not unconstitutional. A 1964 Punj 506 (507, 508).

(6) Hardwar Municipality — Imposition of toll on motor vehicles, tongas and rickshaws entering or leaving municipal limits at four annas per passenger — No power in Board to levy toll on vehicle leaving municipal limits — Power to levy toll limited by Sec. 128 (1) (vii) cannot be extended by resort to residuary clause (xiv). **A 1966 SC 1502 (1506) **** 1968 All WR (HC) 438.

(7) No conflict between List 1, Entry 33 and List 2, Entry 59. **A 1969 J & K 113 (116) (FB).**

SCHEDULE 7, LIST 2, ENTRY 60

SYNOPSIS

1. **Scope of the entry.**
2. **Acts falling or not falling within this Entry.**

1. Scope of the entry.— (1) An obvious distinction exists between a tax on trades, callings or professions and a tax on income arising from a trade, calling or profession. A tax, by whatever name it may be known, if it is based on the income derived from a trade, calling or profession, can be questioned on the ground that it being an income tax could not be imposed by the State Government. It is to save such a tax that Art. 276 appears to have been enacted. A 1957 All 433 (436) (DB). **[Overruled** on another point in A 1980 SC 1088.]

(2) There is nothing unconstitutional in the requirement of the taking out of a licence for a trade, for the requirement is only a mechanism or device for the collection of the tax and is not consequently hit by Art. 19 (1) (g). **A 1957 Pat 386 (389)** (DB).

(3) Tax on receipt of pension — Not a tax on employment. **A 1964 SC 1172 (1178).**

(4) List 1, Item 84 deals with taxes on goods manufactured or produced and List 2, Item 60 deals with the carrying on trade i e. an activity in the nature of buying and selling and the Finance Act (1951) in its pith and substance relates to duty on goods manufactured or produced and has no relationship with item 60. **A 1962 SC 1006 (1028).**

(5) The object of Item 60, List 2 of Sch. 7 of the Constitution, from which the power to levy the tax in question by the Municipality is derived, is to enable the State Legislature to tax persons, who are carrying on any professions, trades, calling and employments. Those four words overlap one another and have been used by way of abundant caution in order to make these provisions broad based and comprehensive. None of those words has any particular technical meaning and even if they had any definitive significance the object of putting them altogether is to ensure that no particular category of persons is being eliminated. A 1960 Punj 669 (671, 672) (DB).

(6) Levy under Entry 60 far in excess of amount specified in Art. 276 (2) — Levy to be struck down. A 1965 Ker 8 (10).

(7) License fee for storing jute imposed by resolution of Municipality under Section 370 (1) (xii) of Bengal Municipal Act (15 of 1932) — Imposition held beyond competence of municipality. (1955) 59 Cal WN 872.

(8) Section 30 (b), Punjab District Boards Act (20 of 1883), has reference to taxation on property itself as such, and does not debar the imposition of tax on profession, trade, calling or employment which fall under a separate item in State List Schedule to the Constitution. (1959) 61 Pun LR 309.

(9) Tax on circumstances and property is tax on income and not on financial status — Items 49 and 60 of List 2 of Constitution — State cannot legislate in respect of tax on sources other than those mentioned therein — But U. P. Act 10 of 1922 which was valid under Government of India Act, is valid under the Constitution by virtue of Art. 277 and Item 82 of Union List — Ss. 108 and 44 thereof, therefore are not void. 1955 All LJ 630.

(10) Liability to pay professional tax under Punjab Professions, Trades, Callings and Employments Taxation Act (7 of 1956) — Situs of trade, business, calling or profession has to be considered — Where no business is carried on by a dealer at a certain place, mere delivery of goods from godown situated there cannot be equated to doing business at that place. A 1968 Punj 289 (291) (DB).

(11) Levy of circumstances and property tax is valid and it falls under Entries 49, 58 and 60 of List II of the Seventh Schedule to the Constitution. It is not a tax on income. An excessive levy on circumstances will tend to blur the distinction between a tax on income and a tax on circumstances. Income will then cease to be a mere measure or yardstrict of the tax and will become the very subject matter of the tax. **A 1980 SC 1088 (1093, 1094) : 1980 All LJ 483. [A 1957 All 433 & 1961 All LJ 743 Overruled; A 1970 All 316 (FB) partly Reversed.]**

(12) Circumstances and property tax is not a tax on income. It is covered by Entries 49, 60 & 58 of List II of the Seventh Schedule to the Constitution. It is not necessary to resort to Art. 277 to uphold its validity. Morecover, Art. 277 would not save the

61. Capitation taxes.
[Government of India Act, 1935, Item 45.]

Schedule 7, List 2, Entry 60—Note 1 (contd.) impugned tax since it was levied in pursuance of the power conferred by Clause (f) of S. 14 of the U. P. Town Areas Act, 1914, which was introduced by a post-Constitution amendment. **A 1980 SC 1088 (1094): 1980 All LJ 483.** [A 1970 All 316 (FB) **partly reversed.**]

2. Acts falling or not falling within this Entry.—

The following Acts fall within this entry:

(1) Cantonments Act (2 of 1924), Sec. 60. **A 1959 SC 582 (584, 585).**

(2) Bombay Municipal Boroughs Act. (18 of 1925). Sec. 79 (1) (xiv). A 1966 Bom 15 (17, 18) (DB).

(3) U. P. Act 21 of 1965. **A 1969 All 317 (321, 329) (FB).**

(4) U. P. District Boards Act (10 of 1922). Sections 174 and 91 (K). **A 1961 SC 356 (360).**

(5) Punjab Municipal Act (3 of 1911) (as applied to Himachal Pradesh). A 1959 Him Pra 17 (20).

(6) Gwalior Municipal Act (Smt. 1993). A 1953 Madh B 145 (146) (DB).

(7) West Bengal Panchayat Act (1957). Sec. 57 (1) — West Bengal Panchayat Rules (1958). Rules 110 and 111 — Assessment of tax by Panchayat on basis of income from trade or business carried on within its jurisdiction — Provisions, although relate to tax on income are saved by Art. 276 (1), Constitution of India. A 1964 Cal 590 (592).

(8) U. P. Town Areas Act (2 of 1914). Section 14 (1) (f). **A 1969 All 40 (42) (FB).**

(9) Patna Municipal Corporation Act (13 of 1952), Sec. 177 (1). 1967 BLJR 135 (DB).

(10) Provision of Sec. 82 (1) (ff). Bihar and Orissa Municipal Act (7 of 1922). 1965 BLJR 886 (DB) ** A 1962 Pat 465 (467) (DB).

(10A) West Bengal State Tax on Professions, Trades, Callings and Employments Act (16 of 1979). (1980) 84 Cal WN 90 : 1980 Tax LR (NOC) 111.

The following Acts do not fall within this Entry.

(11) The base of the levy under the Travancore Tobacco Act (1 of 1087). Sec. 31 is neither an occupation nor its income derived therefrom but commodity concerned namely the tobacco stocked by the licensee — It is not a tax on occupation falling under Entry 60 but is covered by Entry 62. **A 1958 Ker 129 (134) (FB).**

(12) The provisions of Sec. 4-A. Madras Entertainment Tax Act (10 of 1939). A 1959 Andh Pra 461 (465): (1959) 1 Andh WR 347 (DB).

(13) Mysore Village Panchayat and Local Boards Act (10 of 1959). Sec. 73 (4) (1). A 1967 Mys 150 (152) (DB).

(14) Punjab Professions, Trades, Calling and Employments Taxation Act (1956 as amended by Act 10 of 1962) Secs. 2 (b), 3 and 5 — Assessment of professional tax relating to income from trade outside State of Punjab held illegal. (1966) 68 Pun LR 695 (DB).

(15) Kerala Profession Tax (Validation and Reassessment) Act, 1958 is invalid. A 1962 Ker 185 (190) (DB).

(16) Tax on advertisement levied under Sec. 126, Kerala Municipalities Act (14 of 1961) is not tax on profession or calling. A 1965 Ker 237 (239).

(17) Punjab Entertainment Tax (Cinematograph Shows) Act. A 1956 Punj 203 (204) (DB).

(18) Bombay Lotteries and Prize Competitions Control and Tax Act (1948). Sec. 12A (as amended by Bom. Act 30 of 1952) — Tax imposed under Sec. 12-A does not amount to tax on business — Tax imposed is on betting and gambling and is valid under Entry 62. **A 1957 SC 699 (711).** (A 1956 Bom 1 (DB). **Reversed.**)

(19) Theatre tax imposed by Allahabad Nagar Mahapalika — Reasons for or basis of impugned tax is not possession of particular profession or calling but giving of one or more shows or exhibitions and the tax is more properly referable to entries other than No. 60 of List 2 — It is covered by Entries 33 and 62 of this List — Therefore, it is not hit by Art. 276. 1969 All LJ 295.

(20) Madras Commercial Crops Markets Act (20 of 1933). Sec. 11. A 1959 Andh Pra 398 (401) (DB).

(21) Levy of Theatre Tax under U. P. Nagar Mahapalika Adhiniyam falls under Entry 62 and not under 60. 1972 Tax LR 2022 (All) ** A 1955 Sau 90 (92).

(22) Levy of Theatre tax under Section 132 of U. P. Municipalities Act is a tax on entertainment within Entry 62 of List II of the Seventh Schedule to the Constitution and not under Entry 60 thereof. It is, therefore, not invalid if it exceeds Rs. 250 per annum. 1977 Tax LR 1879 (1883) (All).

(23) Directors of a company are not the employees of a company or members of its staff. They do not exercise any profession or calling nor could they be said to be engaged in a trade thereby. Hence the professions tax levied on them under Karnataka Tax on Professions, Trades, Callings and Employments Act, 35 of 1976, was illegal and void. 1979 Tax LR 2513 (2515, 2516) : (1979) 49 Com Cas 468 (DB) (Kant).

(24) The States are conferred with Legislative power in respect of tax on professions etc., by Entry 60 in the State List of the Seventh Schedule to the Constitution. Fetter on the said power put under Article 276 (2) is removed in cases falling under the proviso thereto. Therefore there is no legislative incompetence for the levy of professions tax in cases falling under the said proviso. 1978 Ker LT 233 : 1978 Tax LR (NOC) 74.

(25) Imposition of Haisiyat tax under Section 66 (n) of C. P. and Berar Municipalities Act — It is a tax on man's financial position as reflected by his 'circumstances and property' i.e. upon his capacity to pay — It is thus a combination of the property tax and the professions tax and as such it falls under Entries 49 and 60 of the State List of the Seventh Schedule to the Constitution. 1973 Tax LR 2431 (2432, 2434) (Madh Pra).

62. Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling.

SCHEDULE 7. LIST 2. ENTRY 62
SYNOPSIS

1. Luxuries.
2. Entertainments and amusements.
3. Betting and gambling.
4. Quantum of tax.
5. Scope.

1. Luxuries.— (1) This Entry contemplates a tax on certain articles or goods constituting luxuries and not legislation controlling an activity which may not be a necessary activity but may be unnecessary and in that sense a luxury. A 1956 Bom 1 (11) (DB). **(Reversed** on another point in A 1957 SC 699.)

(2) Tobacco has invariably been considered an article of luxury throughout the world. The levy of an annual fee for a licence under the rules framed in 1951 under Section 31 of the Travancore Tobacco Act (1 of 1087) is, therefore, a luxury tax coming under this entry. **A 1958 Ker 129 (134) (FB).**

(3) Kerala Luxury Tax on Tobacco (Validation) Act (9 of 1964) is not a colourable exercise of power — Imposition falls under Item 62 in List 2, Sch. 7 of the Constitution. A 1966 Ker 46 (53).

(4) Private individual conducting stall on railway platform under licence from railway authorities. Section 135 (1) (i) of Railways Act, 1890 does not confer immunity on him from payment of licence fee under Section 284, Kerala Municipalities Act (14 of 1961) — Fee under Section 284 cannot be considered as tax on land under Entry 49, List 2 of Sch. 7 of Constitution of India — Activity for which licence has to be taken under Section 284 is not for storing or selling luxury articles alone and hence licence fee thereunder is not a tax on luxuries under Entry 62, List 2 of Sch. 7 of Constitution of India. 1967 Ker LT 848 (DB).

(5) Kerala Luxury Tax on Tobacco (Validation) Act (1964), Section 3 — Act is within legislative competence of the State Legislature — Levy of tax thereunder is not in the nature of excise duty. **A 1976 SC 182 (189): 1976 Tax LR 1293 (1300).** (1971 Tax LR 512 **Affirmed.**)

(6) Taxes on luxuries — Luxury — Meaning — Tobacco is an article of luxury — Tax on tobacco has been recognised as a tax in the nature of luxury. **A 1976 SC 182 (190) : 1976 Tax LR 1293 (1301).**

(7) The word 'luxuries' would include 'luxury' as well. Both 'luxuries' and 'luxury' can be taxed under Entry 62. 'Luxuries' in Entry 62 should not be confined to articles or objects of luxury alone. In view to the social and economic structure of India, an airconditioned space whether in a hotel or in a restaurant is a luxury by itself. People enter into these spaces for enjoyment of a luxury. A tax levied under Entry 62 cannot be restricted to certain articles only but may also be extended to things incorporeal. Assuming that "luxuries" in Entry 62 are to be confined to objects or articles of luxury, W. B. Act 21 of 1972 is a legislation with respect to air-conditioners within the meaning of clause (3) of Article 246 of the Constitution. The State legislature is competent to impose a tax on this luxury. 1975 Tax LR 1890 (1892) (Cal) (DB).

(8) W. B. Entertainments and Luxuries (Hotels and Restaurants) Tax Act (21 of 1972), Sections 2 (b) and 2 (c) and 3 (as amended in 1974) — Imposition of entertainment tax — Section 3 is not invalid. 1975 Tax LR 1894 (Cal) (DB).

(9) Karnataka Excise (Sale of Indian and Foreign Liquors) Rules (1968), R. 8 (1) — Imposition of licence fee for retail vending of Indian and Foreign liquors under Rule 8 — Cannot be considered as tax on luxuries. 1975 Tax LR 1377 (Kant) (DB).

2. Entertainments and amusements.— (1) Although it may be said that a person who solves a cross-word puzzle is amusing or entertaining himself, this is not the amusement or entertainment contemplated by this entry. A 1956 Bom 1 (11) (DB).

(2) The word "entertainments" is used in the plural, which means that the word is used as a common noun and not as an abstract noun and as a common noun it must necessarily mean in the case of cinema, a show, in the case of a drama, a performance and in the case of cricket, a match. A 1954 Bom 261 (264) (DB).

(3) The levy of entertainment tax on cinema shows is a tax on entertainment which falls under this entry and not under Entry 60 of List 2 and can be collected from the cinema exhibitor. A 1956 Punj 203 (204) (DB). (A 1953 Madh B 145, **Dissented from.**) ** A 1955 Sau 90 (91) (DB). (A 1953 Madh B 145 (146, 147) **Dissented from.**) ** A 1954 Bom 261 (265) (DB) ** **A 1959 SC 894 (895, 896)** ** A 1967 Mys 150 (152) (DB).

(4) If in substance an entertainment tax is a tax upon a show or performance, it makes no difference whether it is levied from the person who obtains admission to the entertainment or from the person who gives it, it being always permissible for a person from whom the charge is levied to pass on the duty to a person who obtains admission. A 1954 Bom 261 (263, 264) (DB).

(5) The tax is not a tax on "calling" within the meaning of Entry 60 of List 2. A 1955 Sau 90 (91) (DB) ** **A 1959 SC 894 (895, 896).**

(6) The fact that each exhibition is separately taxed, or that the tax, being payable in advance, is refundable if the show is not held, also goes to show clearly the nature of the tax, namely, that it is a tax on entertainment and not on profession, trade or calling. A 1956 Punj 203 (204) (DB) ** A 1955 Sau 90 (91) (DB).

(7) The provisions of Section 4-A, Madras Entertainments Tax Act (10 of 1939), fall within the contents of Entry 62 and hence it is within the legislative competence of the State Legislature and is not ultra vires. A 1959 Andh Pra 461 (467) (DB).

(8) A tax levied by a Cantonment Board on the lessee of a Cinema theatre on each

Schedule 7, List 2, Entry 62—Note 2 (contd.) show of the film exhibited by him is a valid tax. **A 1959 SC 582 (584, 585).**

(9) Theatre tax imposed by Allahabad Nagar Mahapalika — Reasons for or basis of impugned tax is not possession of particular profession or calling but giving of one or more shows or exhibitions and the tax is more properly referable to entries other than No 60 of List II — It is covered by Entries 33 and 62 of this list — Therefore, it is not hit by Article 276. 1969 All LJ 295.

(10) Levy of theatre tax under U. P. Nagar Mahapalika Adhiniyam falls under Entry 62 and not under 60. 1972 Tax LR 2022 (2027) : 1972 All LJ 279.

(11) Kerala Local Authorities Additional Tax on Entertainments and Surcharge on Show Tax Act (1968), Section 2-A (as added in 1972) — Section is valid. 1974 Tax LR 1659 (Ker).

(12) Entertainment tax — Entry permits imposition of tax either on the entertainer, or on the entertainee or on both. **A 1971 Ker 92 (94) : 1971 Tax LR 38 (FB).**

(13) A. P. Entertainments Tax Act (10 of 1939), Section 14-C — Tax on complimentary tickets is covered by Sch I, List II, Entry 62 of the Constitution and is within State Legislature's competence. 1971 Tax LR 1693 (1695, 1697) (AP).

(14) The museum is not a place of entertainment. Consequently the fees levied by the museum for the purpose of meeting the maintenance charges etc., could not be taxed under the Raj. Entertainments and Advertisements Tax Act, 1957. The museum was primarily used for education of the people. It may be that some visitors may derive entertainment or amusement but that may be incidental. 1972 Tax LR 2428 (2432) (DB) (Raj). (A 1971 Raj 151 (157) : 1971 Tax LR 471 **Reversed.**)

(15) Bihar Entertainments Tax Act (1948), Sections 5, 5-A — Act in pith and substance, is a legislation under Entry 62 of the State List — It is a legislation relating to tax on entertainments and matters ancillary and subsidiary thereto — It cannot, even by stretch of imagination, be said to be a legislation on topic of stamp duties. 1974 Tax LR 330 (334, 335) (Pat).

(16) Levy of theatre tax under Sec. 132 of U. P. Municipalities Act is a tax on entertainments within Entry 62 of the State List. It is, therefore, not invalid if it exceeds Rs. 250 p. a. 1977 Tax LR 1879 (1883) (All).

3. Betting and gambling.— (1) Tax on gambling is an indirect tax which is demanded from the promoter in the expectation and with the intention that he shall indemnify himself at the expense of the gamblers who sent entrance fees to him. **A 1957 SC 699 (710, 711).**

(2) Where it is held that the impugned Act is on the topic of betting and gambling under Entry 34 of List 2, the tax imposed by such statute would be a tax on betting and gambling under this entry. Thus, the Bombay Lotteries and Prize Competitions Control and Tax Act (54 of 1948), as amended by Bombay Act, 30 of 1952, being a law with respect to betting and gambling under Entry 34, the taxing provisions of Section 12A of the Act must be held to impose a tax on betting and gambling under this entry, it cannot be held to impose a tax on trade under Entry 60 of List 2. **A 1957 SC 699 (710).** (A 1956 Bom 1 (DB), **Reversed.**)

(3) Resolutions by State Legislatures as required by Article 252 surrendering control and regulation of prize competitions to the Parliament — Power to tax betting and gambling under Entry 62 cannot be said to have been surrendered to Parliament. **A 1962 SC 594 (599).**

(4) The words 'forward contract' as defined in the Act do not set out all the elements which are necessary to render a contract a wagering contract and so the impugned legislation to tax forward contracts as defined does not come within Entry 62 and is beyond the legislative competence of the State Legislature. The notification made under the rules promulgated under the Act and the Rules are also void. The Legislature did not contemplate wagering contracts at all in defining "forward contract" in the way it did.

Assuming that the definition of forward contract in Section 2 is wide enough to include wagering contracts, the portion of the Act which would then be valid is not severable from the portion which would remain invalid and the whole Act must be held to be invalid. **A 1961 SC 268 (269, 270, 271, 272).**

(5) Power of State to tax income from betting, gambling and lotteries — The provision enables the State to make laws taxing entertainments, amusements, betting and gambling but not the income from such entertainments. 1974 Tax LR 885 (All).

(6) The contrast in the language of Entry 82 of List I and Entry 62 of List II is apparent. While the Parliament has got the power tc tax the income, the State Legislatures have got the power to impose tax on betting and gambling. Tax on betting and gambling is different from tax on income from betting and gambling. The Parliament is thus competent to enact Section 2 (24) (ix) of the Income-tax Act, 1961. A 1977 Andh Pra 33 (38, 41).

4. Quantum of tax.— (1) There is no constitutional limit to the quantum of tax which can be imposed by law made under this entry. **A 1957 SC 699 (711).**

5. Scope.— (1) Education cess levied on excise revenue and not independently — Whether falls under Entry 62 (Question left open). **A 1971 SC 152.**

(2) Freedom of trade and commerce guaranteed by Article 301 must be subject to the normal power of taxation for revenue purposes conferred on the State Legislature by Entry 62 in List II of the Seventh Schedule to the Constitution. 1971 Tax LR 512 (522) (Ker). **(Affirmed** in A 1976 SC 182.)

(3) Expenditure Tax Act, 1957 is not invalid for want of legislative competence. It does not fall within Entry 62 of List II. Since it is not specifically provided for in any of the Entries in List II and List III it is covered by residuary Entry 97 in

63. Rates of stamp duty in respect of documents other than those specified in the provisions of List I with regard to rates of stamp duty.
[Government of India Act, 1935, Item 51.]

64. Offences against laws with respect to any of the matters in this List.
[Government of India Act, 1935, Item 37.]

65. Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this List.
[Government of India Act, 1935, Item 2.]

Schedule 7, List 2, Entry 62—Note 5 (contd.)
List I. (A 1970 Andh Pra 86 (FB) **Affirmed.**) **A 1972 SC 2319 (2324) : 1972 Tax LR 360.**

(4) The provisions of U. P. Excise (Amendment) Ordinance, 1972, enabling the State Government the auction of foreign liquor shops is illegal and ultra vires as the amount that would be realised cannot be justified as tax or as fee. 1973 Tax LR 2271 (2283, 2284) (All).

Schedule 7, List 2, Entry 63

(1) Parliament has no power to make laws in respect of rates of stamp duty payable on an application for enrolment as an advocate inasmuch as it is not one of the matters provided for in that List. **A 1958 Andh Pra 63 (65) (SB).**

(2) The proviso to Section 8 (2) (b), Bar Councils Act, 1926 is not ultra vires the legislative competence of Parliament because the pith and substance of the legislation was to prescribe a machinery for constituting Bar Council for enrolment of advocates and for taking proceedings for professional misconduct against them (see List I, Entry 78) and the payment of stamp duty on the application for enrolment as provided in the proviso was only incidental to the main object. **A 1958 Andh Pra 63 (65) (SB).** (It was provided that the applicant for enrolment should pay the stamp duty payable under the Stamp Act — **Held** valid.)

(3) State Legislature was competent to enact Art. 17 of Mysore Stamp Act (34 of 1957) (as amended by Mysore Stamp (Amendment) Act, 1962) prescribing stamp duty on enrolment as advocate. A 1966 Mys 138 (140) (DB).

(4) Section 3 (iii) of U. P. Act 11 of 1969 amending Sch. I-B, Art. 30 of Stamp Act falls within Entry 63 of List II and is valid. A 1971 All 186.

(5) 'Document' — 'Certificate of enrolment' in Section 3 (ii) of Act 11 of 1969 is document. A 1971 All 186 (189).

(6) U. P. Act 11 of 1969 — Validity — Provision falls within Entry 63 of List II and is valid. A 1971 All 186 (186).

(7) The U. P. Legislature is competent to legislate and impose stamp duty on the certificate of enrolment under Section 22 of the Advocates Act. The imposition of such duty, in pith and substance, falls under Entry 44 of List III and prescribing of rates under Entry 63 of List II. **A 1973 SC 231 (238).**

Schedule 7, List 2, Entry 64

(1) The Madras General Sales Tax Act falls squarely within Item 54 of List 2. It follows that the State Legislature under Item 64 could prescribe what acts or conduct would be regarded as offences in relation to taxes on the sale or purchase of goods. **A 1958 Mad 544 (551) (FB).**

(2) Section 5 of Prevention of Insults to National Honour Act (14 of 1957) is within the competence of State Legislature under the head 'Criminal Law' in List 3, Item 1 of Constitution. (1966) 2 Mad LJ 194 (DB).

(3) Mysore Sales Tax Act (1948), S. 22 is not ultra vires Art. 14 of Constitution or Criminal P. C. A 1958 Mys 143 (147) (DB).

(4) Madras Motor Vehicles Rules (1940), Rule 160-C — Does not encroach upon field of State Legislature — (Madras Motor Vehicles Taxation Act (3 of 1931), Sec. 5). A 1956 Andh Pra 129 (139) (DB).

(5) Sections 30-A and 30-B of Andhra Pradesh General Sales Tax Act (6 of 1957) are invalid in toto and void since they contravene Entry 54. 1972 Tax LR 1891 (Andh Pra).

(6) Since Section 2 (2) of the T. N. Additional Sales Tax Act 1970 is not beyond legislative competence of State Legislature and as sub-section (3) is intended to give effect to sub-section (2), the State Legislature is competent to enact sub-section (3) with reference to Entry 64 of State List. 1972 Tax LR 2613 (Mad).

(7) State Legislature has the power to levy a penalty for proper enforcement of the taxing statute. Such a power is ancillary, incidental and necessary to the power of taxation conferred upon the State Legislature. (1979) 44 STC 102 (108, 109, 112) (DB) (Bom).

(8) State Legislation to forfeit sums collected by dealers by way of sales tax, though not exigible, to the public exchequer punitively, is not ultra vires as colourable legislation. Forfeiture provisions are not beyond the legislative power conferred by Entry 54 read with Entry 64 of List II. **A 1977 SC 2279 (2291, 2292, 2303, 2304).**

(9) Section 19 of the W. B. State Tax on Profession, Trades, Callings and Employment Act, 1979, comes within the purview of Entry 64 but the penalty contemplated by Sec. 19 can be imposed and enforced only in accordance with the law of criminal procedure. The authorities under the said Act have no jurisdiction to impose such penalty. (1980) 84 Cal WN 90: 1980 Tax LR (NOC) 111.

SCHEDULE 7, LIST 2, ENTRY 65
SYNOPSIS

(1) Scope.
(2) This entry and Entry 18.

1. Scope.— (1) This entry confers on the State Legislature power, when dealing with particular subjects within its exclusive legislative field, to make laws in respect to the jurisdiction and powers of Courts that will be competent to hear causes relating to those subjects; in other words, this is a power of creating a special jurisdiction only as opposed to general jurisdiction con-

Schedule 7, List 2, Entry 65—Note 1 (contd.)

ferred by Entry 3 of this List. **A 1951 SC 69 (85).**

(2) The words used in the entry are no doubt words of wide import, but the generality of those words is restricted and controlled by the words "with respect to any matters in this list" occurring at the end of the entry. A 1949 Mad 481 (487): ILR (1949) Mad 739: 50 Cri LJ 684 (FB). (Subject-matter of Criminal Procedure Amendment Act, 1943. held did not fall under Entry 2. List 2. Government of India Act.) ** **A 1943 All 26 (31): 44 Cri LJ 216 (FB).**

(3) "Criminal law, including all matters in the Indian Penal Code" being a matter enumerated in Entry 1 of the Concurrent List, the power to make laws dealing with jurisdiction and powers of Courts as regards that matter is not within the exclusive competence of the State Legislature. **A 1943 All 26 (31) (FB).**

(4) Under this entry, it is within the competence of the State Legislature to take away the jurisdiction of the Court. A 1952 Pat 166 (172, 173) (DB).

(5) State Legislature can affect the jurisdiction and power of the High Court with respect to questions relating to tenancy legislation. A 1949 Bom 42 (45) (DB).

(6) State Legislature has no power to reverse the decisions of any Court, because such a power, in its nature, is essentially judicial and has not been conferred on the Legislature by the Constitution either expressly or impliedly. A 1952 Pat 166 (173) (DB).

(7) This entry empowers the State Legislature to remove, by legislation, any doubts as to the validity of decrees passed by Courts where such doubts are caused by the failure of the State Government to observe a legal formality. The Bihar (Munsiff's Proceedings) Validation Act (7 of 1945) is a legislation of this type. A 1952 Pat 282 (282) (DB).

(8) The State Legislature was competent to constitute the Calcutta City Civil Court under the Calcutta City Civil Court Act (21 of 1953) and to vest it with general jurisdiction, since that matter came specifically within Entry 3 of List 2 or Entry 3 read with this entry. A 1957 Cal 534 (544).

(9) Entry 3 of List II read with this entry can cover Section 15 (3) of the Mysore Chief Court Act (1 of 1884) which provided for a reference to a Full Bench by a single Judge of the Chief Court. **A 1955 Mys 65 (74) (FB).**

(10) When the legislature of a State has the competence to make a law pertaining to taxes on sales or purchases it has also the competence to provide punishments in that law for the non-compliance or contravention of the provisions of that law and may also for the purpose of the enforcement of that law vest jurisdiction in Courts. A 1958 Mys 143 (146) (DB).

(11) Mysore High Court Act Section 15 (as amended by Act 35 of 1951) — Amendment to procedure for disposal of second appeals — Amendment is 'intra vires' the State Legislature. A 1952 Mys 75 (76).

(12) Companies Act (1913), Secs. 202, 235 — Misfeasance proceedings — Company Judge directing some of Directors of Company to appear and give evidence — Appeal to Division Bench is maintainable under Sec. 202 of the Companies Act, 1913 read with Sec. 4 of the Mysore High Court Act, 1961. A 1964 Mys 75 (78) (DB).

(13) Sections 19 and 29 (2) (c) of the Mysore Civil Courts Act, 1964 are not susceptible to the denouncement that they were enacted without the requisite legislative competence — They are perfectly valid provisions. A 1965 Mys 76 (84) (DB).

(14) U. P. High Court (Abolition of Letters Patent Appeals) Act (14 of 1962) (as amended by U. P. High Court (Abolition of Letters Patent Appeals) (Amendment) Ordinance, (U. P. Ordinance 12 of 1972) later replaced by U. P. High Court (Abolition of Letters Patent Appeals) (Amendment) Act (32 of 1972). Sec. 4 — State Legislature was competent to make such amending laws (Per majority). **A 1973 All 596 (FB).**

(15) Pith and substance of subject-matter of Mysore Agricultural Produce Marketing (Regulation) Act falls within Entries 26 and 28 of State List — Entry 65 in State List authorises legislation in respect of fees regarding all matters in State List — Imposition of fee with respect to sales made in course of inter-State trade and commerce is only incidental to main legislation and hence within competence of State Legislature. A 1970 Mys 114 (129) (DB).

(16) Vires of the levy made under R. 111 of the Rules under Sec. 90 of the B. & O. Excise Act for a licence to possess denatured spirit, used by a manufacturer in his process, cannot be upheld as a fee as there is no sufficient quid pro quo for the levy. To uphold the levy as a fee it must be shown that it has a reasonable correlationship of a general character with the services rendered by the Government. **A 1971 SC 1182 (1186, 1187).**

(17) **Held:** Though the State Government could constitute any commission in respect of the matters of definite importance, such matters must be only relatable to either List II or List III of the Seventh Schedule of the Constitution. In respect of those matters if there is a pre-existing Central Commission, then for constituting another Commission, consent or approval of the Central Government is required to be taken. (1980) 1 Cal HN 440 (462).

2. This Entry and Entry 18.— (1) This entry is sufficient to give express powers to the States to create and determine the powers and jurisdiction of Courts in respect of land, as a matter ancillary to the subject of Entry 18. **A 1947 PC 72 (74).** (Case under Government of India Act, Sch. VII List 2, Items 2 and 21.) ** **A 1955 Pat 1 (15) (SB)** ** A 1957 Madh B 63 (63) (DB).

(2) The words of this entry and Entry 13 are comprehensive enough to include the remedial as well as the procedural provisions concerned with reliefs in respect of the several rights and remedies enumerated in Entry 18. **A 1955 Pat 1 (15) (SB).** (Bihar Land Encroachment Act, 31 of 1950 is within the competence of the State Legislature.) ** A 1946 Cal 48 (49) (DB).

(3) The two entries together cover any restriction that may be imposed on the

63. Rates of stamp duty in respect of documents other than those specified in the provisions of List I with regard to rates of stamp duty.
[Government of India Act, 1935, Item 51.]

64. Offences against laws with respect to any of the matters in this List.
[Government of India Act, 1935, Item 37.]

65. Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this List.
[Government of India Act, 1935, Item 2.]

Schedule 7, List 2, Entry 62—Note 5 (contd.)
List I. (A 1970 Andh Pra 86 (FB) **Affirmed.**) **A 1972 SC 2319 (2324) : 1972 Tax LR 360.**

(4) The provisions of U. P. Excise (Amendment) Ordinance, 1972, enabling the State Government the auction of foreign liquor shops is illegal and ultra vires as the amount that would be realised cannot be justified as tax or as fee. 1973 Tax LR 2271 (2283, 2284) (All).

Schedule 7, List 2, Entry 63

(1) Parliament has no power to make laws in respect of rates of stamp duty payable on an application for enrolment as an advocate inasmuch as it is not one of the matters provided for in that List. **A 1958 Andh Pra 63 (65) (SB).**

(2) The proviso to Section 8 (2) (b), Bar Councils Act, 1926 is not ultra vires the legislative competence of Parliament because the pith and substance of the legislation was to prescribe a machinery for constituting Bar Council for enrolment of advocates and for taking proceedings for professional misconduct against them (see List I, Entry 78) and the payment of stamp duty on the application for enrolment as provided in the proviso was only incidental to the main object. **A 1958 Andh Pra 63 (65) (SB).** (It was provided that the applicant for enrolment should pay the stamp duty payable under the Stamp Act — **Held** valid.)

(3) State Legislature was competent to enact Art. 17 of Mysore Stamp Act (34 of 1957) (as amended by Mysore Stamp (Amendment) Act, 1962) prescribing stamp duty on enrolment as advocate. A 1966 Mys 138 (140) (DB).

(4) Section 3 (iii) of U. P. Act 11 of 1969 amending Sch. I-B, Art. 30 of Stamp Act falls within Entry 63 of List II and is valid. A 1971 All 186.

(5) 'Document' — 'Certificate of enrolment' in Section 3 (ii) of Act 11 of 1969 is document. A 1971 All 186 (189).

(6) U. P. Act 11 of 1969 — Validity — Provision falls within Entry 63 of List II and is valid. A 1971 All 186 (186).

(7) The U. P. Legislature is competent to legislate and impose stamp duty on the certificate of enrolment under Section 22 of the Advocates Act. The imposition of such duty, in pith and substance, falls under Entry 44 of List III and prescribing of rates under Entry 63 of List II. **A 1973 SC 231 (238).**

Schedule 7, List 2, Entry 64

(1) The Madras General Sales Tax Act falls squarely within Item 54 of List 2. It follows that the State Legislature under Item 64 could prescribe what acts or conduct would be regarded as offences in relation to taxes on the sale or purchase of goods. **A 1958 Mad 544 (551) (FB).**

(2) Section 5 of Prevention of Insults to National Honour Act (14 of 1957) is within the competence of State Legislature under the head 'Criminal Law' in List 3, Item 1 of Constitution. (1966) 2 Mad LJ 194 (DB).

(3) Mysore Sales Tax Act (1948), S. 22 is not ultra vires Art. 14 of Constitution or Criminal P. C. A 1958 Mys 143 (147) (DB).

(4) Madras Motor Vehicles Rules (1940), Rule 160-C — Does not encroach upon field of State Legislature — (Madras Motor Vehicles Taxation Act (3 of 1931), Sec. 5). A 1956 Andh Pra 129 (139) (DB).

(5) Sections 30-A and 30-B of Andhra Pradesh General Sales Tax Act (6 of 1957) are invalid in toto and void since they contravene Entry 54. 1972 Tax LR 1891 (Andh Pra).

(6) Since Section 2 (2) of the T. N. Additional Sales Tax Act 1970 is not beyond legislative competence of State Legislature and as sub-section (3) is intended to give effect to sub-section (2), the State Legislature is competent to enact sub-section (3) with reference to Entry 64 of State List. 1972 Tax LR 2613 (Mad).

(7) State Legislature has the power to levy a penalty for proper enforcement of the taxing statute. Such a power is ancillary, incidental and necessary to the power of taxation conferred upon the State Legislature. (1979) 44 STC 102 (108, 109, 112) (DB) (Bom).

(8) State Legislation to forfeit sums collected by dealers by way of sales tax, though not exigible, to the public exchequer punitively, is not ultra vires as colourable legislation. Forfeiture provisions are not beyond the legislative power conferred by Entry 54 read with Entry 64 of List II. **A 1977 SC 2279 (2291, 2292, 2303, 2304).**

(9) Section 19 of the W. B. State Tax on Profession, Trades, Callings and Employment Act, 1979, comes within the purview of Entry 64 but the penalty contemplated by Sec. 19 can be imposed and enforced only in accordance with the law of criminal procedure. The authorities under the said Act have no jurisdiction to impose such penalty. (1980) 84 Cal WN 90 : 1980 Tax LR (NOC) 111.

SCHEDULE 7, LIST 2, ENTRY 65
SYNOPSIS

(1) Scope.
(2) This entry and Entry 18.

1. Scope.— (1) This entry confers on the State Legislature power, when dealing with particular subjects within its exclusive legislative field, to make laws in respect to the jurisdiction and powers of Courts that will be competent to hear causes relating to those subjects; in other words, this is a power of creating a special jurisdiction only as opposed to general jurisdiction con-

Schedule 7, List 2, Entry 65—Note 1 (contd.)

ferred by Entry 3 of this List. **A 1951 SC 69 (85).**

(2) The words used in the entry are no doubt words of wide import, but the generality of those words is restricted and controlled by the words "with respect to any matters in this list" occurring at the end of the entry. A 1949 Mad 481 (487): ILR (1949) Mad 739: 50 Cri LJ 684 (FB). (Subject-matter of Criminal Procedure Amendment Act, 1943, held did not fall under Entry 2, List 2, Government of India Act.) ** **A 1943 All 26 (31): 44 Cri LJ 216 (FB).**

(3) "Criminal law, including all matters in the Indian Penal Code" being a matter enumerated in Entry 1 of the Concurrent List, the power to make laws dealing with jurisdiction and powers of Courts as regards that matter is not within the exclusive competence of the State Legislature. **A 1943 All 26 (31) (FB).**

(4) Under this entry, it is within the competence of the State Legislature to take away the jurisdiction of the Court. A 1952 Pat 166 (172, 173) (DB).

(5) State Legislature can affect the jurisdiction and power of the High Court with respect to questions relating to tenancy legislation. A 1949 Bom 42 (45) (DB).

(6) State Legislature has no power to reverse the decisions of any Court, because such a power, in its nature, is essentially judicial and has not been conferred on the Legislature by the Constitution either expressly or impliedly. A 1952 Pat 166 (173) (DB).

(7) This entry empowers the State Legislature to remove, by legislation, any doubts as to the validity of decrees passed by Courts where such doubts are caused by the failure of the State Government to observe a legal formality. The Bihar (Munsiff's Proceedings) Validation Act (7 of 1945) is a legislation of this type. A 1952 Pat 282 (282) (DB).

(8) The State Legislature was competent to constitute the Calcutta City Civil Court under the Calcutta City Civil Court Act (21 of 1953) and to vest it with general jurisdiction, since that matter came specifically within Entry 3 of List 2 or Entry 3 read with this entry. A 1957 Cal 534 (544).

(9) Entry 3 of List II read with this entry can cover Section 15 (3) of the Mysore Chief Court Act (1 of 1884) which provided for a reference to a Full Bench by a single Judge of the Chief Court. **A 1955 Mys 65 (74) (FB).**

(10) When the legislature of a State has the competence to make a law pertaining to taxes on sales or purchases it has also the competence to provide punishments in that law for the non-compliance or contravention of the provisions of that law and may also for the purpose of the enforcement of that law vest jurisdiction in Courts. A 1958 Mys 143 (146) (DB).

(11) Mysore High Court Act Section 15 (as amended by Act 35 of 1951) — Amendment to procedure for disposal of second appeals — Amendment is 'intra vires' the State Legislature. A 1952 Mys 75 (76).

(12) Companies Act (1913), Secs. 202, 235 — Misfeasance proceedings — Company Judge directing some of Directors of Company to appear and give evidence — Appeal to Division Bench is maintainable under Sec. 202 of the Companies Act, 1913 read with Sec. 4 of the Mysore High Court Act, 1961. A 1964 Mys 75 (78) (DB).

(13) Sections 19 and 29 (2) (c) of the Mysore Civil Courts Act, 1964 are not susceptible to the denouncement that they were enacted without the requisite legislative competence — They are perfectly valid provisions. A 1965 Mys 76 (84) (DB).

(14) U. P. High Court (Abolition of Letters Patent Appeals) Act (14 of 1962) (as amended by U. P. High Court (Abolition of Letters Patent Appeals) (Amendment) Ordinance, (U. P. Ordinance 12 of 1972) later replaced by U. P. High Court (Abolition of Letters Patent Appeals) (Amendment) Act (32 of 1972), Sec. 4 — State Legislature was competent to make such amending laws (Per majority). **A 1973 All 596 (FB).**

(15) Pith and substance of subject-matter of Mysore Agricultural Produce Marketing (Regulation) Act falls within Entries 26 and 28 of State List — Entry 65 in State List authorises legislation in respect of fees regarding all matters in State List — Imposition of fee with respect to sales made in course of inter-State trade and commerce is only incidental to main legislation and hence within competence of State Legislature. A 1970 Mys 114 (129) (DB).

(16) Vires of the levy made under R. 111 of the Rules under Sec. 90 of the B. & O. Excise Act for a licence to possess denatured spirit, used by a manufacturer in his process, cannot be upheld as a fee as there is no sufficient quid pro quo for the levy. To uphold the levy as a fee it must be shown that it has a reasonable correlationship of a general character with the services rendered by the Government. **A 1971 SC 1182 (1186, 1187).**

(17) **Held:** Though the State Government could constitute any commission in respect of the matters of definite importance, such matters must be only relatable to either List II or List III of the Seventh Schedule of the Constitution. In respect of those matters if there is a pre-existing Central Commission, then for constituting another Commission, consent or approval of the Central Government is required to be taken. (1980) 1 Cal HN 440 (462).

2. This Entry and Entry 18.— (1) This entry is sufficient to give express powers to the States to create and determine the powers and jurisdiction of Courts in respect of land, as a matter ancillary to the subject of Entry 18. **A 1947 PC 72 (74).** (Case under Government of India Act, Sch. VII List 2, Items 2 and 21.) ** **A 1955 Pat 1 (15) (SB)** ** A 1957 Madh B 63 (63) (DB).

(2) The words of this entry and Entry 13 are comprehensive enough to include the remedial as well as the procedural provisions concerned with reliefs in respect of the several rights and remedies enumerated in Entry 18. **A 1955 Pat 1 (15) (SB).** (Bihar Land Encroachment Act, 31 of 1950 is within the competence of the State Legislature.) ** A 1946 Cal 48 (49) (DB).

(3) The two entries together cover any restriction that may be imposed on the

66. Fees in respect of any of the matters in this List, but not including fees taken in any Court.

[Government of India Act, 1935, Item 54.]

Schedule 7, List 2, Entry 65—Note 2 (contd.) jurisdiction and powers of Courts with respect of land, land tenures, relation of landlord and tenant and collection of rents. **A 1941 FC 16 (32).** (A 1940 All 272 (FB). **Reversed.**)

(4) Section 168-A of the Bengal Tenancy Act (8 of 1885) is clearly a piece of legislation covered by the words of Entry 18 or by the words of this entry if the section were regarded as a procedural section. **A 1947 FC 19 (21)** ** A 1942 Cal 587 (591) (DB) ** A 1942 Cal 470 (472) (DB).

(5) Section 163-A of the Bihar Tenancy Act (8 of 1885) comes within this entry. **A 1944 Pat 54 (58) (FB).** (Obiter.)

(6) In view of the subjects enumerated in these entries, Entries 6 and 7 of the Concurrent List cannot be held to prohibit a piece of legislation like the Mysore Tenancy Act (13 of 1952). ILR (1955) Mys 360 (363) (DB).

(7) A suit under Madras Estates Land Act (1 of 1948) for issue of pattas against a Banking Company against which liquidation proceedings are in progress in the High Court is not triable by the Deputy Collector by virtue of Secs. 45-A, 45-B and 45-C of the Banking Companies Act (as amended) read with Banking Companies (Amendment) Act, 1950, Sec. 11. A 1958 Mad 403 (405, 411).

SCHEDULE 7, LIST 2, ENTRY 66

SYNOPSIS

1. Fees and taxes.
2. Scope of the entry.
3. Illustrations.

1. Fees and taxes.— (1) Debenture trust deed — Properties of value of Rs. 2.50 crores — Registration fee demanded held was not fee but was tax — Notification was ultra vires. A 1964 Punj 492 (496, 497) (DB).

(2) The phrase 'fees taken in all Courts' in entry 3 includes those impositions which can properly be described as 'court-fees' and the word 'fees' in entry 66 will not include such court-fees. **A 1960 All 462 (463) (FB).**

(3) As there is no question of rendering any service to the Mulgirasia who has been made liable to pay cess, such cess cannot be called a fee falling within Entry 66 of List 2. A 1959 Bom 43 (46) (DB).

(4) Bombay Court-fees Act (36 of 1959), Sch. 1, Art. 16 — Levy imposed is neither tax nor fee in the strict sense — It is within legislative competence of the State under Sch. 7, List 2, Entry 3. A 1962 Bom 106 (113, 114) (DB).

(5) Orissa Mining Areas Development Fund Act (27 of 1952), Sec. 4 — Cess levied under is neither a tax nor a duty of excise but is a fee. **A 1961 SC 459 (469).**

(6) From a conjoint reading of Entries 5, 17 and 66 of List 2 it would be clear that the State legislature is competent after the coming into force of the Constitution to enact a law with respect to fees in relation to water supply by a municipality to its inhabitants. A 1961 All 583 (586).

(7) Generally speaking a fee is defined to be a charge for a special service rendered to individuals by some Governmental agencies. It is exiomatic that the special service rendered must be to the payer of fee. The element of quid pro quo must be established between the payer of the fee and the authority charging it. It may not be the exact equivalent of the fee by a mathematical precision, yet by and large, or predominantly, the authority collecting the fee must show that the service which they are rendering in lieu of fees for some special benefit of the payer of fee. It may be so intimately connected or interwoven with service rendered to others that it may not be possible to do a complete dichotomy and analysis as to what amount of special services was rendered to the payer of the fee and what proportion went to others. **A 1980 SC 1008 (1015).**

2. Scope of the entry.— (1) This entry gives power to the State Legislature to levy fees in most general terms in all matters which are within their legislative field. A 1942 All 156 (166). (Case under Item 54, List II, Government of India Act, 1935.)

(2) Fees including those for licenses are leviable in the course of the levy or collection of taxes. A 1958 Mad 158 (169) (DB).

(3) The "fees" in this entry can only mean fees other than court-fees, as the latter has already been provided for in Entry 3 of List 2. A 1954 Mys 161 (162) (DB).

(4) In order to avoid confusion and in order to avoid provision being made for fees taken in Courts at two places — One specifically under Entry 3 and the other generally under Entry 66 — Fees taken in Courts are specifically excepted from the general entry being Entry 66 because the same had already been provided for specifically under Entry 3. A 1960 Bom 96 (99).

(5) When any levy is being justified under Item 66 of List 2 or Item 47 of List 3 as a fee it should be shown that it is for some service rendered by the State or by the Municipality to the particular person concerned and that its incidence is such as to meet the expense of the service rendered more or less. There can be no fee under Item 66 which is for the purposes of local Government because that would not be fee strictly so called but a tax which is not provided, anywhere in List 2. **A 1960 Raj 135 (136, 137, 138) (FB).**

(6) When entries 96 of List 1 or 66 of List II speak of any of the matters in List 3, they necessarily include also the entries relating to taxation. In other words, a fee may be levied even under an enactment relating to the imposition of tax. **A 1965 SC 1107 (1123).**

(7) Levy of local cess surcharge under Section 116 of the T. N. Panchayats Act, 1958, on the basis of land revenue due falls within the ambit of 'land revenue.' Term land revenue has been defined under the explanation to Sec. 115 (1) to include water cess for purposes of Secs 115, 116. So long as the power to tax is there, the legislature is

LIST III
CONCURRENT LIST

1. Criminal law, including all matters included in the Indian Penal Code at the commencement of this Constitution but excluding offences against laws with respect to any of the matters specified in List I or List II and exclud-

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Schedule 7, List 2, Entry 66—Note 2 (contd.)

entitled to adopt any measure to effectuate the levy of tax. A 1976 Mad 318 (320).

(8) The power to levy fees given by Section 59 (d) of Punjab Excise Act (1 of 1914) to the Excise Commissioner is within the competence of the State Legislature. 1972 Tax LR 1776 (1777) (Delhi).

(9) Reference under Art. 199 (2) to the fees as (i) fee for licence and (ii) fee for services rendered does not indicate that licence fee which is not backed by services rendered and is excessive can be justified without reference to any taxing entry in the legislative List. 1973 Tax LR 2271 (2277) (All).

3. Illustrations.— (1) The contribution levied under Section 49 of the Orissa Hindu Religious Endowments Act (4 of 1939) was held to be a fee and not a tax and Sec. 49 was not ultra vires the Provincial Legislature. **A 1954 SC 400 (403).** (A 1950 Orissa 47, Affirmed.)

(2) Section 76 (1) of the Madras Hindu Religious and Charitable Endowments Act (19 of 1951) imposed a tax and not a fee and was therefore void as being beyond the legislative competence of the Madras Legislature. **A 1954 SC 282 (297).**

(3) Bye-law No. 6 framed by the District Board of Saharanpur under Sec. 174 (2) (k) of the U. P. District Boards Act (10 of 1922) imposing a licence fee for working of factories was held ultra vires the District Board, since the amount of licence fee was fixed not merely for meeting the expenses of the bye-law but with a view to enhance the general revenue of the District Board. A 1954 All 675 (680).

(4) Cess imposed under Section 29 of the U. P. Sugar Factories Control Act (1 of 1938) was treated as a fee under the corresponding Item 54 of List 2 of the Government of India Act, 1935. A 1942 All 156 (169).

(5) Entries 59 and 66 of List II give power to legislate on tolls and fees respectively. Hence it cannot be said that there is no legislative competence to enact Sec. 140 of the Assam Municipal Act (1 of 1923). A 1958 Assam 156 (159) (DB).

(6) Bengal Municipal Act (15 of 1932). Sec. 370 (1) (xii) — Licence fee — Imposition to be characterised as fee, must not be raised for general revenue — Licence fee for storing jute imposed by resolution of Municipality — Imposition held beyond competence of municipality. (1955) 59 Cal WN 872.

(7) The fares charged by the Calcutta Tramways Company Ltd., cannot be called 'fees' chargeable by the State Government in terms of Item 66. The power to fix the rate of fares is based on legislative sanction. A 1960 Cal 396 (399).

(8) The registration fee leviable under the notification of Delhi Govt. dt. 15-12-1952, does not satisfy the requirement as to a valid fee, namely, that the fee realised must be correlated with expenditure incurred on registration so as to be spent on maintenance of registration organisation. Consequently the impost under the notification is illegal. **A 1978 SC 1181 (1182).**

(9) U. P. Excise (Amendment) Ordinance (1972). Sec. 3 (1) and (4). Section is ultra vires so far as it makes provisions of Section 30 of the U. P. Excise Act applicable to the grant of licence for foreign liquor. 1973 Tax LR 2271 (2283).

(10) Sections 29 and 22, Bihar and Orissa Excise Act (2 of 1915) are not invalid on the ground that they are beyond the legislative competence of the State. 1972 Tax LR 1981 (1990) (Orissa).

Schedule 7, List 3, Entry 1

(1) The power under this entry extends to the creation of new offences by legislation. **A 1939 FC 58 (62)** °° **A 1931 PC 94 (99).**

(2) Legislature can for the purpose of effecting desirable social reforms pass laws making acts, which came in the way of the success of such reforms, offences and punishable. A 1949 Bom 168 (169, 170) (DB). (Removal of social disabilities of Harijans.) °° A 1953 Bom 183 (187). (Prevention of practice of excommunication.)

(3) The Legislature where it is competent to create new offences is also competent to provide for the destination of the fines imposed and realized in respect of those offences. **A 1939 FC 58 (62).**

(4) A State Legislature has no power to legislate to make an offence of an act committed outside its territory. **A 1958 Bom 68 (72) (FB).**

(5) If a law made by the State Legislature is entirely covered by an entry in the State List the creation of offences under that law and the making of provision in that law for governing other ancillary matters would also fall within the same list under Entry 64 thereof. In such a case it is not necessary for the State Legislature to act under Entry 1 of the Concurrent List to enact those provisions. A 1950 FC 59 (64) °° A 1954 Mad 993 (996) (DB) °° A 1954 All 655 (657) (DB).

(6) Offences against laws with respect to matters specified in List 1 or 2 excluded — Offences under Sections 489-A to 489-D, I. P. C. — Conviction and sentence — Government competent to remit sentence is Central Government. **A 1974 SC 31 (33) : 1974 Cri LJ 150.**

(7) The Constitution has given the appropriate legislature, whether Parliament or the State Legislature, power to derogate from the existing jurisdiction of High Court as can be seen from Articles 200, 225 and Item 78, List I, Item 3, List II and Items 1, 2 and 46 of List III, Sch. 7. Law like Code of Criminal Procedure (Madras Amendment) Act (Madras Act 34 of 1955) transferring cases pending before Pre-

ing the use of naval, military or air forces or any other armed forces of the Union in aid of the civil power.

[NOTE.—Unless mentioned otherwise, the item number under this heading refers to the item number of List III of Schedule VII of the Government of India Act, 1935.]

JAMMU AND KASHMIR

For Entry 1, the following entry shall be substituted, namely:—

"1. Criminal law (excluding offences against laws with respect to any of the matters specified in List I and excluding the use of naval, military or air forces or any other armed forces of the Union in aid of the civil power) in so far as such criminal law relates to offences against laws with respect to any of the matters specified in this List."

—See the Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-paragraph (22) (c) (as substituted by C. O. 69 and C. O. 70).

2. Criminal procedure, including all matters included in the Code of Criminal Procedure at the commencement of this Constitution.

[Government of India Act, 1935, Item 2.]

JAMMU AND KASHMIR

For entry 2, the entry "2. Criminal procedure in so far as it relates to administration of oaths and taking of affidavits by diplomatic and consular officers in any foreign country," shall be substituted;

—See the Constitution (Application to Jammu and Kashmir) Order, 1954, Para. 2, sub-para. (22) (c) (iii) (as substituted by C. O. 72 and amended by C. O. 94 of 1972) (2-8-72).

Schedule 7, List 3, Entry 1 (contd.)

sidency Magistrate to Sessions Judge can therefore be passed by the State Legislature without amending the Constitution. A 1959 Mad 261 (268) (DB).

(8) The head of power under the 'criminal law' in List III includes all matters included in the Indian Penal Code at the commencement of the Constitution some of which are offences against public tranquillity and affecting public safety. Burning copy of Constitution may affect public safety. Madras Prevention of Insult to National Honour Act 15 of 1957 therefore falls under Entry 1 of List III and is valid. A 1965 Mad 11 (14) ** (1966) 2 Mad LJ 194.

(9) Section 105-A, Criminal P. C. is valid — In exercise of the power conferred by S. 105-A, the Additional District Magistrate in Delhi has jurisdiction and power to execute the warrants of arrest and search issued by the Criminal Courts in the State of Jammu and Kashmir. The said provision of law was enacted under Arts. 245 and 246 of the Constitution under Entries 1 and 2 in List IV of the Seventh Schedule and cannot be deemed to be invalid on the ground that it would have extra-territorial operation. By inserting this provision, the Parliament has not made any law for the State of Jammu and Kashmir or in respect of the Courts exercising jurisdiction in that territory. 1974 Cri LJ 1182 (1185) (Delhi).

(9) Orissa Freedom of Religion Act (2 of 1968) — State Legislature has no legislative competence to enact the legislation. Since the Act is not enumerated either in List II or List III and comes under Entry 97 of List 1. A 1973 Orissa 116 (123) (DB).

(10) There is no gain saying the fact that no State Government enjoys extra-territorial powers and its orders and laws are legally operative within its territory, but the same cannot be said so far as Parliamentary Legislation is concerned if it otherwise conforms to the constitutional limitations. Entries Nos. 1, 2 and 4 in List III concurrent list, Seventh Schedule of the Constitution of India empowers the Parliament to frame legislation in regard to matters like removal from one State to another State of prisoners accused persons and persons subjected to preventive detention for reasons specified in Entry 3 of this list and it is by virtue of the aforesaid provisions that the Parliament enacted Criminal Procedure Code as also the Transfer of Prisoners Act, 1950. A 1976 Punj 358 (362, 363) (DB).

(11) Railway Protection Force Act (1957) and Railway Property (Unlawful Possession) Act (1966) are enacted by Parliament in exercise of powers conferred on it under Entry No. 2. The Constitution of the police force is normally the exclusive power of the State Government under Entry No. 2 of the State List II of Schedule VII. To attribute to Parliament an intention to create a police force or police officers who are normally to be constituted in exercise of the State powers, would be, therefore, inconsistent with the Constitution. Neither the R. P. F. Act nor the R. P. U. P. Act falls within the ambit of Entry No. 80 of List 1 (Union list Sch. VII) under which alone the Parliament could provide for execution of powers and jurisdiction of the members of the police force belonging to the State to any area outside that State. 1975 Cri LJ 1891 : (1975) 77 Bom LR 295 (308) (DB).

(12) Section 18 of the Penal Code defining 'India' as excluding State of J. & K. is not violative of Art. 1 — It is consistent with S. 1 of Cr. P. C. — It is within power of Parliament in view of Article 245. A 1980 Andh Pra 243 (244) : (1980) 1 Andh LT 381 (DB).

Schedule 7, List 3, Entry 2

(1) It is reasonable to assume that the framers of the Constitution intended to convey by the words "Criminal Procedure" all that was being commonly treated as part of criminal procedure in the legislative enactments of the Indian Legis-

Schedule 7, List 3, Entry 2 (contd.)

latures before the date of the Constitution. A 1949 Mad 481 (485) (FB).

(2) There is no gainsaying the fact that no State Government enjoys extra-territorial powers and its orders and laws are legally operative within its territory, but the same cannot be said so far as Parliamentary legislation is concerned if it otherwise conforms to the constitutional limitations, Entries Nos. 1, 2 and 4 in List III concurrent list, VIIth Schedule of the Constitution of India empowers the Parliament to frame legislation in regard to matters like removal from one State to another State of prisoners, accused persons and persons subjected to preventive detention for reasons specified in Entry 3 of this list and it is by virtue of the aforesaid provisions that the Parliament enacted Criminal Procedure Code as also the Transfer of Prisoners Act, 1950. A 1976 Punj 358 (362, 363) (DB).

(3) The word "including" has been used in the entry as a word of enlargement and not as a word of restriction. **A 1949 Mad 481 (486) (FB).**

(4) Under this entry not only matters which strictly related to procedure but also those matters which although are not matters of procedure were included in the Criminal Procedure Code when the Constitution came into force would be concurrent legislative subjects. **A 1949 Mad 307 (312) (SB).** (Provisions relating to appeals and "directions of the nature of habeas corpus.") ** (1950) 54 Cal WN 753 (755) (DB). (Legislation relating to jurisdiction of Courts.)

(5) Parliament can introduce an amendment to the Criminal Procedure Code by including a suitable provision in any of the Acts it may pass. A 1954 Mad 704 (705).

(6) The word 'matters' in the entry is of wider import than the word 'provisions' and hence it cannot be said that while an amendment of an existing provision would be valid the introduction of a new provision is ultra vires the powers of Parliament. **A 1949 Mad 481 (486) (FB).**

(7) The expression 'criminal procedure' in Entry 2, List III, Sch. 7 includes investigation of offences. Bombay Prohibition Act 25 of 1949 was reserved for consideration of the President and has received his assent. Sections 129-A and 129-B of the Act will therefore prevail in the State of Bombay by virtue of Article 254 (2) of Constitution to the extent of inconsistency with the Code but no more. **A 1963 SC 1531 (1541).**

(8) Matters included in Criminal P. C. → Delhi Special Police Establishment Act (1946), Sections 6, 3 — Parliament is competent to legislate regarding investigation of offences notified under Section 3. 1970 Raj LW 141 (144).

(9) The Constitution has given the appropriate legislature, whether Parliament or the State Legislature, power to derogate from the existing jurisdiction of the High Court as can be seen from Articles 200, 225 and Item 78 of List 1, Item 3 of List II and Items 1, 2 and 46 of List III, Sch. 7. Law like Code of Criminal Procedure (Madras Amendment) Act (Madras Act 34 of 1955) derogating from powers of High Court can therefore be passed by State legislature without amending the Constitution. A 1959 Mad 261 (268) (DB).

(10) Criminal Procedure (U. P. Amendment) Act (16 of 1976) — Constitutional validity — Proviso inserted to Section 25 (2) of the principal Act by the Amending Act — Said Amending Act receiving assent of the President — Said Act thus falls under Art. 254 (2) and is hence valid — Proviso inserted by the State Act, though inconsistent with the provisions of Section 25 (2) of the Principal Act, will therefore prevail over the main provision. Notification (placing Assistant Public Prosecutors under the Administrative and Disciplinary Control of Police Authorities) dated 15-3-1975, issued by the State Government thereunder was not invalid as the said State Act passes the test of Art. 254 (2). It makes Clause (1) of Art. 254 inapplicable to it. 1978 All LJ 936 (937, 938) : 1978 All Cri R 347 (DB).

(11) No provision in the Civil Procedure or Criminal Procedure Code gives a party to a litigation any right to question the language used by the Court and hence no party can challenge in petition under Article 226 the notification issued under Section 3 (2) of the Madhya Pradesh Official Languages Act. A 1959 Madh Pra 208 (212) (DB).

(12) Bombay Village Panchayats Act falls under Sch. 7, List 2, Entry 5 and not under List 3, Entry 2 — Article 254 is not attracted. That Article applies only where the Acts fall under List III and there is a repugnancy between Central and State Acts. A 1961 Mys 257 (259) (DB).

(13) Even though Section 9 of the U. P. Amendment Act (16 of 1976) is repugnant to Section 438 of Criminal P. C. dealing with the same subject-matter it is fully covered by Article 254 (2) of the Constitution and is evidently within the legislative competence of the State legislature as it falls under the concurrent list and is covered by Entry No. 2 of List III of Schedule VII to Constitution. Therefore S. 9 cannot be challenged on the basis of legislative incompetence. 1979 All LJ 972 (975) (DB).

(14) Section 105-A, Criminal P. C. is valid. In exercise of the power conferred by S. 105-A, the Additional District Magistrate in Delhi has jurisdiction and power to execute the warrants of arrest and search issued by the Criminal Courts in the State of Jammu and Kashmir. The said provision of law was enacted under Arts. 245 and 246 of the Constitution under Entries 1 and 2 in List III of the Seventh Schedule and cannot be deemed to be invalid on the ground that it would have extra territorial operation. By inserting this provision, the Parliament has not made any law for the State of Jammu & Kashmir or in respect of the Courts exercising jurisdiction in that territory. 1974 Cri LJ 1182 (1185) (Delhi).

(15) Railway Protection Force Act (1957) and Railway Property (Unlawful Possession) Act (1966) are enacted by Parliament in exercise of the powers conferred on it under Entry No. 2. The Constitution of the police force is normally the exclusive power of the State Government under Entry No. 2 of the State List II of Schedule VII. To attribute to Parliament an intention to create a police force or police officers, who are normally to be constituted in exercise of the State powers, would be, therefore, inconsistent with the Constitution. Neither the R. P. F. Act nor the R. P. U. P. Act falls within the ambit of Entry No. 80 of List 1 (Union List

3. Preventive detention for reasons connected with the security of a State, the maintenance of public order, or the maintenance of supplies and services essential to the community; persons subjected to such detention.

JAMMU AND KASHMIR

Omit Entry 3—See the Constitution (Application to Jammu and Kashmir) Order, 1954, Para. 2, sub-para. (22) (c) (iii) (as amended by C. Os. 72 and 74).

Schedule 7, List 3, Entry 2 (contd.)
of Sch VII) under which alone the Parliament could provide for extension of powers and jurisdiction of the members of the police force belonging to the State to any area outside that State. (1975) 77 Bom LR 295 (308) : 1975 Cri LJ 1891 (DB).

SCHEDULE 7, LIST 3, ENTRY 3

SYNOPSIS

1. Scope.
2. "For reasons connected with."
3. Security of a State.
4. Maintenance of public order.
5. "Maintenance of supplies and services essential to the community."

1. Scope.— (1) It is necessary that the activities which are sought to be prevented by the detention of an individual under a preventive detention law passed under Entry 3 of List 3, must have relation to matters enumerated therein. **A 1950 FC 67 (68, 69) : 51 Cri LJ 1011.**

(2) Under List III, Entry 3 Parliament is empowered to enact a law or preventive detention (a) for reasons connected with the security of State, (b) for reasons connected with the maintenance of public order, or (c) for reasons connected with the maintenance of supplies and services essential to the community. **A 1950 SC 27 (42) : 1951 Cri LJ 1383.**

(3) There is no authoritative definition of preventive detention in Indian Law. The word preventive is used in contradistinction to the word punitive. **A 1950 SC 27 (91) : 1951 Cri LJ 1383** °° (1975) 77 Bom LR 506 (507) (DB). (Reversed on another point in 1977 Cri LJ 785 : A 1977 SC 1027.)

(4) A State must exercise due care and attention in framing laws such as preventive detention lest it may be accused of bad faith on account of any hasty or ill-advised move taken in that direction. A 1950 Pat 332 (345).

(5) Provision of Section 3 (1) (b) of Preventive Detention Act is not ultra vires the Central Legislature. **A 1969 Delhi 45 (53) (FB).**

(6) West Bengal (Prevention of Violent Activities) Act (President's Act 19 of 1970), Ss. 10 to 13 do not violate Article 22 (7) of the Constitution. **A 1972 SC 1660 (1664) : 1972 Cri LJ 1010.**

(7) Entries in the lists are to be interpreted liberally and broadly — They only indicate how legislative powers should be exercised by concerned legislatures. **Held** that Maharashtra Restoration of Lands to Scheduled Tribes Act (14 of 1975) and Maharashtra Land Revenue Code (41 of 1966 as amended by Act 35 of 1974) are not ultra vires on the ground of being beyond legislative competence of State legislature. 1977 Mah LJ 564 (575) (DB).

(8) Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (1974) is not beyond legislative competence of Parliament. ILR (1975) 2 Delhi 820 (843) (DB) °° 1976 Mad LW (Cri) 179 (181) (DB) °° ILR (1976) 55 Pat 473.

2. "For reasons connected with".— (1) The connection contemplated by the expression 'for reasons connected with' is real and proximate, not far-fetched or problematic. **A 1950 FC 67 (68, 69).**

3. Security of a State.— (1) The Constitution requires a line to be drawn between those serious and aggravated forms of public disorder which are calculated to endanger the security of the State and the relatively minor breaches of the peace of a purely local significance. **A 1950 SC 124 (128)** °° **A 1955 Raj 6 (9) (DB).**

4. Maintenance of public order.— (1) The expression 'public order' is of wide connotation and signifies that state of tranquillity prevailing among the members of a political society as a result of the internal regulations enforced by the Government which they have instituted. **A 1950 SC 124 (127).**

(2) The disturbance of communal harmony no doubt amounts to a disturbance of public order. A 1949 All 120 (2) (123).

(3) The taking of measures to check activities of bad characters would come under the expression 'maintenance of public order'. A 1951 All 718 (724) (DB).

(4) The affiliation to a party which is alleged to be spreading its doctrine of violence may, in certain circumstances lead to an inference that the person concerned is likely to act in a manner prejudicial to the public safety, order or tranquillity. **A 1950 FC 129 (131).**

(5) The act of committing thefts in running goods trains is not an act prejudicial to the maintenance of public order or public safety. A 1949 Pat 299 (300) (DB).

(6) The detention of a person alleged to have published and distributed pamphlets attacking the character and integrity of a Chief Justice who was accused of gross partiality and communal bias, was held illegal as there was no rational connection between the acts alleged and the maintenance of law and order. **A 1954 SC 276 (277).**

5. "Maintenance of supplies and services essential to the community".— (1) Where with regard to an essential commodity there is a system of controls on which the maintenance of supplies and services depends, evasion of the control orders will prejudicially affect the maintenance or upkeep of the supplies and services essential to the community. **A 1952 Pat 185 (188) (FB).**

(2) It has been held that the word 'and' between the words 'supplies' and 'services' occurring in a similar expression used in S. 3 (1) (a) (iii), Preventive Detention Act, 1950, should be read in a disjunctive sense. **A 1951 Pat 47 (51) (DB).**

(3) Any activity, e. g., black-marketing or hoarding, which directly interferes with or threatens the maintenance of such primary necessities of life as food or cloth will directly

4. Removal from one State to another State of prisoners, accused persons and persons subjected to preventive detention for reasons specified in Entry 3 of this List.

[Government of India Act, 1935, Item 3.]

5. Marriage and divorce; infants and minors; adoption; wills, intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law.

[Government of India Act, 1935, Items 6, 7.]

JAMMU AND KASHMIR

Omit Entry 5—See the Constitution (Application to Jammu and Kashmir) Order, 1954, Para. 2, sub-para. (22) (c) (iii) (as amended by C. Os. 72 and 74).

Schedule 7, List 3, Entry 3 (contd.)

affect the maintenance of supply and service essential to the community. A 1951 Pat 47 (51) : 30 Pat 630 (DB).

(4) The act of adulteration of food-stuffs is not covered by the expression 'maintenance of supplies and services essential to the community'. A 1951 Pat 134 (136) (FB).

Schedule 7, List 3, Entry 4

(1) There is no gainsaying the fact that no State Government enjoys extra-territorial powers and its orders and laws are legally operative within its territory, but the same cannot be said so far as Parliamentary Legislation is concerned of, if otherwise conforms to the constitutional limitations. Entries 1, 2 and 4 in List III Concurrent List, VII Schedule of the Constitution of India empowers the Parliament to frame legislation in regard to matters like removal from one State to another State of prisoners, accused persons and persons subjected to preventive detention for reasons specified in Entry 3 of this list and it is by virtue of the aforesaid provisions that the Parliament enacted Criminal Procedure Code and also the Transfer of Prisoners Act, 1950. A 1976 Punj 358 (362, 363) (DB).

(2) There is absolutely nothing to hold that the "Concurrent List" was introduced into the Government of India Act, 1935 as well as the Constitution of India in respect of matters which required uniformity throughout the country and therefore, when the Governor General then was, and the President now is, called upon to give his assent to a law made by the Legislature of a State with respect to a matter in the Concurrent List, which law is repugnant to the provisions of the Central Law, the only consideration which the President now will have to take into account is as to why there should be a departure in respect of a particular State only. **Held** that Sections 62-A, 62-B, 62-C, 62-D and 62-E of the Motor Vehicles Act, 1939 (as introduced by the Tamil Nadu Act, 16 of 71) are void. (1979) 92 Mad LW 565 (574) (DB).

Schedule 7, List 3, Entry 5

(1) The word "succession" in this entry includes the subject of devolution by survivorship, of property. **A 1941 FC 72 (79).**

(2) For the meaning of the words "succession", "inheritance" and "devolution", see the following case. **A 1941 FC 72 (78, 79).**

(3) From the present entry the words "save as regards agricultural land' which were found in Item 7 of List 2 in the Government of India Act, are omitted. In view of this change the Hindu Succession Act, 1956, would apply to agricultural lands also. A 1957 Orissa 1 (4) (DB) ** A 1960 Punj 462 (463) ** A 1971 Mys 151 (155) (DB).

(4) The provisions of Hindu Succession Act cannot be made applicable to agricultural plots governed by the U. P. Zamindari Abolition and Land Reforms Act — Entry No. 5 in the 3rd List of the Seventh Schedule of the Constitution which is the only entry under which the Central Legislature has the jurisdiction to pass the Hindu Succession Act relates only to personal law. Laws passed under this entry do not apply to any particular property. They merely determine the personal law. It is noteworthy that in List 3 whenever the entry relates to rights in land, agricultural land has expressly been excluded. A 1970 All 238 (240) (DB).

(5) Before Constitution Central Government had no power to affect the devolution of agricultural land within Governor's provinces. Hindu Women's Rights to Property Act therefore did not apply to devolution of agricultural land. After Constitution Parliament has power under Entry 5, List III, Sch. 7 to legislate in the matters of wills, intestacy and succession in respect of agricultural land. But unless fresh legislation is made in that respect the old law could not govern the devolution or succession to agricultural land. A 1965 Punj 254 (256) ** A 1968 Cal 83 (85) (DB).

(6) Hindu Succession Act (1956), Section 14 — Providing enlarged right over land to Hindu female entrenches on Entry 18 of State List — But being legislation under Entry 5 of List 3 is valid. A 1960 Punj 666 (668, 669) (FB).

(7) If the subject-matter is marriage, the State Legislature can only legislate with regard to that marriage which is contracted within the limits of the State. If it legislates with regard to marriages contracted beyond those limits, there is no territorial nexus between the State and the marriages to confer jurisdiction, although the parties to such marriages are domiciled in that State. **A 1958 Bom 68 (71, 72, 74) (FB).** (Section 4 (b) of Bombay Act 25 of 1946 held ultra vires.)

(8) Under this entry the State Legislature is empowered to make laws regarding marriage, succession, etc. But these laws, in order to be valid, must not offend against the Funda-

6. Transfer of property other than agricultural land; registration of deeds and documents.

[Government of India Act, 1935, Item 8.]

JAMMU AND KASHMIR

Omit Entry 6—See Constitution (Application to Jammu and Kashmir) Order, 1954, Para. 2, sub-para. (22) (c) (iii) (as amended by C. Os. 72 and 74).

Schedule 7, List 3, Entry 5 (contd.)

mental Rights guaranteed to the citizens by the Constitution. A 1953 SC 91 (93, 94). (Hyderabad Wali-ud-Daula Succession (Decision of Disputes) Act infringed Article 14.) °° A 1952 Mad 193 (195, 196) (DB). (Madras Hindu (Bigamy Prevention and Divorce) Act (6 of 1949) does not offend Articles 15 and 25.)

(9) Power of State Legislature to make laws respecting intestacy and succession extends to make laws respecting succession to agricultural lands. A 1966 Madh Pra 11 (13) (DB).

(10) Item 5, List III read with Item 46 shows that the Parliament as also the Legislature of the State specified in Part A and Part B of the first schedule has power to make laws with regard to jurisdiction and powers of High Courts in respect of intestacy and succession and therefore the Succession Act of 1925 made applicable to the State of Mysore on 1-4-1951 could and did confer on High Court the jurisdiction in respect of intestacy and succession. A 1959 Mys 83 (85) (FB).

(11) Madras Aliyasanthana (Mysore Amendment) Act, 1962 relates to partition and succession, which are matters falling within Entry 5 of List III of Sch. VII. The Act having received the assent of the President it is a law enacted by a competent legislature and is intra vires the legislative power of the legislature concerned. A 1968 Mys 216 (223) (DB).

(12) Section 7 of Punjab Act (2 of 1920) (as amended by Section 3 of the Act 12 of 1973) — Words "non-ancestral immovable property" in Section 7 substituted by the words "immovable property, whether ancestral or non-ancestral" — Not ultra vires Art. 254 of Constitution. A 1975 Punj 292 (294).

(13) The constitutionality of Section 125, Criminal P. C., 1973, cannot be questioned on the basis of right to freedom of religion as contained in Arts. 25 & 26 of the Constitution. In view of Entry 5 of List III of Schedule VII to the Constitution, it cannot be said that the Parliament or the Legislatures cannot legislate on matters relating to the personal law of the Muslims in the country, so, as to alter, abrogate or amend the same i. e. personal law of the parties. 1980 Cri LJ (NOC) 80 (All).

Schedule 7, List 3, Entry 6

(1) The Mysore Tenancy Act (13 of 1952) is within the legislative competence of the State Legislature under Entries 18 and 65 of List II and the enumeration of subject in List III Entries 6 and 7 does not prohibit this piece of legislation. ILR (1955) Mys 360 (363, 364) (DB) °° (1955) 33 Mys LJ 158 (162).

(2) Bihar Buildings (Lease, Rent and Eviction) Control Act (3 of 1947), S. 11 — State Legislature's power to create jurisdiction and office of House Controller could be based on the implied power of the State Legislature under Entries 6, 7 and 13 of the Concurrent List. A 1954 Pat 97 (99) (DB).

(3) The subject-matter of Rajasthan Premises (Control of Rent and Eviction) Act, 1950, comes under Items 6, 7 and 13 of List III and not Item 18 of List II in Sch. VII. A 1954 Raj 252 (255) (DB).

(4) Entry 18 comprehends enactment of a law relating to law and agriculture and its improvement while Entry 6 of List III contemplates making of laws relating to transfer of property other than land. The specific entry at Sr. No. 6 of List III takes away land from the ambit of property. The U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972) is covered by Entry No. 6 of List III of the Seventh Schedule and the provisions of this Act, even if repugnant to the provisions of the T. P. Act are valid and shall prevail in U. P. 1973 All LJ 524 (531) (DB).

(5) Kerala Agriculturists' Debt Relief Act (31 of 1958), Section 11-A — Deals with agricultural indebtedness. Even if the pith and substance of the matter were a contract of sale of goods the State legislature would be competent to pass it under Entries 6 and 7 of List III. A 1965 Ker 39 (42) (FB).

(6) Hindu Succession Act (1956), Section 14 applies to agricultural lands and falls within Entry 5, List III. Its application to agricultural land cannot be excluded by invoking the provisions of Entry 6 of List III, Sch. 7. A 1964 All 165 (166).

(7) Hindu Succession Act (1956), Sections 14 (1) and (2) and 4 (2) — Act has no application to agricultural plots — Provisions do not apply to land tenures created under U. P. Zamindari Abolition and Land Reforms Act. A 1970 All 238 (240) (DB). (A 1964 All 165 and A 1968 All 419, Overruled.)

(8) State legislature is competent to amend the Section 69 of the Registration Act in view of Entry No. 6 of concurrent list. A 1969 Andh Pra 134 (135).

(9) State Legislature is competent to amend the section in view of Entry 6 of concurrent list. A 1969 Andh Pra 134 (135).

(10) United Khasi-Jaintia Hills District (Transfer of Land) Act is ultra vires of District Council. A 1968 Assam 43 (46, 47) (DB).

(11) Object and scope of Act — Determination of subject-matter of a legislation — Interpretation of legislative entry — Doctrine of pith and substance — Merely because a building can be used for any purpose including that of market, a legislation regulating mainly relations between landlords and tenants does not ipso facto become legislation on markets — Word 'market' — Meaning of. ILR (1969) Andh Pra 129 (DB).

(12) Bihar Sales Tax Act (19 of 1959) (as amended by Act 20 of 1962), Section 20-A — Sub-sections (3), (4) and (5) are ultra vires State Legislature as power to legislate in respect of these sub-sections does not fall under Entries 6, 7 and 13 of List III expressly sub-sections (6) and (8) as corollary thereto, are invalid. A 1971 SC 946 (952) : 1971 Tax LR 414.

(13) Sections 15 and 17 of the U. P. Sales Tax (Amendment and Validation) Act 1971 are

7. Contracts, including partnership, agency, contracts of carriage, and other special forms of contracts, but not including contracts relating to agricultural land.

[Government of India Act, 1935, Item 10.]

JAMMU AND KASHMIR

Omit Entry 7—See Constitution (Application to Jammu and Kashmir) Order, 1954, Para. 2, sub-para. (22) (c) (iii) (as amended by C. Os. 72 and 74).

Schedule 7, List 3, Entry 6 (contd.)

unconstitutional. The State Legislature has no power to enact Section 29-A as substituted by Section 15 in the principal Act (U. P. Sales Tax Act of 1948), Section 17 which is an auxiliary provision to Section 15 is also necessarily unconstitutional. **1972 Tax LR 1782 (1784, 1785) (All) (FB).**

(14) Section 123, T. P. Act is not ultra vires the Central Legislative Authority. 1971 Cur LJ 846 (850) (Punj).

(15) Public Premises (Eviction of Unauthorised Occupants) Act (1971), S. 5 and M. P. Accommodation Control Act (41 of 1961), Sec. 12 — Both 1971 Act and 1961 Act fall within List III, Entries 6 and 7 read with Entry 46 — 1971 Act being later to 1961 Act will prevail over 1961 Act in view of Art. 254 (2) of the Constitution. A 1980 MP 106 (110) : 1980 Jab LJ 183 (DB).

(16) Public Premises (Eviction of Unauthorised Occupants) Act (1971) in so far as it includes in definition of public premises in Section 2 (e), premises belonging to Government company is not ultra vires. A 1980 MP 106 (109) : 1980 Jab LJ 183 (DB).

Schedule 7, List 3, Entry 7

(See also under Entry 6 of this List.)

(1) A contract between a landlord and a tenant for payment of rent in respect of agricultural land, irrespective of the form in which it might be clothed, is a contract relating to agricultural land and is excluded from the scope of this entry. **A 1943 FC 9 (10, 11).**

(2) Where a State law is, in pith and substance, covered by some entry in the State List but only touches a subject in the Concurrent List incidentally, no question of repugnancy under Article 254 of the Constitution would arise. **A 1952 Cal 740 (749) (SB) •• A 1953 Pat 87 (91) (DB).**

(3) Bihar Sales Tax Act is a law imposing taxation on sale of goods and is not a law with respect to sale of goods and falls within Item 84, List II. Article 254 has no application though incidentally it may trench to a certain extent upon Items 7 and 8 in List III. A 1953 Pat 87 (91) (DB). (Reversed on another point in A 1955 SC 661.)

(4) Bihar Sales Tax Act (19 of 1959) (as amended by Act 20 of 1962), Section 20-A, sub-sections (3), (4) & (5) are ultra vires since the power to legislate in respect of these sub-sections does not fall under Entries 6, 7 and 13 of the List III, expressly. Sub-sections (6) and (8) are also invalid being their corollaries. **A 1971 SC 946 (952) : 1971 Tax LR 414.**

(5) The determination of the water rate under Section 78, Bengal Irrigation Act, is not a matter of contract between the parties : it is an exercise of statutory power, and, therefore, no question of repugnancy between Section 78 and the provisions of the Contract Act arises. A 1956 Pat 482 (488) (DB).

(6) Punjab Forward Contracts Tax Act (7 of 1951) does not fall within Entry 7 of List III of Sch. 7 nor under Entry 62, List II and is ultra vires of State Legislature. **A 1961 SC 268 (270).**

(7) Kerala Agriculturists' Debt Relief Act (1958), Section 11-A deals with agricultural indebtedness. Even if the pith and substance of the matter were contract of sale of goods State Legislature would be competent to pass it under Entries 6 and 7, List III. **A 1965 Ker 89 (42) (FB).**

(8) Madhya Pradesh Tendu Patta (Vyapar Viniyaman) Niyamavali Sanshodhan Adhyadesh (1965) (Ordinance No. 3 of 1965), Section 3 only inserts a new sub-rule in Rule 7 which deals with disposal of Tendu leaves which have already become the property of the State Government — It does not deal with any subject mentioned in Entries 7, 21 and 42, List III. The Ordinance is valid. **A 1966 Madh Pra 110 (114) (DB).**

(9) In Item 7 of List III the concurrent List does not affect the validity of Mysore Tenancy Act (13 of 1952). It is within the competence of the State legislature. (1955) 33 Mys LJ 158 (162).

(10) Forward Contracts (Regulation) Act (1952) — Falls under specific Entry 48 of List 1 and not under general Entry 26 of List 2 nor Entry 7 of List 3 which cannot prevail against specific entry. **A 1963 SC 90 (96) •• A 1959 Cal 89 (92) (DB).** (Reversed on another point in A 1963 SC 90. Even if the Act comes under Entry 7, List III it will be intra vires Parliament.)

(11) Bihar Shops and Establishments Act, 1953 (8 of 1954), Section 26 (2) — Provision held not repugnant to existing law relating to contract of service and therefore not void — Contract Act (1872), Section 27. **A 1958 Pat 442 (444).**

(12) 'Contracts' in the entry would include quasi-contracts. See A 1962 Bom 12 (20) (DB). (Analogy not correct for interpreting "corporations" in Entry 44 of List 1, so as to include quasi-Corporations or societies similar to corporations.)

(13) The Beedi and Cigar Workers (Conditions of Employment) Act (1966) is within the legislative competence of Parliament as the subject-matter of the Act falls principally under Entry 24 and also partly under Entries 7, 22 and 23 of List 3 in Sch. 7 of the Constitution. A 1971 Bom 244 (251) : 1971 Lab IC 1080 (DB).

(14) The provisions of Chapter III-B of the Reserve Bank of India Act in pith and substance relate to control of currency by the Reserve Bank and fall under Entries 38 and 36 of List I of Sch. VII and they do not in any way entrench upon Entry 30 of List II. The contract entered into by a foreman conducting Chit Funds with the subscriber is a special contract falling under

8. Actionable wrongs.
[Government of India Act, 1935, Item 14.]

JAMMU AND KASHMIR

Omit Entry 8—See the Constitution (Application to Jammu and Kashmir) Order, 1954, Para. 2, sub-para. (22) (c) (iii) (as amended by C. Os. 72 and 74).

9. Bankruptcy and insolvency.
[Government of India Act, 1935, Item 12.]

JAMMU AND KASHMIR

Omit Entry 9—See the Constitution (Application to Jammu and Kashmir) Order, 1954, Para. 2, sub-para. (22) (c) (iii) (as amended by C. Os. 72 and 74).

10. Trust and Trustees.
[Government of India Act, 1935, Item 12.]

JAMMU AND KASHMIR

Omit Entry 10—See the Constitution (Application to Jammu and Kashmir) Order, 1954, Para. 2, sub-para. (22) (c) (iii) (as amended by C. Os. 72 and 74).

Schedule 7, List 3, Entry 7 (contd.)

Entry 7 of List III of Seventh Schedule. The President's assent to the Act confirms this view. The provisions of Chapter III-B of the Reserve Bank of India Act, 1934 and the Notification dated 29-10-1966 issued by R. B. I. are valid. (1971) 41 Com Cas 890 : (1973) 2 Mad LJ 72 (85, 89) (DB) (Mad).

(15) Entry 7 of the concurrent list is wide and comprehensive enough. It comes into play where there is no special entry covering a particular contract. M. P. Dhan Parichalan Skeem (Pratishedh) Adhiniyam (19 of 1975) is not beyond legislative competence of the State Legislature. A 1977 Madh Pra 74 (79) (DB).

(16) Hindu Succession Act (1956), Sections 14 (1) and (2) and 4 (2) — Act has no application to agricultural plots — Provision do not apply to land tenures created under U. P. Zamindari Abolition and Land Reforms Act. A 1970 All 238 (240) (DB). (A 1964 All 165 and A 1968 All 419, **Overruled.**)

(17) U. P. Sales Tax (Amendment and Validation) Act (20 of 1971), Section 29-A is ultra vires, being beyond powers of State Legislature. **1972 Tax LR 1782 (1785) (FB) (All).**

(18) Section 5 of the Public Premises (Eviction of Unauthorised Occupants) Act (1971), and M. P. Accommodation Control Act (41 of 1961), Section 12 — Both 1971 Act and 1961 Act fall within List III Entries 6 and 7 read with Entry 46. 1971 Act being later to 1961 Act will prevail over 1961 Act in view of Art. 254 (2) of the Constitution. A 1980 MP 106 (110) : 1980 Jab LJ 183 (DB).

(19) Public Premises (Eviction of Unauthorised Occupants) Act (1971), in so far as it includes in definition of public premises belonging to Government company is not ultra vires. A 1980 MP 106 (109) : 1980 Jab LJ 183 (DB).

(20) Provisions of the Section 23-B of the Rajasthan Sales Tax Act (29 of 1954) are not ultra vires the State legislature. 1976 Tax LR 2142 (2149) (DB) (Raj).

Schedule 7, List 3, Entry 8

(1) Bihar Sales Tax Act is not a law in respect to sale of goods but is a law imposing taxation on sale of goods and falls entirely within Item 54, List II — Article 254 has no application though it may incidentally trench to a certain extent upon Items 7 and 8 in List III. A 1953 Pat 87 (91) (DB). **(Reversed on another point in A 1955 SC 661.)**

Schedule 7, List 3, Entry 9

(1) In a general sense, insolvency means inability to meet one's debts or obligations; in a technical sense, it means the condition or standard of inability to meet debts or obligations, upon the occurrence of which the statutory law enables a creditor to intervene, with the assistance of a Court, to stop individual action by creditors and to secure administration of the debtor's assets in the general interest of creditors; the law also generally allows the debtor to apply for the same administration. The justification for such proceeding by a creditor generally consists in an act of bankruptcy by the debtor. **A 1937 PC 95 (98).**

(2) If some of the provisions are merely ancillary to the general Act relating to bankruptcy and insolvency, the ancillary matters must be regarded as being within the domain of bankruptcy and insolvency. **A 1943 PC 76 (83).**

Schedule 7, List 3, Entry 10

(1) Under Entry 10 List III the existence of a trust alone gives the power to legislate upon trusts. It cannot be combined with Entry 28 List III to say that religious institutions shall be regarded as public trusts for purpose of exercising control over it by legislation. A 1958 Madh Pra 362 (365) (DB).

(2) Provisions of Rajasthan Sales Tax Act 1954), Section 23-B cannot be said to be ultra vires the State legislature on the ground that it it is not covered by Entry 10, List 3 of Schedule VII relating to trust and trustees. 1976 Tax LR 2142 (2148) (DB) (Raj).

(3) Section 58 of the Bihar Wakfs Act (8 of 1948) is not ultra vires the powers of Bihar Legislature as it was competent to legislate with respect to trust and trustee within the State of Bihar. A 1955 Pat 470 (471).

(4) The Bihar Land Reforms Act (30 of 1950) has been held to be constitutionally valid as the pith and substance of the Act falls within List 2 Entry 35 and not under Entries 10 and 28 of List 3. A 1953 Pat 337 (338) (DB).

(5) State Legislature is competent to pass Jadavpur University Act which comes under Entry 11 of List II and Entry 10 of List III and to modify an existing Trust. A 1960 Cal 120 (123).

(6) Bombay Public Trusts Act (29 of 1950) applies to a society though it is registered under

11. Administrators-general and official trustees.
[Government of India Act, 1935, Item 12.]

[a][11-A. Administration of justice; constitution and organisation of all Courts, except the Supreme Court and the High Courts.]

[a] Inserted by Constitution (42nd Amendment) Act, 1976, S. 57 (3-1-77).

12. Evidence and oaths; recognition of laws, public acts and records, and judicial proceedings.
[Government of India Act, 1935, Item 5.]

JAMMU AND KASHMIR

For entry 12, the entry "12. Evidence and oaths in so far as they relate to administration of oaths and taking of affidavits by diplomatic and consular officers in any foreign country," shall be substituted;

—See the Constitution (Application to Jammu and Kashmir) Order, 1954, Para. 2, sub-para. (22) (c) (iii) (as amended by C. O. 94 of 1972).

13. Civil procedure, including all matters included in the Code of Civil Procedure at the commencement of this Constitution, limitation and arbitration.

JAMMU AND KASHMIR

For entry 13, the entry "13. Civil procedure in so far as it relates to administration of oaths and taking of affidavits by diplomatic and consular officers in any foreign country." shall be substituted;

—See the Constitution (Application to Jammu and Kashmir) Order, 1954, Para. 2, sub-para. (22) (c) (iii) (as amended by C. O. 94).

Schedule 7, List 3, Entry 10 (contd.)

Societies Registration Act. It is intended to regulate the administration of public, religious and charitable trusts within Entries 10 and 28 of List III and the validity of the Act cannot be challenged on the ground that it incidentally entrenches on the field contemplated by Entry 44 List II. A 1962 Bom 12 (21) (DB).

(7) Per Mudholkar J. — Delhi Legislature was competent to make a law dissolving a charitable trust and transferring its rights etc. to another institution. Entries 10 and 28 of List III permit making of such law. Delhi Tibbia College Act assented to by the President cannot be called in question on the ground of repugnancy with existing law or a law made by Parliament. **A 1962 SC 458 (478).**

(8) U. P. Intermediate Education Act (2 of 1921), Sections 16-A to 16-I — Added by U. P. Act 35 of 1958 — Subject-matter of Legislation falls within List II, Entry 11. It cannot be said that Act relates to charities or charitable institutions or to trusts or trustees, because it incidentally trenches upon or affects a charitable institution and for that reason beyond competence of State legislature — Act is intra vires. **A 1966 SC 1307 (1310, 1311).**

(9) Sir Currimbhoy Ebrahim Baronetcy Act IV of 1913 passed by Central Government and the Sir Currimbhoy Ebrahim Baronetcy (Repeal and Distribution of Trust Properties) Act, 1959 fall under Entry 10 of List III and the repealing Act was within the competence of Bombay State Legislature and is not ultra vires. (1967) 69 Bom LR 326 (366, 367) (DB).

(10) U. P. Sales Tax (Amendment and Validation) Act (20 of 1971), Section 29-A is ultra vires, being beyond powers of State Legislature. **1972 Tax LR 1782 (1784, 1785) (All) (FB).**

Schedule 7, List III, Entry 11-A

(1) By virtue of Art. 246 (2), Parliament has clearly the power to make laws with respect to the constitution and organisation, that is to say, the creation and setting up of Special Courts. Clause 2 of the Special Courts Bill, 1978 is therefore within the competence of the Parliament to enact. **A 1979 SC 478 (498, 499).**

Schedule 7, List 3, Entry 12

(1) It is open to a State Legislature to define "foreign judgments" and how they are to be enforced within the State subject to any legislation by Parliament — Items 12 and 13 of List III give powers to the State similar to those given to Parliament by Art. 261 (2). **A 1959 Punj 265 (270) (FB).**

(2) It has been held that the U. P. Panchayat Raj Act (26 of 1947) is a valid existing law enacted by virtue of entries in Lists 2 and 3 including the present entry. A 1954 All 655 (657) (DB).

Schedule 7, List 3, Entry 13

(1) Words "civil procedure" in this entry are used in a general sense as the procedure applicable to litigation generally; they do not include a special law of procedure which is applicable only to litigation regarding a special matter. A 1942 Cal 587 (590) (DB). (Bengal Tenancy Act, 8 of 1885, when it deals with procedure does not deal with civil procedure generally.)

(2) The words "civil procedure" must be held to exclude matters relating to jurisdiction and powers of Courts, since special provision is made for these matters elsewhere in the lists. A 1939 Cal 628 (635) (DB).

(3) Expression "Civil Procedure" — Interpretation of the expression "Civil Procedure" would signify the rules of machinery for administering justice in the courts of justice and cannot and do not signify the competence to set up the machinery itself. A 1972 Cal 160 (169) (DB).

(4) The provisions of the Civil Procedure Code itself are of course specifically included in this entry. But there is no warrant for including in the entry any provisions which are not in the Code and which do not appertain to

14. Contempt of Court, but not including contempt of the Supreme Court.

JAMMU AND KASHMIR

Omit Entry 14—See Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (22) (c) (iii) (as amended by C. O. 80).

Schedule 7, List 3, Entry 13 (contd.)

"civil procedure". A 1939 Cal 628 (635) (DB) •• A 1939 Pat 90 (95) (DB).

(5) The amendment of S. 15 of the Mysore High Court Act, by Act 35 of 1951 providing for second appeals in which the value of subject-matter is not more than Rs. 3,000 being decided by a Judge sitting alone, is intra vires the State Legislature. The words of the entry are capable of being applied to procedure for disposal of second appeals. A 1952 Mys 75 (76).

(6) The words "including all matters included in the Code of Civil Procedure at the commencement of the Constitution" enlarge the subjects of concurrent legislation by including every matter included in the Civil Procedure Code at the commencement of the Constitution. A 1939 Pat 90 (95) (DB).

(7) The State Legislature can legislate in respect of the procedure to be followed in the High Court as to the filing and disposal of appeals, etc., under this entry or under Entry 3 of the State List. A 1953 Trav-Co 53 (55) (DB).

(8) Article 261 (2) empowers only the Parliament to determine the manner in which judicial proceedings whether of the Union or of the State are to be proved and are to be made effective, while Items 12 and 13 of the concurrent list give similar power to the States. It is open to a State Legislature to define foreign judgments and how they are to be enforced within the State subject to any legislation by the Parliament. **A 1959 Punj 265 (269) (FB).**

(9) Civil Procedure Code is Item 13 of the Concurrent List. It is open to Bihar Legislature to amend the Code of Civil Procedure, while legislating in respect of religious endowment and religious institutions in Bihar and the President's assent having been received to the Act, Bihar law shall prevail in that State under Article 254 (2). **A 1959 SC 1073 (1080).**

(10) By virtue of Schedule 7, List III, Entry 13 read with proviso to Article 254 the Parliament was fully competent to enact Central Act, 66 of 1956 even though its effect was to amend, vary or repeal the State Act of 1954. A 1962 All 299 (300) (DB). (A 1961 All 320, Overruled.)

(11) The subject-matter of Rent Control Acts has been held to fall under Entries 6, 7 and 13 of List 3 and not under Entry 18 of List 2. A 1954 Pat 97 (99) (DB). (Bihar Buildings (Lease, Rent and Eviction) Control Act, 3 of 1947.) •• A 1954 Raj 252 (255) (DB). (Rajasthan Premises (Control of Rent and Eviction) Act (XVII of 1950).)

(12) In the following case it was assumed that the Bengal Non-agricultural Tenancy (Temporary Provisions) Act (9 of 1940) was a legislation in respect of "civil procedure". **A 1945 FC 1 (1, 2).**

(13) The Travancore-Cochin Holdings (Stay of Execution Proceedings) Act (8 of 1950) does not relate to "civil procedure" and, therefore, does not come within the Concurrent List. A 1953 Trav-Co 327 (334) (DB).

(14) Since Entry 65 of the State List read with Entry 18 of the same list gives the State Legislature exclusive power to create and determine powers and jurisdiction of Courts in respect of land, there is no necessity of invoking the concurrent power relating to Civil Procedure Code under this entry. A 1957 Madh B 63 (63). (M. B. Muafi and Inam Tenants and Sub-tenants Protection Act (32 of 1954), Section 4 — Validity — Provision held not repugnant to Civil P. C.)

(15) It has been held that the Barahiya Tal Lands (Declaration of Possession) Act (26 of 1950), passed by the Bihar Legislature is not a law, either in form or in substance, with respect to arbitration. A 1952 Pat 166 (170) (DB).

(16) U. P. High Court (Abolition of Letters Patent Appeals) Act (14 of 1962), (as amended by U. P. High Court (Abolition of Letters Patent Appeals) (Amendment) Ordinance (U. P.) (Ordinance 12 of 1972)) later replaced by U. P. High Court (Abolition of Letters Patent Appeals) (Amendment) Act (32 of 1972), Sec. 4 — Constitutionality of Amending Ordinance and Amending Act — State Legislature was competent to make such amending laws (Per majority). **A 1973 All 596 (604) (FB).**

(17) Bihar Sales Tax Act (19 of 1959) (as amended by Act 20 of 1962), Section 20-A sub-sections (3), (4) and (5) are ultra vires since the power to legislate in respect of there sub-sections does not fall under Entries 6, 7 and 13 of the List III expressly — Sub-sections (6) and (8) are also invalid being their corollaries. **A 1971 SC 946 (952) : 1971 Tax LR 414.**

(18) Calcutta City Civil Court Act (21 of 1953), Ss. 3 and 5, (as amended by W. B. Act (35 of 1969)) — Establishment of City Civil Court in 1953 and conferment of additional jurisdiction to that Court in 1969 are intra vires the State Legislature under Sch. VII, List II, Entry 3 and List III, Entry 13 of the Constitution — The Amendment Act is also intra vires. A 1972 Cal 160 (171) (DB).

Schedule 7, List 3, Entry 14

(1) Section 9, Punjab Security of the State Act (12 of 1953) was not repugnant to Contempt of Courts Act, 1952. The Punjab Act in pith and substance dealt with public order and not with contempt. The entire provisions of Section 9 fell within List 2, Entry 1. A 1956 Punj 169 (169, 172) (DB).

(2) Law of contempt of Courts is not beyond the competence of Legislature, Central or State. **A 1969 Delhi 201 (206) (FB) •• 1975 Cri LJ** 164 (168) (DB) (All).

15. Vagrancy; nomadic and migratory tribes.
[Government of India Act, 1935 — Item 23.]

JAMMU AND KASHMIR

Omit Entry 15—See Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (22) (c) (iii) (as amended by C. O. 80).

16. Lunacy and mental deficiency, including places for the reception or treatment of lunatics and mental deficients.
[Government of India Act, 1935 — Item 18.]

17. Prevention of cruelty to animals.
[Government of India Act, 1935 — Item 22.]

JAMMU AND KASHMIR

Omit Entry 17 — Constitution (Application to J. and K.) Order 1954, Para. 2, sub-para. (22) (c) (iii) (as amended by C. O. 80).

[a][17-A. Forests.

17-B. Protection of wild animals and birds.]

[a] Inserted by Constitution (Forty-second Amendment) Act, 1976, S. 57 (3-1-77).

18. Adulteration of foodstuffs and other goods.
[Government of India Act, 1935 — List II, Item 30.]

19. Drugs and poisons, subject to the provisions of Entry 59 of List I with respect to opium.
[Government of India Act, 1935 — Item 19.]

20. Economic and social planning.

JAMMU AND KASHMIR

Omit Entry 20 — Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (22) (c) (iii) (as amended by C. O. 80).

Schedule 7, List 3, Entry 15

(1) A. P. Land Reforms (Ceiling on Agricultural Holdings) Act (1973), S. 7 and Hindu Adoptions and Maintenance Act (1956), Pre. — No repugnancy between the two Acts; since both the competent legislatures have enacted two different laws, both within the demarcated fields of their respective jurisdiction but one on the Concurrent List and the other on the State List. A 1979 Andh Pra 262 (263, 264) (DB).

Schedule 7, List 3, Entry 18

(1) Adulteration of food stuffs and other goods — Definition of 'adulterated' in S. 2 (i) of Prevention of Food Adulteration Act (1955) is within competency of the power conferred on the Legislature by Entry 18. ILR (1969) Delhi 1196 (1206) (DB).

Schedule 7, List 3, Entry 19

(1) Madras Prohibition Act so far as it pertains to Ganja — Is not repugnant to any provisions of Constitution — Ganja being narcotic drug State Legislature is competent to make laws on that subject under Entry 19 of Concurrent List. 1955 Andh LT (Cri) 205.

(2) Extension of Central Acts, 2 of 1930 and 23 of 1940 to Hyderabad State did not completely efface Hyderabad Act of 1333-F. It remained alive so far as it dealt with collection of duties of excise and provided for licences for narcotic drugs. A 1966 SC 713 (717) •• A 1964 Andh Pra 430 (432) (DB).

(3) The provision for punishment of a person who possesses opium without licence has nothing to do with cultivation or manufacture or sale for export and as such comes under general Entry 19, List III and not under Entry 59, List I. The Madhya Bharat Opium Act, 15 of 1955 amending the provisions of Indian Opium Act in regard to matters not falling under Entry 59, List I is valid as it was assented to by the President. A 1961 Madh Pra 13 (14). (Overruled on another point in A 1963 Madh Pra 337.)

(4) U. P. Excise Act (4 of 1910), S. 37-A (as inserted by U. P. Act (6 of 1972)) — The provision is not beyond the competence of State Legislature — Section 37-A does not seek to levy any excise duty — It contemplates prohibition in relation to intoxicating drinks and drugs. A 1978 All 386 (389, 390) : 1978 All LJ 581 (FB).

(5) Sections 4, 40, 41, 75 and 76 of the U. P. Excise Act (4 of 1910), authorising prevention of misuse of medicinal preparations containing alcohol as alcoholic beverages — Not repugnant to provisions of Drugs and Cosmetics Act (1940) and Medicinal and Toilet Preparations (Excise Duties) Act (1955). A 1978 All 490 (495) : 1978 All LJ 919 (DB).

(6) A taxation law cannot be sustained by reference to a general entry in the Legislative List. It is thus clear that levy of excise duty on methanol can neither be justified under Entry 19 of List III nor under Entry 8 of List II. None of these entries empowers the State Legislature to levy excise duty on intoxicating liquors. 1976 Raj LW 338 : 1977 Tax LR (NOC) 47.

Schedule 7, List 3, Entry 20

(1) Bombay Town Planning Act falls within Entry 18 of List II and also Entry 20 of List III and is within the competence of State Legislature. A 1967 SC 1373 (1381-82).

[a][20-A. Population control and family planning.]

[a] Inserted by Constitution (Forty-second Amendment) Act, 1976, S. 57 (3-1-77).

21. Commercial and industrial monopolies, combines and trusts.

JAMMU AND KASHMIR

Omit Entry 21 — Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (22) (c) (iii) (as amended by C. O. 80).

See the Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969).

22. Trade unions; industrial and labour disputes.

[Government of India Act, 1935 — Item 29.]

Schedule 7, List 3, Entry 20 (contd.)

(2) Gujarat Industrial Development Act (23 of 1962) — Constitutionality — Act in its pith and substance is legislation with respect to "social and economic planning' within Entry 20 of List III. ILR (1970) Guj 844 (865, 866) (DB).

(3) Bombay Provincial Municipal Corporation Act (59 of 1949), Ss. 284-R (1), 284-S (as amended by Gujarat Amendment in 1964) is a legislation which is not a taxation measure in its pith and substance but is only an incident of a land development scheme, would clearly fall in pith and substance under general Entry 18 of land or Entry 20 of List III of economic and social planning. ILR (1973) Guj 1 (42) (DB).

Schedule 7, List 3, Entry 21

(1) The expression "commercial and industrial" monopolies is wide enough to include grant or creation of monopolies to the State and citizens as well as control of monopolies. **A 1960 SC 1073 (1078).**

(2) Entry 26 of List II, Sch. 7 does not derogate from the authority conferred by Entry 21 of List III concurrently on the Parliament and the State Legislature to grant or create by law commercial monopolies. **A 1960 SC 1073 (1078).**

(3) Motor Vehicles Act (1939) (as amended by Act 100 of 1956), Chap. IV-A, could competently be enacted by the Parliament under Entry 21 read with Entry 35 of List III. It is therefore intra vires of Parliament. **A 1961 SC 82 (86).**

(4) Madhya Pradesh Tendu Patta (Vyapar Viniyaman) Niyamavali Sanshodhan Adhyadesh (1965), (Ordinance No. 3 of 1965), Section 3 only introduces new sub-rule in Rule 7 which deals with the disposal of Tendu leaves which have already become property of the State. The new sub-rule (7-a) does not pertain to contracts, partnership etc. falling under Items 7, 21 and 42 of List III. A 1966 Madh Pra 110 (114) (DB).

(5) State creating monopoly in liquor and passing it on to chosen individuals — State can justify the action under Art. 19 (6) even though it cannot justify it under Art. 19 (6) (ii) and also under Entry 21, List III of Sch. VII. 1969 Ker LJ 686 (692) (DB).

(6) Sections 18, 27 of M. P. Excise Act (2 of 1915) (as amended by M. P. Excise Act (19 of 1964) enabling State to lease its exclusive right to manufacture or trade in any intoxicant or liquor — Those sections as made applicable to foreign liquor come within the legislative competence of the State. **A 1975 Madh Pra 1 (15) (FB).**

Schedule 7, List 3, Entry 22

(1) No question of repugnancy with the Contract Act arises in interpreting the definition of 'Industrial Dispute' in S. 2 (k) of the Industrial Disputes Act, 1947. Once a particular dispute is found to fall under the definition, the jurisdiction to decide the same rests with the Tribunal under the Act. **A 1949 FC 111 (113, 120).**

(2) The definition of "industry" in S. 2 (j) of the Industrial Disputes Act is covered by Entry 22 and Entry 24 of List 3. It is thus within the legislative competence of the Central Legislature. A wrong application of the definition to cases which are not strictly covered by it cannot vitiate the definition. **A 1957 SC 329 (339).**

(3) The entry should not be given a narrow construction. **A 1957 SC 329 (339).** (Includes all ancillary matters.)

(4) Entry 22 should be construed liberally so as to include disputes of individual workman. **(1969) 19 Fac LR 352 (358) (FB) (Delhi).**

(5) Entry 22 — Interpretation giving the term "Industrial Dispute" in Entry 22 of List 3, Sch. VII a wide and natural meaning, there is no reason for restricting it to disputes between a body of workmen and the management. A dispute between a single workman and the management would also come within the meaning of the term "Industrial Dispute". The Entry also includes labour disputes. There is no reason for excluding disputes between individual workman and the employer from the purview of the term 'labour disputes'. In the Industrial Disputes Act, provision is also made for determination of a dispute between an individual workman and the management such as Sec. 33-C (2) of the Act. The plea therefore that Parliament will have no power to legislate regarding disputes between an individual workman and the employer has to be rejected. A 1970 Mad 82 (83, 84).

(6) In the ordinary or non-technical sense, industry or business means an undertaking where capital and labour co-operate with each other for producing wealth in the shape of goods, machines, tools etc., and for making profits. But the limited concept of what an industry meant in early times must now yield place to an enormously wider concept so as to take in various and varied forms of industry, so that disputes arising in connection with them might be settled quickly without much dislocation and disorganisation of the needs of the society. **A 1953 SC 58 (60).**

(7) Industrial Disputes Act applies to disputes between the Municipalities and their employees

23. Social security and social insurance; employment and unemployment.

[Government of India Act, 1935 — Item 28.]

Schedule 7, List 3, Entry 22 (contd.)

in branches of work that can be regarded as analogous to the carrying on of trade or business. It is within the competence of a tribunal under the Act to reinstate dismissed Municipal employees. This power, though trenches upon the powers of the Chairman under Municipal Acts, this invasion of the provincial field of legislation does not render the Industrial Disputes Act of the Central Legislature invalid. **A 1953 SC 58 (59).**

(8) The Industrial Disputes (Madras Amendment) Act (12 of 1947) is intra vires the Madras Legislature, being covered by Items 27 and 29 of the Concurrent List of the Government of India Act, 1935. **A 1951 Mad 191 (199) (DB).**

(9) Rajasthan Industrial Tribunal (Constitution and Proceedings) Validating Act 1959) — Act because of Entry 22, List III is within the competence of the State Legislature and having received the assent of the President must by virtue of Art. 254 (2) prevail in the State of Rajasthan. **A 1964 SC 444 (448) °° A 1963 Raj 22 (24).**

(10) Chapter VA incorporated in the Industrial Disputes Act in 1953 and C. P. and Berar Industrial Disputes Settlement Act do not deal with the same matter. No question of repugnancy between the Central Act and the State Act can therefore arise and both will be in force in C. P. and Berar. A 1963 Bom 189 (193) (DB).

(11) Power of Parliament to make law fixing minimum bonus — Flows from jurisdiction over industrial and labour disputes. **A 1967 SC 691 (717) : (1967) 1 SCR 15.**

(12) Section 2-A, Industrial Disputes Act is not ultra vires — Parliament had power to enact it either under Entry 22 of Concurrent List or Entry 97 of Union List. A 1970 Delhi 60 (66) °° A 1970 Mad 82 (84) °° A 1970 Mys 171 (177) : 1970 Lab IC 841 (DB) °° (1970) 2 Mad LJ 705 (708) (DB).

(13) Sections 53-A and 53-B of the Bombay Industrial Relations Act (11 of 1947) (as inserted by Gujarat Amendment Act No. 21 of 1972) fall under Entries 22 and 24 of List III in Seventh Schedule of the Constitution and the State Legislature is competent to enact the same. The said provisions are intended in pith and substance to forestall and prevent industrial and labour disputes. They constitute also in essence a measure for the welfare of the labour. **A 1976 SC 2177 (2181).**

(14) Industrial Disputes Act (1947) (as amended by Act 35 of 1965), Section 2-A. Relevant provisions in the Act referring to "workmen" would have to be construed as including "workman" so that S. 2-A is harmonised with rest of provisions of the Act. Section 2-A cannot be said to be repealed by any older provision in the Act. It is also not ultra vires the Parliament. Parliament had power to enact it either under Entry 22 of Concurrent List or under Entry 97 of Union List read with Article 248 of Constitution. A 1970 Delhi 60 (66) : 1970 Lab IC 421 (DB).

(15) Beedi and Cigar Workers (Conditions of Employment) Act (1966) — Validity — Act falls within Entry 22 and is not beyond legislative competence of Parliament. **A 1974 SC 1832 (1839, 1840) : 1974 Lab IC 1237.**

Schedule 7, List 3, Entry 23

(1) Pursuant to Entries 54, 55, 96 of List I and Entries 23 and 24 Parliament can levy or collect fees which may be regarded as regulatory fees only. A 1968 Mys 42 (45) (DB).

(2) Provision relating to payment of bonus to all persons including persons other than workmen is within the ambit of Entries 23 and 24 of List III, Sch. 7. A 1968 Ker 143 (145) (DB).

(3) Bihar Shops and Establishments Act, 1953 (8 of 1954), S. 26 (2) — Provisions are not repugnant to existing law relating to contract of service. The Act received the assent of the President and is covered by Entries 23 and 24 of List III. The Act, therefore, is not void. A 1958 Pat 442 (444).

(4) The provisions of Iron Ore Mines Labour Welfare Cess Act (1961), which impose certain obligations on mine owners are clearly relatable to such topics as social security, welfare of labour maternity benefit etc. covered by Entries 23 and 24 of List III. A 1968 Mys 42 (45) (DB).

(5) Gwalior Rayons (Rayon Pulp Division) Taking Over Management Ordinance (Kerala Ord. 14 of 1978), S. 1 — Subject-matter of the Ordinance falls fairly and squarely within Entry 52 of List 1 of the VIIth Schedule to the Constitution and not either within Entry 24 or 27 of List II of the said Schedule or within Entry 23 or 33 of List III of the said schedule of the Constitution — Being so, Ordinance is ultra vires — Governor had no authority to promulgate the Ordinance. A 1979 Ker 56 (68) (DB).

(6) Beedi and Cigar Workers (Conditions of Employment) Act (1966) — Validity — Act falls within Entry 23 and is not beyond legislative competence of Parliament. **A 1974 SC 1832 (1839, 1840) : 1974 Lab IC 1237.**

(7) West Bengal Relief Undertakings (Special Provisions) Act (13 of 1972), Pre., Ss. 3, 4, 8 — Pith and substance of legislation directly falls under Entry 23 of List III and Act is not ultra vires of State Legislature. **A 1978 Cal 215 (219) (FB).**

(8) Bombay Relief Undertakings (Special Provisions) Act (XCVI of 1958) — Act falls within Entry 23 of List III and therefore not violative of Art. 245 or 246 of Constitution. (1972) 13 Guj LR 33 (46) (DB).

(9) Employees' State Insurance Act (1948), S. 73-A — Special contribution by employer — Legislation falls under Entries 23 and 24 of Concurrent List — Hence within legislative competence. (1972) 13 Guj LR 230 (241) (DB).

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24. Welfare of labour including conditions of work, provident funds, employers' liability, workmen's compensation, invalidity and old age pensions and maternity benefits.[a]

[Government of India Act, 1935 — Item 27.]

[a] See the Maternity Benefit Act, 53 of 1961 which is now enforced in almost all the States.

[a][25. Education, including technical education, medical education and universities, subject to the provisions of Entries 63, 64, 65 and 66 of List I; vocational and technical training of labour.]

[a] Substituted by Constitution (Forty-second Amendment) Act, 1976, Section 57 (3-1-77).

Schedule 7, List 3, Entry 24

(1) Entry 24, List III, Sch. 7 is not restricted to shops or establishments where labour is employed but applies also to shops or establishments which are run by the owners and their families. **A 1951 SC 315 (316).**

(2) The subject-matter of Section 7 (1) of the Punjab Trade Employees Act (10 of 1940) as amended in 1943 is covered by List 2, Item 27 and also List 3, Item 27 of the Government of India Act (1935). **A 1951 SC 315 (316).**

(3) The definition of the term "industry" in Sec. 2 (j) of the Industrial Disputes Act, 1947, was held to be justified under List 3, Item 27 of the Government of India Act, 1935, even if the same was not covered by Item 29 of that list. **A 1957 SC 329 (339).**

(4) The provisions of Iron Ore Mines Labour Welfare Cess Act (1961) which impose certain obligations on mine owners are clearly relatable to such topics as social security, welfare of labour, maternity benefit etc. covered by Entries 23 and 24 of List III. **A 1968 Mys 42 (45) (DB).**

(5) M. P. Minimum Wages Fixation Act (16 of 1952), Pre. and Section 3 is an independent enactment fixing minimum rates of wages for employment — Act is not a piece of colourable legislation — Legislature was competent to enact it under Entry 24, List III. **A 1964 Madh Pra 45 (51) (DB).**

(6) Minimum Wages (Madhya Pradesh Amendment and Validation) Act (23 of 1961) is a legislation with respect to matters enumerated in List III, Entry 24. **A 1962 Madh Pra 342 (345) (DB).**

(7) U. P. Shops and Commercial Establishments Act (22 of 1947) is not ultra vires the State Legislature under Entry 27, List III of Government of India Act (1935). The U. P. Legislature was competent to have passed this Act. In the present Constitution there is nothing which makes it ultra vires. **A 1961 All 79 (82).**

(8) Payment of Wages Act (1936), Section 6 (as amended), making provision for compulsory saving of a part of bonus payable to an industrial worker should be deemed to be a piece of legislation covered by the words 'welfare of labour' and falls within Entry 24 of List 3 in Schedule 7 of the Constitution and is intra vires. **A 1964 Punj 513 (514) (DB).**

(9) Minimum Wages Act, 1948 (2 of 1948) making provision for minimum wages and for machinery for payment of the same comes within Item 24, List III (Item 27, List III of Government of India Act, 1935) and merely because in one respect it shades into the field of Entry 5 of List II, it cannot be held to be unconstitutional. **(1963-64) 24 FJR 194 (197) (DB) (Punj).**

(10) Bombay Labour Welfare Fund Act (40 of 1953) provides for taking over of unpaid accumulations which are regarded by Legislature as abandoned property and such taking over is directed for providing for the Fund constituted for the carrying out of various measures and activities for welfare of labour and their dependants. It is within competency of State Legislature under Entry 24, List III. **(1966) 7 Guj LR 156 (177) (DB).**

(11) Power of Parliament to make a law such as Payment of Bonus Act, 1965 fixing minimum bonus payable to workers flows from jurisdiction of Parliament over welfare of labour including conditions of work and wages. **A 1967 SC 691 (701).**

(12) Bihar Shops and Establishments Act, 1953 (8 of 1954), Section 26 (2) — Provision held not repugnant to existing law relating to contract of service — The Act received the assent of President and is covered by Entries 23 and 24 of List III and is therefore valid. **A 1958 Pat 442 (444).**

(13) Sections 53-A and 53-B of the Bombay Industrial Relations Act (11 of 1947) (as inserted by Gujarat Amendment Act No. 21 of 1972) fall under Entries 22 and 24 of List III in Seventh Schedule of the Constitution and the State Legislature is competent to enact the same. The said provisions are intended in pith and substance to forestall and prevent industrial and labour disputes. They constitute also in essence a measure for the welfare of the labour. **A 1976 SC 2177 (2181).**

(14) Beedi and Cigar Workers (Conditions of Employment) Act (1966) falls within Entry 24 and is not beyond legislative competence of Parliament. **1974 Lab IC 1237 : A 1974 SC 1832 (1839, 1840) °° 1973 Lab IC 558 (561) (Ker).**

[Overruled on another point in A 1974 SC 1832.]

(15) Beedi and Cigar Workers (Conditions of Employment) Act (1966) — Even if it does not fall within Entry 24 of List 3, the Act is protected by Entry 97 of List I of Schedule 7. **(1972) 1 Mys LJ 450 (462, 463) (DB).**

(16) Provident Fund — Established under State Act — State Act prevails over Central Act on the subject — Provident Fund Commissioner of the Region not entitled to take proceedings against the Fund under the Central Act. **1974 Lab IC 810 (811, 812) (All).**

Schedule 7, List 3, Entry 25

(1) The extensive power vested in the Provincial Legislatures to legislate with respect to

26. Legal, medical and other professions.
[Government of India Act, 1935 — Item 16.]

27. Relief and rehabilitation of persons displaced from their original place of residence by reason of the setting up of the Dominions of India and Pakistan.

JAMMU AND KASHMIR

Omit Entry 27 — See Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (22) (c) (iii) (as amended by C. O. 72).

Schedule 7, List 3, Entry 25 (contd.)

higher, scientific and technical education and vocational and technical training of labour under the Government of India Act is under the Constitution controlled by the five items in List I and List III mentioned in Item 11 of List II. Use of the expression "subject to" in Item 11 of List II, Schedule 7 clearly indicates that the legislation in respect of excluded matters cannot be undertaken by the State Legislatures. A 1963 SC 703 (715).

(2) Karnataka State Universities (Second Amendment) Act (1977), S. 11 is not ultra vires State Legislature — Notification curtailing term of professors representing constituency under Sec. 21 (1), (19) of the parent Act — Not invalid — Section 11 is a consequential provision and declaratory in character — It is merely part and parcel of the regulatory power enjoyed by the State under Entry 25 of List III of VIIth Schedule of the Constitution. A 1979 Kant 190 (194, 195) (DB).

Schedule 7, List 3, Entry 26

(1) The general power under this entry must be read subject to the power of the Union under Entry 78 of List I and a legislation with respect to advocates must be held to come under Entry 78 of List I regardless of whether it comes under this entry or not. Thus, the Indian Bar Councils (U. P. Amendment) Act (24 of 1950) being a legislation falling under List I, Entry 78, is ultra vires the U. P. Legislature. A 1954 All 728 (732, 734) (DB).

(2) Barring those entitled to practice in Supreme Court and the High Courts, power to legislate with respect to the rest of practitioners would still seem to be retained under Entry 26 of List III. A 1968 SC 888 (892).

(3) Imposition of stamp duty on the certificate of enrolment under Section 22 of Advocates Act — Constitutionality of — The power to legislate in regard to persons entitled to practise before the Supreme Court and the High Court is altogether excluded from Entry 26, in List III and is made the exclusive field for Parliament — The imposition of such a duty falls in pith and substance under Entry 44 of List III and the prescribing of rates under Entry 63 of List II — Thus the U. P. State Legislature is competent to legislate and impose stamp duty on certificate of enrolment under Section 22 of Advocates Act to be issued by the State Bar Council of U. P. — Hence Sec. 11 (c), Sch. 1-B, Art. 17-A and Sch. 1-B Article 30 of Stamp Act as amended from time to time in its application to U. P. are constitutionally valid. A 1973 SC 231 (237, 238).

(4) Term "profession" includes the work of a document writer within its ambit. 1970 Pat LJR 568 : 1971 BLJR 226 (229) (DB).

Schedule 7, List 3, Entry 27

(1) Under this Entry the Parliament as well as the State Legislatures have power to legislate for rehabilitation of refugees from foreign countries and such legislation cannot be impugned on the ground that it is an extra territorial legislation. A 1952 Cal 679 (682).

(2) The acquisition of land for settlement of refugees as provided in the West Bengal Land Development and Planning Act (21 of 1948) is acquisition for a public purpose and is within the competence of the Provincial Legislature under the Government of India Act, 1935, List 2, Item 9. A 1952 Cal 679 (682) •• A 1951 Cal 97 (99) •• A 1966 Cal 429 (430).

(3) Acquisition of land for rehabilitation of persons displaced from East Pakistan falls under Entry 27 of List III. A 1961 All 520 (521).

(4) The pith and substance of the Displaced Persons (Compensation and Rehabilitation) Act 1954 deals with relief and rehabilitation and is a valid Central Act falling under Entry 27, List 3, Sch. 7. A 1961 Punj 34 (41) (FB).

(5) Punjab Consolidation of Land Proceedings (Validation) Act (6 of 1957) is within the competence of State Legislature to pass the Act. Act so far as it concerns the property which has ceased to be evacuee property having been acquired by Displaced Persons (Compensation and Rehabilitation) Act, 1954 would fall under Entry 18 of List 2 — Even if legislation in relation to that kind of property is not covered by Entry 18 of List 2 it would still fall under Items 27 and 41 of List 3. A 1959 Punj 8 (12) (FB). (Overruled on another point in A 1959 SC 519.)

(6) Sir Currimbhoy Ebrahim Baronetcy (Repealing and Distribution of Trust Properties) Act (1960) — Section 7 (4) of the Repealing Act can be attributed to the legislative power of the State Legislature in respect of Sch. VII, List III, Entry 41 — Entry 27 of that List is also relevant — Further, the Repealing Act received the assent of the President — In case of any repugnancy between the Repealing Act and the Administration of Evacuee Property Act, 1950, the former will prevail by reason of Art. 254 (2) of the Constitution — However the sub-section is not repugnant to any provision of the Administration of Evacuee Property Act, for it is in the nature of additional legislation on the subject. A 1979 SC 687 (694).

28. Charities and charitable institutions, charitable and religious endowments and religious institutions.

[Government of India Act, 1935 — List II, Item 34.]

JAMMU AND KASHMIR

Omit Entry 28 — See Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (22) (c) (iii) (as amended by C. O. 72).

29. Prevention of the extension from one State to another of infectious or contagious diseases or pests affecting men, animals or plants.

[Government of India Act, 1935 — Item 30.]

JAMMU AND KASHMIR

Omit Entry 29 — See Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (22) (c) (iii) (as amended by C. O. 72).

30. Vital statistics including registration of births and deaths.[a]

[Government of India Act, 1935 — List II, Item 14.]

[a] Now see the Registration of Births and Deaths Act 18 of 1969.

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For Entry 30, the following entry shall be substituted, namely:—

"30. Vital statistics in so far as they relate to births and deaths including registration of births and deaths."

—See Constitution (Application to Jammu and Kashmir) Order, 1954, Para. 2, sub-para. (22) (b) (ii) (a) (inserted and amended by C. O. 70 and C. O. 74).

Schedule 7, List 3, Entry 28

(1) Though the words 'religious institutions' were not present at the end of Item 34 in List 2 of Sch. VII of the Government of India Act, 1935, it was held that the power to legislate with respect to religious institutions was included in that item. **A 1947 FC 1 (5).** (Madras Temple Entry Authorisation and Indemnity Act, 22 of 1939.) °° **A 1950 Orissa 47 (52) (DB).** (Section 49 of the Orissa Hindu Religious Endowments Act, 4 of 1939, not ultra vires.)

(2) The word 'charities' in this entry is an appropriate generic term of wide scope and meaning and a power to legislate in respect of 'charities' will include a power to legislate in respect of all matters connected with religious charities and religious institutions. **A 1947 FC 1 (5, 6)** °° **A 1950 Orissa 47 (48) (DB).**

(3) The additional phrases 'charitable institutions' and 'charitable endowments' in this entry are only illustrative of the directions which the power to legislate in respect of charities may, amongst others, take. **A 1947 FC 1 (5, 6).**

(4) Madras Hindu Religious Endowments Act (Madras Act, 19 of 1951) (as amended by Madras Act, 27 of 1954), Ss. 52 (1) (f), 55, 76 (1) and (2), 80, 81 and 82 as in force in Madras area of the State of Mysore and in their application to Maths are intra vires. It has rectified the defects that existed in the section before. **A 1963 SC 966 (971, 972).**

(5) Madras Hindu Religious and Charitable Endowments Act (19 of 1951) (as amended by Andhra Act, 13 of 1955), S. 76 (1) contribution levied under Section 76 (1) is a fee and not a tax is intra vires. **A 1961 Andh Pra 216 (218) (FB).** (W. P. No. 58 of 1953 (Andhra) and W. A. No. 68 of 1956 (Andhra), **Overruled.**)

(6) State Legislature is competent to legislate both for public and private religious endowments under Item 28, List III but in the case of private religious endowments there may be a proprietary interest in the beneficiaries and the Legislature cannot take away that interest and thereby contravene Art. 19 (1) (f) or Article 31 (2). **A 1959 Orissa 17 (19) (DB).**

(7) Bihar Legislature has power to legislate in respect of charities, charitable institutions, charitable and religious endowments and religious institutions situate in the State of Bihar are in so legislating it has power to affect trust property which may be outside Bihar but which appertains to the trust situate in Bihar. **A 1959 SC 1002 (1010).**

(8) Per Mudholkar, J. — Delhi Legislature had competence to make Tibbia College Act (5 of 1952) dissolving a charitable trust and transferring its property, right etc. to another institution, and Entries 10 and 28 of List III permit making a law of this kind. **A 1962 SC 458 (478).**

(9) Subjert-matter of U. P. Intermediate Education Act (2 of 1921), Ss. 16-A to 16-I, added by U. P. Act, 35 of 1958, falls within List II, Entry 11 — Act is intra vires and because it incidentally trenches upon or affects a charitable institution or powers of trustees of the institution it cannot on that account be beyond legislative competence. **A 1966 SC 1307 (1310).**

(10) Under Entry 10, List III the existence of a trust alone gives the power to legislate upon trusts. It cannot be combined with Entry 28, List III to say that religious institutions shall be regarded as public trust for purpose of exercising control over it by legislation. A 1958 Madh Pra 362 (365) (DB).

(11) Bombay Public Trusts Act (29 of 1950), Sections 2 (13) and 18 (1) is intra vires of State Legislature falling under Entries 10 and 28 of List III. A 1962 Bom 12 (21) (DB).

(12) The State Legislature has power to levy a fee under the Constitution of India, Seventh Schedule, List III, Entry 28 read with Sec. 47. The Legislature is, therefore, competent to levy a fee for rendering services in connection with the maintenance, supervision and control over the religious institutions and it is competent to levy the fee retrospectively. **A 1963 SC 966 (971, 972).**

31. Ports other than those declared by or under law made by Parliament or existing law to be major ports.

[Government of India Act, 1935 — List II, Item 18.]

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Omit Entry 31 — See Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (22) (c) (iii) (as amended by C. O. 72).

32. Shipping and navigation on inland waterways as regards mechanically propelled vessels, and the rule of the road on such waterways, and the carriage of passengers and goods on inland waterways subject to the provisions of List 1 with respect to national waterways.

[Government of India Act, 1935 — Item 32.]

JAMMU AND KASHMIR

Omit Entry 32 — See Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (22) (c) (iii) (as amended by C. O. 72).

[a][**33.** Trade and commerce in, and the production, supply and distribution of,—

(a) the products of any industry where the control of such industry by the Union is declared by Parliament by law to be expedient in the public interest, and imported goods of the same kind as such products;

Schedule 7, List 3, Entry 33

(1) Since raw materials used are not the products of the industry, their production, distribution and supply, however, will not be covered by clause (a) of this entry. The regulation of production, supply and distribution of sugarcane used as raw material in the controlled sugar industry would not, therefore, be covered by this entry as it stood before the amendment but fell under Entry 27 of the State List and therefore, the U. P. Sugarcane (Regulation of Supply and Purchase) Act (24 of 1953) was fully intra vires of the U. P. Legislature. **A 1956 SC 676 (690).**

(2) After the amendment by the addition of Cl. (b) to the entry it was possible for Parliament also to legislate in relation to sugarcane but that in no way affected the legislative competence of the State Legislatures to legislate on the same subject-matter. **A 1956 SC 676 (690, 691).**

(3) The effect of the amendment was only to enlarge the scope of the entry but not to affect the legislative competence of Parliament and State Legislatures. **A 1956 SC 676 (690).**

(4) The Essential Commodities Act, 1955, was enacted by Parliament in exercise of its concurrent jurisdiction under this entry and not in exercise of its jurisdiction under Entry 52 of List 1. **A 1956 SC 676 (695) ** A 1969 Ker 154 (161) (FB) **** A 1969 Pat 8 (9) (DB).

(5) Entry is wide enough to include supply and distribution of foodstuff and their storage for all classes of persons including paddy lender — Hence the provisions of the Foodgrains Dealers Licensing Order passed under the Essential Commodities Act (1955) must be held to relate in pith and substance to Entry 33 List III. A 1968 Pat 346 (351) (DB).

(6) (Per majority, Raghavan C. J. contra) — Essential Commodities Act (1955), Sec. 2 (a) (xi) — Notification S. O. 2615, D/- 22-7-1968 declaring Cocoanut husk (raw or retted) as an essential commodity — Coir Retting (Licensing) Order (1968) and notifications issued thereunder cannot be said to be without jurisdiction. Production of husk and certainly of retted husks is part of the integrated activities of the Coir Industry. Therefore there is legislative competence under Entry 33 of List III to legislate with respect to the production of husks, raw and retted. **A 1977 Ker 88 (92 to 94) (FB).**

(7) The Essential Commodities Act 1955 is an Act made under Entry 33 of List III of Sch. VII of Constitution. So it is a law within the meaning of Sec. 2 of the A. P. District Collectors Powers (Delegation) Act (32 of 1969). Consequently, the State Government has power under the Delegation Act to delegate the powers of the Collector to a District Revenue Officer, who is certainly not lower in rank than a Revenue Divisional Officer. The delegation of the powers is therefere competent and valid. A 1977 Andh Pra 103 (109) (DB).

(8) Essential Commodities Act (1955), Section 5 — A. P. Scheduled Commodities (Regulation of Distribution by Card System) Order, 1973, Clause 1 — Constitutionality — S. 5 of the Act and order not unconstitutional. 1979 Cri LJ 1454 (1455, 1456) (DB) (AP).

(9) The production, distribution and supply of wheat and wheat products would fall within Clause (b) of Item 33 List III. Sch. 7 and the validity of the Defence of India Rules especially Rule 35 (5) defining wheat and wheat products as essential commodities cannot be questioned as unconstitutional. A 1964 Cal 279 (283) (DB).

(10) Law relating to control of sugarcane — Parliament is competent to enact law by virtue of Entry 33 of List III — Power conferred on Government under Sec. 3 of Essential Commodities Act and Sugarcane (Control) Order (1955), cannot be challenged as invalid. **A 1970 SC 267 (269).**

(11) Since milk and milk products are foodstuffs, regulation and control of production, supply and distribution of milk

(b) foodstuffs, including edible oilseeds and oils;
(c) cattle fodder, including oilcakes and other concentrates;
(d) raw cotton, whether ginned or unginned, and cotton seed; and
(e) raw jute.]

[a] Substituted for the old Entry 33 by the Constitution (Third Amendment) Act, 1954, S. 2 (22-2-1955).

[a][33-A. Weights and measures except establishment of standards.]

[a] Inserted by Constitution (Forty-second Amendment) Act, 1976, S. 57 (3-1-77).

34. Price control.

35. Mechanically propelled vehicles including the principles on which taxes on such vehicles are to be levied.

[Government of India Act, 1935 — Item 20.]

Schedule 7, List 3, Entry 33 (contd.)

and milk products come within the ambit of Entry 33 List III of Sch. VII of Constitution. Regulating export of milk and milk products from any region in the State of U. P. may incidentally affect the inter-State Trade and Commerce. But in pith and substance the U. P. Milk Act (7 of 1976) provides for regulating production supply and distribution of milk. The Act is therefore not violative of the constitutional provisions. **A 1977 All 515 (519) (FB).**

(12) Amendment of Rice Milling Industry (Regulation) Act, 1958 — The true character and object of the Amendment Act does not relate to any of the matters enumerated in Sch. 7, List 3, Entry 33 and as such the Amendment Act is ultra vires the legislative competence of West Bengal Legislature, A 1975 Cal 235 (239).

(13) West Bengal Relief Undertakings (Special Provisions) Act (13 of 1972), Pre-Ss. 3, 4, 8 — Pith and substance of legislation directly falls under Entry 23 of List III and Act is not ultra vires of State Legislature — The Act intends to give a breathing time to a Sick Industry and thereby encourage it to continue its productive activities — And from this point of view, it may be held that the Act is intra vires the powers of the State Legislature under Item 33 (a) List III. **A 1978 Cal 215 (219, 220) (FB).**

(14) Industries — Manufacture of gold ornaments is industry — Gold (Control) Act 1968 is validly enacted by Parliament. **A 1970 SC 1453 (1460).**

(15) Gwalior Rayons (Rayon Pulp Division) Taking Over Management Ordinance (Kerala Ord. No. 14 of 1978), Sec. 1 — Subject matter of the Ordinance falls fairly and squarely within Entry 52 of List 1 of the VIIth Schedule to the Constitution and not either within Entry 24 or 27 of List II of the said Schedule of the Constitution. Being so ordinance is ultra vires. Governor had no authority to promulgate the Ordinance. A 1979 Ker 56 (68) (DB).

(16) Industries (Development and Regulation) Act (1951), Sec. 18 (b) (1) — State's power to regulate distribution of intoxicating liquor — Neither expressly nor explicitly nor impliedly taken away by the Ethyl Alcohol (Price Control) Orders passed under Sec. 18 (b) (1) of the Act. Under Entry 33 List 3, the Parliament and the State have concurrent powers to legislate regarding the production, supply and distribution of the products of industries notified by the Parliament. **A 1980 SC 614 (622, 623): 1980 All LJ 258.**

(17) As Kerala Raw Cashewnuts (Movement Control) Order seeks to regulate movements of raw cashewnuts which is a food stuff, it is invalid for want of prior concurrence of Central Government as required under Rule 114 of the Defence of Internal Security of India Rules. Consequently, contravention of the order does not constitute an offence. 1979 Cri LJ 770 (772) (Ker).

(18) Bihar Agricultural Produce Markets Act (16 of 1960), Preamble and S. 3 (1) — Constitutionality of Act not covered by Entry 33 of List 3. 1975 BBCJ 1 (16) (Pat) (DB).

(19) Entry 14 of List II of the Seventh Schedule to the Constitution has to be read with Entries 24, 26 and 27 thereof and corresponding entries relating to scheduled industry, that is, Entry 52 of List I and Entry 33 of List III of the said Schedule. 1979 MPLJ 221 (DB) (MP).

Schedule 7, List 3, Entry 34

(1) There was no item in the Government of India Act, 1935, corresponding to this entry. Item 29, List 2, Sch. VII to the Government of India Act, 1935, referred, inter alia, to distribution of goods and it was held that fixation of price was involved in regulating the distribution of articles. A 1946 Cal 197 (204) (DB).

(2) Madras Essential Articles Control and Requisitioning (Temporary Powers) Act (29 of 1949) (As Amended by Andhra Act 1 of 1955), Section 3 is applicable to Government when it distributes the electrical energy produced or generated by it. Consequently it is empowered to control the price of electrical energy despite the fact that it is the only purveyor of the energy to the consumers. A 1959 Andh Pra 538 (543) (DB).

Schedule 7, List 3, Entry 35

(1) Entry 21 covers grant of monopolies — Powers under Entry 21 not restricted by Entry 26 in State List — Ch. IV-A of Motor Vehicles Act — Held validity enacted by Parliament. **A 1960 SC 1073 (1078) ** A 1961 SC 82 (86).**

(2) Assam Motor Vehicles Taxation (Amendment) Acts (15 of 1963) and (12 of 1966) do not fall within Entry 35 of List III

36. Factories.

[Government of India Act, 1935 — Item 26.

37. Boilers.

[Government of India Act, 1935 — Item 21.]

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Omit Entry 37 — See Constitution (Application to J. and K.) Order, 1954. Para. 2, sub-para. (22) (c) (iii) (as amended by C. O. 72).

38. Electricity.

[Government of India Act, 1935 — Item 31.]

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Omit Entry 38 — See Constitution (Application to J. and K.) Order 1954, Para. 2 sub-para. (22) (c) (iii) (as amended by C. O. 72).

39. Newspapers, books and printing presses.

[Government of India Act, 1935 — Item 17.]

Schedule 7, List 3, Entry 35 (contd.)

but are solely concerned with taxes on vehicles within the meaning of Entry 57, List II. They thus do not come in conflict with the Motor Vehicles Taxation Act (9 of 1936) and there is no scope for application of Article 254 (2) of the Constitution. **A 1967 SC 1575 (1576, 1577).** (ILR (1966) 18 Assam 494, **Reversed.**)

(3) Madras Motor Vehicles Rules (1940), Rule 160-C — Does not encroach upon field of State Legislature — The mere fact that a permit-holder may be compelled to pay his tax under Madras Motor Vehicles Taxation Act in time cannot make the rule any the less a rule made for the control of the plying of motor vehicles within the Item 35 of List III. A 1956 Andhra 129 (139) (DB).

(4) M. P. Motor Vehicles Taxation (Amendment) Act (15 of 1965) as it deals with the question of taxes on vehicles and not with the matter of the principles on which taxes on mechanically propelled vehicles are to be levied, falls under Entry 57 of List II and not under Entry 35, List III and is not ultra vires for want of assent of the President. A 1966 Madh Pra 131 (133) (DB).

(5) Motor Vehicles Act (1939), Sec. 68-CC as added by Section 4 of M. V. (Rajasthan Amendment) Ordinance (3 of 1974) — Section is constitutional and not beyond the competence of the State Legislature. **A 1974 SC 1373.**

(6) U. P. Motor Vehicles (Special Provisions) Act (1976), Section 7 — Scheme relating to inter-State route — Amendment operating upon scheme — The matter dealt with by Section 7 falls under Entry 35 or 42 of List III of the Seventh Schedule to the Constitution and is thus a topic on which the State Legislature could legislate. The amending Act is, therefore, not ultra vires the legislative competence of the State of Uttar Pradesh. A 1977 All 251 (258) (DB).

Schedule 7, List 3, Entry 36

(1) The Legislature can insert a taxing clause in the legislation under this entry in order to recoup itself for any expenditure incurred in carrying out the scheme embodied in it. A 1942 All 156 (166, 167).

(2) State Legislature can impose taxes and not merely fees on lands and buildings belonging to a factory. **A 1975 SC 2037.**

(3) The fee levied under Section 6, Factories Act (1948), is not a tax but a fee meant for meeting the expenses of supervision, which became necessary in view of the various regulatory provisions of the Act. Resort to Entry 97 of List I is not necessary for justifying the provisions of Section 6. The section can be justified under this entry itself. A 1954 Raj 178 (181) (DB.)

Schedule 7, List 3, Entry 38

(1) The Madras Electricity Supply Undertaking (Acquisition) Act (43 of 1949) passed by the Madras Legislature was in pith and substance an Act to provide for the acquisition of electrical undertakings and could not be justified as a legislation coming under this entry. **A 1954 SC 251 (252).** (A 1951 Mad 979, **Reversed.**)

(2) Electricity is a concurrent subject and hence Bombay Legislature is competent to provide for levy of surcharge so long as the relevant provisions do not conflict with any provision in the Central Act (Electricity Act) — No conflict in Clause 12 of Schedule in Electricity Act (1910) and Sections 3 and 4 of Bombay Electricity Surcharge Act — Notification issued by Chief Commissioner of Ajmer levying surcharge is not ultra vires the provisions of Electricity Act. **A 1969 SC 227 (234).** (First Appeal No. 67 of 1956 D/- 22-9-1964, **Reversed.**)

(3) Electricity (Supply) Act, 1948, should be deemed to be one falling under Entry 38 of List III of Sch. VII to the Constitution. It cannot be said to fall under Entry 43 or Entry 44 of List I. **A 1976 SC 1031 (1040, 1042, 1044).**

(4) Kerala Essential Articles Control (Temporary Powers) Act, 3 of 1962 is not a permanent legislation with respect to electricity but a temporary one dealing with a temporary situation and hence does not fall under List III Entry 38 of Sch. 7. **A 1976 SC 1031 (1045).** (ILR (1970) 1 Ker 116, **Reversed.**)

Schedule 7, List 3, Entry 39

(1) The Press (Objectionable Matters) Act, 1951, passed by Parliament deals with

40. Archaeological sites and remains other than those [a][declared by or under law made by Parliament] to be of national importance.

[Government of India Act, 1935 — List I Item 15].

[a] Substituted for the words 'declared by Parliament by law' by the Constitution (Seventh Amendment) Act, 1956, S. 27 (1-11-1956).

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Omit Entry 40 — See Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (22) (c) (iii) (as amended by C. O. 72).

OBJECTS AND REASONS

See under List I, Entry 67.

41. Custody, management and disposal of property (including agricultural land) declared by law to be evacuee property.

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Omit Entry 41 — See Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (22) (c) (iii) (as amended by C. O. 72).

Schedule 7, List 3, Entry 39 (contd.)

"newspapers, books and printing presses" mainly and substantially and, therefore, falls under this entry. The Act also incidentally deals with "public order" which is a State subject, but such trespass is a very minor and incidental trespass which will not render the Act unconstitutional. A 1954 Bom 508 (511) : 1954 Cri LJ 1549 (DB).

(2) Central Government can certainly make laws about newspapers and printing presses under Item 39 — It cannot however issue notifications under Charitable Endowments Act in respect of Trust which runs a press and publishes newspaper within one State. A 1971 All 442.

Schedule 7, List 3, Entry 41

(1) Administration of evacuee property has been recognised as a special class of legislation and it has been treated as such by the Constitution, namely, in Art. 31 (5) (b) (iii) and in this entry. A 1953 Sau 73 (75) (DB).

(2) If by the Administration of Evacuee Property Act, 1950, the Legislature has not only legislated with regard to the custody, management and disposal of evacuee property, but it has also by that very piece of legislation declared what property is evacuee property, it was acting within its legislative competence. A 1951 Bom 440 (446, 447) (DB) ** A 1952 Punj 389 (390) (DB).

(3) Though some of the matters to which Section 12 of the Administration of Evacuee Property Act relates might come within the ambit of Entry 18 of List 2, the precise entry under which the matter dealt with in Section 12 falls in this entry. A 1952 Pepsu 12 (14).

(4) Section 10 (a) (iii) of the Evacuee Interest (Separation) Act, 1951, which allows non-evacuee property to be sold cannot be held to be ultra vires the Parliament, because even if non-evacuee property is affected, it is affected incidentally and the Act does not in pith and substance deal with non-evacuee property. A 1957 All 561 (573) (DB).

(5) Question of administering evacuee property cannot involve judicial determination of complicated question of title between ex-evacuee and Custodian — The words "custody, management and disposal" in Entry 41 of List III do not indicate conferment of any such power, as only a civil Court can have. A 1958 Punj 384 (385).

(6) The term "management" in this entry includes all ancillary questions of taking possession of evacuee property, etc. A 1953 Sau 73 (75) (DB).

(7) The expression "disposal" appearing in this entry is wide enough to cover the extinguishment of a mortgage. A 1964 Punj 261 (263) (DB).

(8) A law concerning the property of an evacuee cannot be made under this entry, for it empowers a law to be made in respect of property which has been declared by law to be evacuee property. A 1954 Punj 261 (263) (DB).

(9) List 3 refers to "property declared by law to be evacuee property" and not to "property belonging to an evacuee". Property declared to be evacuee property under Section 7, Administration of Evacuee Property Act is covered by this entry and such property does not cease to be within ambit of Entry 41, merely because the evacuee to whom it belonged at the date of the declaration or vesting has later on died or ceased to be an evacuee. Hence Section 43 of the Act is not ultra vires the Constitution. A 1963 All 101 (104) ** 1972 Tax LR 752 (Bom).

(10) E. P. Evacuees (Administration of Property) Act (14 of 1947) and Administration of Evacuee Property (Chief Commissioners' Provinces) Ordinance (12 of 1949) are valid as regards property in the nature of land but are invalid so far as property other than land is concerned. **A 1960 Punj 341 (345) (FB).**

(11) Punjab Consolidation of Land Proceedings (Validation) Act (6 of 1957), Sections 3 and 4 are within the competence of State Legislature — Even if it is not covered by Entry 18, List II it would fall under Item 27 and Item 41 of List III. **A 1959 Punj 8 (12) (FB). (Overruled** on another point in A 1959 SC 519.)

(12) Goa, Daman and Diu Administration of Evacuee Property Act (1964) does not deal with the question of granting or

[a][42. Acquisition and requisitioning of property.]

[a] Substituted for the original entry by the Constitution (Seventh Amendment) Act, 1956. S. 26 (1-11-1956).

OBJECTS AND REASONS

With respect to the amendment by substitution of this entry it is stated in S. O. R.:

"The existence of three entries in the legislative litsts (33 of List I, 36 of List II and 42 of List III) relating to the essentially single subject of acquisition and requisitioning of property by the Government gives rise to unnecessary technical difficulties in legislation. In order to avoid these difficulties and simplify the constitutional position, it is proposed to omit the entries in the Union and State Lists and replace the entry in the Concurrent List by a comprehensive entry covering the whole subject."— Gaz. of Ind., 1956, Extra., Pt. II, Sec. 2, page 222.

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For entry 42, the entry "42. Acquisition and requisitioning of property, so far as regards acquisition of any property covered by entry 67 of List I or entry 40 of List III or of any human work of art which has artistic or aesthetic value." shall be substituted;

—See Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (22) (c) (iii) (as amended by C. O. 95 (10-8-72).

Schedule 7, List 3, Entry 41—Note 1 (contd.) divesting any person of the citizenship of India and does not infringe the provisions in Entry 17 of List I of Sch. VII to the Constitution of India. The Act of 1964 in 'pith and substance' falls within legislative Entry 41 of List III and if there is an incidental encroachment on the Entry 17 of List I, this encroachment will not affect its validity. Further whatever invalidity was in the Act was removed by the Amending Act of 1970 retrospectively. A 1976 Goa 28 (32).

(13) Sir Currimbhoy Ebrahim Baronetcy (Repealing and Distribution of Trust Properties) Act (1960) Section 7 (4) of the Repealing Act can be attributed to the legislative power of the State legislature in respect of Sch. VII List III; Entry 41, Entry 27 of that list is also relevant. Further, the Repealing Act received the assent of the President. In case of any repugnancy between the Repealing Act and the Administration of Evacuee Property Act, 1950, the former will prevail by reason of Article 254 (2) of the Constitution. However the sub-section is not repugnant to any provision of the Administration of Evacuee Property Act for, it is in the nature of additional legislation on the subject. **A 1979 SC 687 (694).** (ILR (1968) Bom 202 **Reversed.)**

SCHEDULE 7, LIST 3, ENTRY 42

SYNOPSIS

1. Acquisition and requisitioning of property.

2. Provision for payment of compensation.

3. Entry 42, List III and Entry 18, List II.

1. Acquisition and requisitioning of property.— (1) Entry 42 in List 3 is merely a head of legislation. The power to legislate is given by Articles 245 and 246. A 1952 All 88 (89) (DB).

(2) Though land acquisition is dealt with in Entry 42 of List 3, still Union Executive powers cover land acquisition functions also. A 1971 All 452.

(3) Acquisition means and implies the acquiring of the entire title of the expropriated owner, and the entire bundle of rights which were vested in the original holder would pass on acquisition to the acquirer, leaving nothing to the former. **A 1951 SC 41 (54) ** A 1944 FC 62 (65, 66) ** A 1951 All 674 (679) (FB).**

(4) Scope of the meaning of 'Banking' in Entry 45 in List I — Banking Regulation Act (1949), Section 5 (b) — Acquisition of undertaking is covered by 'Property' in Entry 42 in List III, which includes not only assets but also liabilities and obligations of a going concern. **A 1970 SC 564.**

(5) Mere increase of an assessment for land revenue does not involve any acquisition of the land or any rights in or over immovable property. **A 1944 FC 62 (65, 66).** (Case under Government of India Act (1935).)

(6) Amalgamation or merger of certain companies would not amount to acquisition of property. A 1953 Cal 695 (699).

(7) There is a distinction between acquisition of property and resumption. While resumption implies that the person or authority which resumes the property has pre-existing rights over it, acquisition carries no such implication and in general while the effect of resumption is to extinguish the interests of the person whose property is resumed, that of the acquisition is to vest that interest in the acquirer. **A 1955 SC 504 (518).**

(8) There is also a distinction between acquisition and requisitioning of property. In requisitioning the property dealt with is not acquired by the State but is taken out of the control of the owner for the time being for certain purposes. A 1955

Schedule 7, List 3, Entry 42 — Note 1 (contd.)
Nag 153 (157) (DB) ** A 1953 Assam 177 (181) (DB) ** A 1953 Mad 252 (256).

(9) The effect of Seventh Amendment Act, 1956 in Entry 42, List III is that the power of acquisition and requisitioning of property falls in the concurrent list and it makes no reference to the principles on which compensation for acquisition or requisitioning is to be determined. **A 1969 SC 634 (650).**

(10) After deletion of Item 36 in List II and amendment of Item 42 in List III in 1956 the State Legislature is permitted to enact a law of acquisition even without a public purpose and the only obstacle to such a law was Article 31 (2). That obstacle also disappeared if the law in question was within Article 31-A. **A 1961 SC 1649.** (A 1958 Pat 31. **Reversed.**) ** A 1964 Cal 587 (589, 590).

(11) Parliament has legislative competence to enact, laws for compulsory acquisition by the Union of land and other properties vested in or owned by the State. The State of W. B. is not sovereign authority such as to disentitle the Union Parliament to exercise its legislative power under Entry 42, List III — The Coal Bearing Areas (Acquisition and Development) Act (1957) is not ultra vires the legislative competence of Parliament. **A 1963 SC 1241 (1266).**

(12) Madras Estates (Abolition and Conversion into Ryotwari) Act (26 of 1948), Section 1 does not deal with succession to impartible estate — It is validly enacted under Sch. 7, List II, Item 9, of Government of India Act 1935. **A 1963 SC 842 (848).**

(13) The provisions of new Rule (7-a) inserted by Madhya Pradesh Tendu Patta (Vyapar Viniyaman) Niyamavali Sanshodhan Adhyadesh (1965). (Ordinance No. 3 of 1965), Sec. 3 do not pertain to contracts, partnership, agency or commercial and industrial monopolies or acquisition and requisitioning of property falling under Items 7, 21 and 42 of the concurrent list or to any matter falling under other items of that list. A 1966 Madh Pra 110 (114).

(14) The taking over of Oriental Gas Co., under Oriental Gas Company Act 15 of 1960 is within the field of requisition under Entry 42 in List III. Act does not come in conflict with Union Act 65 of 1951 and is intra vires. A 1961 Cal 267 (279): 1961 (1) Cri LJ 639. **(Reversed** on another point in **A 1962 SC 1044).**

(15) Mining Leases (Modification of Terms) Rules made for regulation of mines and development of minerals (1956), do not come within Entry 42 of List III dealing with acquisition or requisitioning of property — They fall within Entry 54 of List 1. **A 1967 SC 964 (968).**

(16) By the amendment of the Constitution in 1956 the distinction between the Union purpose and the State purpose is abolished and a power has been given to the State Government to acquire land for any public purpose so long as the property is within its territorial jurisdiction. A State Government can therefore acquire property for the Union Government under the Central Act. **A 1961 Assam 133 (138) (FB).**

(17) Rehabilitation of persons displaced from East Pakistan falls under Entry 27, List III and since the U. P. Government is competent to legislate for that matter it is competent to acquire land for rehabilitation in U. P. of persons displaced from East Pakistan. A 1961 All 520 (521).

(18) The word acquisition in Entry 42 includes deprivation of property even when there is no transfer of title as such, Madhya Pradesh Abolition of Cash Grants Act (16 of 1963). Secs. 2 (1) and 3, not providing transfer of any title of the grantee but depriving them of their cash grants are regarding 'acquisition of property' — State Legislature competent to enact such legislation under Item 42. A 1965 Madh Pra 77 (80, 81) (DB).

(19) The supermacy of the legislature in India within the constitutional limits of their jurisdiction is complete — Legislature had power to validate past acquisitions by getting over discriminations caused by two existing procedures. Bangalore Acquisition of Lands (Validation) Act 19 of 1963 held valid. **A 1969 SC 477 (482)** (A 1962 Mys 218, **Reversed** on basis of subsequent event.)

(20) Entry 42 of List III which deals with acquisition does not speak where the property should vest after acquisition. **A 1959 SC 475 (479).**

(21) The provisions of the City of Bangalore Improvement Act modifying the provisions of the Acquisition Act are provisions of an existing law with respect to one of the matters enumerated in the concurrent List. The provisions of Sec. 2 of Ordinance (1 of 1960) and Amending Act (13 of 1960) and Sec. 27-A sought to be introduced in the Improvement Act are repugnant to the provisions with respect to the same matters in the Improvement Act and are invalid as not complying with the Art. 213 as having reserved for the consideration of the President. A 1962 Mys 218 (229, 231).

(22) Motor Vehicles Act (1939), Sec. 68-CC as added by Sec. 4 of M. V. (Rajasthan Amendment) Ordinance (3 of 1974) — Section is constitutional and not beyond the competence of the State Legislature. **A 1974 SC 1373.**

(23) U. P. Motor Vehicles (Special Provisions) Act (1976), S. 7 — Scheme relating to inter-State route — Amendment operating upon Scheme — The matter dealt with by Sec. 7 falls under Entry 35 or 42 of List III of the Seventh Schedule to the Constitution and is thus a topic on which the State Legislature could legislate. The Amending Act is, therefore not ultra vires the legislative competence of the State of U. P. **A 1977 All 251 (258) (DB).**

(24) Madhya Pradesh Act (13 of 1955) amending M. P. Housing Board Act (43 of 1950) — Amending Act is not a colourable piece of legislation. 1970 MPLJ 238.

(25) The State Legislature is competent under Entry 42 of List III of the 7th Schedule of the Constitution to enact the U. P. Sugar Undertakings (Acquisition) Act (23 of 1971). 1979 All LJ 730 (735) (DB).

(26) Karnataka Contract Carriages (Acquisition) Act is not an Act which deals with

43. Recovery in a State of claims in respect of taxes and other public demands, including arrears of land-revenue and sums recoverable as such arrears, arising outside that State.

JAMMU AND KASHMIR

Omit Entry 43 — See Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (22) (c) (iii) (as amended by C. O. 72).

Schedule 7, List 3, Entry 42 — Note 1 (contd) any inter-State trade and Commerce. Even assuming that carriage of passengers from one State to the other is in one sense a part of the inter-State trade and Commerce the said Act is not one which seeks to legislate in regard to the said topic. The incidental encroachment on the topic of inter-State trade or Commerce, even assuming there is some, cannot invalidate the Act. **A 1978 SC 215 (229).**

[ILR (1976) Kant 1478 **Reversed.**]

(27) Haryana Minerals (Vesting of Rights) Act (14 of 1973) is ultra vires Art. 31 (2) of Constitution and is also beyond Competence of State Legislature. A 1975 Punj 102 (111) (DB).

2. Provision for payment of compensation.— (1) The entry does not, by itself, import any condition as to the existence of a public purpose or the payment of compensation. These conditions under the Indian Constitution are the subject of a specific enactment in the body of the Constitution in Article 31, Clause (2). **A 1955 SC 810 (811, 812) ** A 1952 SC 252 (284).** (On appeal from **A 1951 Pat 91 (SB)). ** A 1951 All 674 (678) (FB) **** A 1955 Bom 28 (34) (DB). ** A 1955 Sau 80 (85) (DB). ** (1967) 1 Mad LJ 206 (246) (DB) ** A 1966 Assam 51 (55) (DB) ** (1959) 63 Cal WN 751.

(2) In view of the clear provisions of Article 31-A of the Constitution a law providing for acquisition without payment of compensation cannot be questioned. It cannot therefore, be said that Section 9 of Mysore Inam Abolitions Act constitutes a fraud on the Constitution inasmuch as it is a colourable exercise of the powers under Entry 42 of List III of Sch. 7. A 1959 Mys 222 (224, 225) (DB).

(3) 'Acquisition' as used in Entry 42 does not imply payment of compensation — Right to payment of compensation springs from Articles 19, 31. **A 1971 Ker 98 (FB).**

(4) Legislation based on Entry 36 of List II need not necessarily be based simultaneously on Entry 42 of List III. The words "subject to Entry 42 in List III" do not mean that there can be no legislation on the basis of Entry 36, List II without there being also legislation along with it based on Entry 42, List III. (1968) 2 Andh WR 427 (447) (DB). (Hyderabad Inams Abolition Act (VIII of 1955) (as amended by X of 1956), Sec. 3 (2) (g) is valid.)) **A 1969 SC 453 (459) ** A 1952 SC 252 (272).**

[**See also** ILR (1953) Nag 1 (42) (FB).]

(5) Entry 42, List 3 is merely a description of a legislative head and in deciding about the competence of a legislation under this entry the court is not concerned with justice or propriety of principles upon which the determination of the compensation was to be made or the form and manner in which it was to be paid. But even then the legislation must rest upon some principles of giving compensation. **ILR (1956) 8 Assam 379 (406) (FB).**

(6) It is not necessary for purposes of Entry 42 of List 3, that the compensation should be the just equivalent of the property taken or even adequate. The requirement of the entry is that the legislation should relate to acquisition and that it should be acquisition on payment of compensation and not merely a thinly or thickly veiled attempt at seizure or confiscation. **ILR (1956) 8 Assam 379 (415, 433) (FB).**

3. Entry 42, List III and Entry 18, List II.— (1) Entry 18 in List 2 refers to "land, that is to say, rights in or over land." The provisions of Entry 42 in List 3 with respect to the powers of the State Legislature limit the exent of Entry 18 in List 2. Entry 18 in List 2 will exclude from its scope what is mentioned in Entry 42 in List 3. **A 1951 All 674 (679) (FB).**

(2) The argument that Secs. 18, 50 and 55 of Madras Land Reforms (Fixation of Ceiling on Land) Act is a colourable exercise of power under List III, Entry 42 is not open in view of the Seventh Amendment to the Constitution relating to the power of acquisition and of the terms of Article 31-B. It does not provide a power to compel transfer of land from one person to another. A 1967 Mad 352 (359).

(3) Law in respect of rights in or over Land — Madras Land Reforms (Fixation of Ceiling on Land) Act (58 of 1961) is not covered by Entry 18 of List 2 read with Entry 42 of List III and as such State Legislature is competent to enact this Law in order to acquire Surplus Land so as to give effect to policy in Art. 39. **A 1972 SC 425 (436, 437).**

(4) Kerala Agrarian Relations Act (IV of 1961) — Act is not a colourable piece of legislation on the ground of being a device to take money from landowners. The main provisions of the Act clearly fall within Entry 42, List III and Entry 18, List II, Sch. 7. **A 1962 SC 723 (727).**

(5) Scope — Assam Fixation of Ceiling on Land Holdings Act (1 of 1957) is of composite character, providing for a limit of land tenure and also for acquisition by State of excess land — State legislature has ample authority to enact it under Entry 18, List 2 and Entry 42 of List 3 read with Articles 245 and 246. A 1959 Assam 147 (152) (DB).

(6) Kannan Devan Hills (Resumption of Lands) Act (5 of 1971), Secs. 4, 5 — Subject-matter of provisions of Secs. 4 and 5 is covered by Entry 18 of List II and Entry 42 of List III — State Legislature cannot be denied the power to legislate on ground that legislation will affect subject-matter of Entry 52 of List I. **A 1972 SC 2301.**

Schedule 7, List 3, Entry 43

(1) This entry authorises Parliament as also the States to legislate in respect of re-

44. Stamp duties other than duties or fees collected by means of judicial stamps, but not including rates of stamp duty.

JAMMU AND KASHMIR

Omit Entry 44 — See Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (22) (c) (iii) (as amended by C. O. 72).

45. Inquiries and statistics for the purposes of any of the matters specified in List II or List III.

[Government of India Act, 1935 — Item 24.]

JAMMU AND KASHMIR

In its application to the State of Jammu and Kashmir, in Entry 45, for the words and figures "List II or List III", the words "this List" shall be substituted.

—See Constitution (Application to Jammu and Kashmir) Order, 1954, Para. 2, sub-para. (22) (c) (iv) (as renumbered by C. O. 74).

46. Jurisdiction and powers of all Courts, except the Supreme Court, with respect to any of the matters in this List.

Schedule 7, List 3, Entry 43 — Note 3 (contd.) covery of all claims, whether they accrue before or after the Constitution. **A 1954 Trav-Co 518 (520) (FB).**

(2) It has been held that the Bengal Public Demands Recovery Act (2 of 1913), does not fall within this entry since the subject-matter of the Act is not the realisation of a tax which might arise outside the State. A 1954 Cal 447 (451).

(3) Bengal Public Demands Recovery (Validation of Certificates and Notices) Act (II of 1931) falls under Entries 3 and 45 of State List and does not fall under Entry 43 of Concurrent List — State Legislature was competent to enact it — Assent of President under Article 254 (2) was not necessary. A 1964 Cal 165 (171, 173) (DB).

Schedule 7, List 3, Entry 44

(1) It is true the Parliament has no power to make laws in respect of rates of stamp duty payable on an application for enrolment as an advocate. But the payment of stamp duty on such an application under the Bar Councils Act, 1926, was incidental to the object of the Act. In this view, it cannot be held that the proviso to S. 8 (2) (b) of the Act was not within the legislative competence of the Parliament. **A 1958 Andh Pra 63 (65) (SB).**

(2) The U. P. State Legislature is competent to legislate and impose stamp duty on the certificate of enrolment under Sec. 22 of the Advocates Act to be issued by the State Bar Ccuncil of U. P. Hence Sec. 11 (c) Sch. 1-B Article 17-A and Sch. 1-B Art. 30 of Stamp Act as amended from time to time in its application to U. P. are Constitutionally valid. The imposition of such a duty falls in pith and substance under Entry 44, List III. **A 1973 SC 231 (238).**

Schedule 7, List 3, Entry 45

(1) The words "for the purpose of" indicate that the scope of inquiry is not necessarily limited to the particular or specific matters enumerated in any of the Entries in the List concerned but may extend to enquiries into collateral matters which may be necessary for the purpose, legislative or otherwise, of those particular matters. It cannot, therefore, be held that the inquiry which may be set up by law made under this entry is, in its scope and ambit, limited to future legislative purposes only. **A 1958 SC 538 (545).** (59 Bom LR 769, **Reversed.**)

(2) The Commissions of Inquiry Act (1952) is not invalid on ground that federal Structure of the State is jeopardised. Act is within the legislative competence of Parliament. **A 1978 SC 68 (11).**

(3) **Held:** Though the State Government could constitute any commission in respect of the matters of definite importance, such matters must be only relatable to either List II or List III of the Seventh Schedule to the Constitution. In respect of those matters if there is pre-existing Central Commission then, for constituting another Commission, consent or approval of the Central Government is required. (1980) 1 Cal HN 440 (462).

Schedule 7, List 3, Entry 46

(1) The State legislature is competent to take away the jurisdiction of all Courts, including the High Court but excluding the Supreme Court, with respect to any matter in List 3. But it is not competent to reverse the decisions and orders of Courts and to nullify their effect in exercise of such powers. A 1952 Pat 166 (172) (DB).

(2) The Constitution has given the appropriate legislature, whether Parliament or State legislature, power to derogate from the existing jurisdiction of High Court as can be seen from Articles 200, 225 and Item 78, List I, Item 3 List II and Items 1, 2 and 46, List III, Sch. 7. Law like Code of Criminal Procedure (Madras Amendment) Act (Madras Act 34 of 1935) derogating from powers of High Court can, therefore, be passed by the State Legislature without amending the Constitution. A 1959 Mad 261 (268): 1959 Cri LJ 731 (DB).

(3) The amendment of the Mysore High Court Act by Mysore Act, 35 of 1951, effecting a change in the number of Judges by whom a second appeal is to be decided is not ultra vires of the State Legislature inasmuch as the matter falls either under Entry 3 or Entry 65 of List 2, or under this entry read with Entry 13. A 1952 Mys 75 (76).

(4) Scrutiny of Entry 95, List 1 and Entry 46, List III would clearly show that the power to legislate conferred on the concerned legislatures is only in relation to

47. Fees in respect of any of the matters in this List, but not including fees taken in any court.

[Government of India Act, 1935 — Items 25, 36.]

Schedule 7, List 3, Entry 46 (contd.)

subjects assigned to the respective legislatures in those lists. These entries do not derogate from the general power given to the State legislature under Item 3 of List II. A 1959 Andh Pra 3 (6) (DB). (It is within competence of Provincial or State Legislature to amend the Madras Civil Courts Act 3 of 1873 by Madras Civil and Village Courts (Amendment) Act (16 of 1951).)

(5) Item 5 of List 3 read with Item 46 shows that Parliament as also the State Legislature specified in Part A or Part B of 1st Schedule has power to make laws with regard to jurisdiction and powers of High Courts in respect of intestacy and succession and therefcre the Succession Act, 1925 which was made applicable to the State of Mysore on 1-4-1951 used and did confer such jurisdiction. **A 1959 Mys 83 (85) (FB).**

(6) M. B. Muafi and Inam Tenants and Sub-tenants Protection Act is a law relating to special jurisdiction about inam tenants and cannot be said to be repugnant to any provision of C. P. C. and is valid. A 1957 Madh B 63 (64).

(7) The Central Legislature is competent to enact a law regarding the jurisdiction of Courts to try offences under the Penal Code as matters included in the Penal Code are covered by Item 1 of this List. **A 1943 All 26 (31, 32) (FB).**

(8) U. P. High Court (Abolition of Letters Patent Appeals) Act (14 of 1962) (as amended by U. P. High Court (Abolition of Letters Patent Appeals) (Amendment) Ordinance (U. P. Ordinance 12 of 1972) later replaced by U. P. High Court (Abolition of Letters Patent Appeals) (Amendment) Act (32 of 1972), Section 4 — Amending Ordinance and Amending Act — State Legislature was competent to make such amending laws (Per majority). **A 1973 All 596 (FB).**

(9) Public Premises (Eviction of Unauthorised Occupants) Act (1971), Sec. 2 (e) Act in so far as it includes in definition of public premises in Sec. 2 (e) premises belonging to Government Company is nct ultra vires for want of legislative competence. A 1980 MP 106 (109): 1980 Jab LJ 183 (DB).

(10) Public Premises (Eviction of Unauthorised Occupants) Act (1971), Sec. 5 and M. P. Accommodation Control Act (41 of 1961), S. 12 — Both 1971 Act and 1961 Act fall within List III Entries 6 and 7 read with Entry 46 — 1971 Act being later to 1961 Act will prevail over 1961 Act in view of Art. 254 (2) proviso. A 1980 MP 106 (110): 1980 Jab LJ 183 (DB).

(11) The conferment of power on the District Judge to hear appeals from the judgments and decrees of the Subordinate Judge, irrespective of their value, is within the legislative competence of the State Legislature. The impugned legislation would still be valid on the basis of doctrine of pith and substance in spite of the fact that the legislation incidentally results in an encroachment upon legislative field assigned to Parliament: Hence the Punjab Courts (Amendment) Act, 1963, and Haryana Acts 20 of 1977 and 24 of 1976 are valid and were enacted with the requisite legislative competence. A 1980 Punj 1 (17, 18).

Schedule 7, List 3, Entry 47

(1) Each of the entries relating to the levy of fees is to be read as an adjunct to every legislative power including the entries conferring the power to levy particular taxes. This indicates that the Constitution makers conceived of fees being leviable in the course of the levy or collection of taxes, including fees for licences, which, however, must satisfy the test of reasonableness. A 1958 Mad 158 (169) (DB).

(2) Entry 47 List III enables the legislature to impose fees in respect of any of the matters in that list but not including fees taken in any court. This is in terms identical with Entry 96 List I and Entry 66 List II. A fee may be levied even under an enactment relating to imposition of tax. **A 1965 SC 1107 (1122, 1123).**

(3) The State Legislature has power to levy a fee under Entry 28 List III read with Entry 47 List III for rendering services in connection with the maintenance, supervision and control over the religious institutions and it can be levied retrospectively. **A 1963 SC 966 (971, 972) ** A 1961 Andh Pra 216 (218) (FB).** (W. P. No. 58 of 1953 (Andhra) and W. A. No. 68 of 1956 (Andhra), **Overruled.**)

(4) State legislature was competent to enact Section 58, Bombay Public Trusts Act 29 of 1950, under Entry 47, List 3. Contribution which has got to be made by public trusts which are registered does not constitute a tax but is a fee. A 1953 Bom 242 (249) (DB). (Point affirmed but case **Reversed** on another point in **A 1954 SC 388.**)

(5) The Constitution does not contemplate to be an essential element of a fee that it should be credited to a separate fund and not to the consolidated fund. **A 1960 All 462 (465, 466) (FB).** (Court-fees Act (1870), Section 4 and Schedule II, Article 1, Clause (e) (U. P. Amendment) — Court-fee imposed by Amendment is not a tax but a fee — Section 4 and Schedule II, Article 1 (e) as amended by Court-fees (U. P. Amendment) Act (10 of 1959), are within legislative compentence of U. P. Legislature.)

(6) There is an inherent limitation on the legislative power under this entry, namely that the levy should bear a just and reasonable proportion to the services rendered for which fee is exacted. A 1956 Mad 491 (503, 505) (DB) **** A 1954 SC 282 (295, 296, 297) ** A 1954 SC 400 (403) ** A 1954 SC 388 (395).**

(7) Entry 36 of this list read with this entry authorises the levy of fees in connection with control of factories. A 1942 All 156 (166): ILR (1942) All 302: 43 Cri LJ 674 (2). (Case under corresponding Entries 26 and 36 of List 3, Schedule VII of Govern-

EIGHTH SCHEDULE

[Articles 344 (1) and 351.]

LANGUAGES

1. Assamese.
2. Bengali.
3. Gujarati.
4. Hindi.
5. Kannada.
6. Kashmiri.
7. Malayalam.
8. Marathi.
9. Oriya.
10. Punjabi.
11. Sanskrit.
[a][12. Sindhi.]
[b][13.] Tamil.
[b][14.] Telugu.
[b][15.] Urdu.

[a] Added by the Constitution (Twenty-first Amendment) Act, 1967, S. 3 (10-4-1967).

[b] Entries 12 to 14 renumbered as 13 to 15 respectively, ibid.

[a][NINTH SCHEDULE

[Article 31B]

1. The Bihar Land Reforms Act, 1950 (Bihar Act XXX of 1950).

2. The Bombay Tenancy and Agricultural Lands Act, 1948 (Bombay Act LXVII of 1948).

3. The Bombay Maleki Tenure Abolition Act, 1949 (Bombay Act LXI of 1949).

4. The Bombay Taluqdari Tenure Abolition Act, 1949 (Bombay Act LXII of 1949).

5. The Panch Mahals Mehwassi Tenure Abolition Act, 1949 (Bombay Act LXIII of 1949).

6. The Bombay Khoti Abolition Act, 1950 (Bombay Act VI of 1950).

7. The Bombay Pargana and Kulkarni Watan Abolition Act, 1950 (Bombay Act LX of 1950).

8. The Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950 (Madhya Pradesh Act I of 1951).

Schedule 7, List 3, Entry 47 (contd.)

ment of India Act. 1935.) ** A 1954 Raj 178 (181) (DB).

[See also A 1954 All 675 (680).]

(8) Schedule 7 List I item 96 enables Parliament to introduce legislation in regard to matters which are enumerated in that list which does not include the fee payable in Courts other than the Supreme Court. The same must be said of item 66 in List II and item 47 List III. A 1959 Andh Pra 271 (272) (DB).

(9) Bombay Court-fees Act (36 of 1959), Schedule I, Article 16 — Levy imposed is neither tax nor fee in the strict sense — It is within legislative competence of the State under Schedule 7, List 2, Entry 3. Entry 4 in List III excludes the Court-fees from the categories of fees with reference to which that entry empowers State legislature to make laws. A 1962 Bom 106 (114) (DB).

(10) License fee under Section 128 (xiv) of the U. P. Municipalities Act (2 of 1916) held could not be justified either under Schedule 7, List 2, Entry 66 or List 3, Entry 47. **A 1960 Raj 135 (138) (FB).**

(11) State Legislature can impose taxes and not merely fees on lands and buildings belonging to a factory. **A 1975 SC 2037.**

(12) Punjab Agricultural Produce Markets Act (23 of 1961) and Punjab Agricultural Produce Markets (General)) Rules (1962), Rules 29 and 24 (1) — Tax and fee — Distinction — Substantial portion of amount of fees realised must be spent for special benefit of its payers. In spite of this the fee charged by the various Marketing Committees and the Boards both in the State of Punjab and Haryana is a fee and charging of the same is justified and fit to be sustained. **A 1980 SC 1008 (1028, 1037).**

Schedule 9, Entry 2

(1) Bombay Tenancy and Agricultural Lands Act (67 of 1948), is saved from the operation of Part III by Article 31-B and 9th Schedule to the Constitution. A 1957 Bom 155 (158) (DB).

9. The Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948 (Madras Act XXVI of 1948).

10. The Madras Estates (Abolition and Conversion into Ryotwari) Amendment Act, 1950 (Madras Act I of 1950).

11. The Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 (Uttar Pradesh Act I of 1951).

12. The Hyderabad (Abolition of Jagirs) Regulation, 1358F. (No. LXIX of 1358, Fasli).

13. The Hyderabad Jagirs (Commutation) Regulation, 1359F. (No. XXV of 1359, Fasli).

[b][**14.** The Bihar Displaced Persons Rehabilitation (Acquisition of Land) Act, 1950 (Bihar Act XXXVIII of 1950).

15. The United Provinces Land Acquisition (Rehabilitation of Refugees) Act, 1948 (U. P. Act XXVI of 1948).

16. The Resettlement of Displaced Persons (Land Acquisition) Act, 1948 (Act LX of 1948).

17. Sections 52A to 52G of the Insurance Act, 1938 (Act IV of 1938), as inserted by Section 42 of the Insurance (Amendment) Act, 1950 (Act XLVII of 1950).

18. The Railway Companies (Emergency Provisions) Act, 1951 (Act LI of 1951).

19. Chapter III-A of the Industries (Development and Regulation) Act, 1951 (Act LXV of 1951), as inserted by Section 13 of the Industries (Development and Regulation) Amendment Act, 1953 (Act XXVI of 1953).

20. The West Bengal Land Development and Planning Act, 1948 (West Bengal Act XXI of 1948), as amended by West Bengal Act XXIX of 1951.]

[c][**21.** The Andhra Pradesh Ceiling on Agricultural Holdings Act, 1961 (Andhra Pradesh Act X of 1961).]

Schedule 9, Entry 9

(1) Madras Estates (Abolition and Conversion into Ryotwari) Act (26 of 1948), Section 45 — Act is protected by Article 31-B read with Schedule 9, Entry 9 of the Constitution — Section 45 of the Act is not void, and cannot be attacked on the ground that it contravenes Article 14 of the Constitution. **A 1963 SC 842 (848).**

(2) Madras Act (26 of 1948), being included in Ninth Schedule cannot be challenged on ground that it offended Sec. 299, Government of India Act (1935). **A 1960 SC 32 (35).**

Schedule 9 Entry 16

(1) The inclusion of Displaced Persons (Land Acquisition) Act (1948) in the Ninth Schedule does not save the impugned provision from being declared void or from becoming void. A 1970 Delhi 44 (52) (DB).

(2) Provision in a pre-Constitution Act void ab initio is not existing law — Provision does not attract Article 31 (5) or 31-A, inclusion of the Act (Resettlement of displaced Persons (Land Acquisition) Act (1948) in Sch. IX of Constitution notwithstanding) — (Resettlement of Displaced Persons (Land Acquisition) Act (1948), Section 7 (1) (e), Provisos) — Provisos ultra vires Section 299 (2) of the Government of India Act, 1935 — Hence ignored — Provisos not existing law under Article 366 (10) of Constitution. A 1970 Delhi 44.

Schedule 9, Entry 20

(1) West Bengal Land Development and Planning Act (21 of 1948), Sec. 8 (1), Proviso (b) are valid provisions of law under the protection of Article 31-B and Ninth Schedule to the Constitution. Subsequent amendment of Proviso (b) to Section 8 (1) does not curtail further any rights guaranteed under Part III of the Constitution. A 1965 Cal 177 (183) (DB). ** **A 1975 Cal 103.**

(2) West Bengal Land Development and Planning Act (21 of 1948), Sec. 8 — Section continues to be constitutional in view of Constitution (Fourth Amendment) Act 1955 by which Articles 31, 31A, 305 and the 9th Schedule mentioned in Art. 31-B were amended when the Constitution validated the section in the original Act; the section in the Act extended to Tripura also stood validated. A 1962 Tripura 13 (14).

(3) Validity of West Bengal Land Development and Planning Act (21 of 1948), Section 7 does not contravene Article 14 of the Constitution and the attack based on Articles 19 (1) (f) and 31 (2) of the Constitution is futile in view of the provisions of Article 31-B of the Constitution. **A 1961 SC 16 (20).**

[**See however** A 1975 Cal 325 (329) (DB). (W. B. Land Development and Planning Act (as amended in 1955) —Sec. 8 (1) Proviso Cl. (6) second para — Does not get protection of Art. 31-B.)]

22. The Andhra Pradesh (Telangana Area) Tenancy and Agricultural Lands (Validation) Act, 1961 (Andhra Pradesh Act XXI of 1961).

23. The Andhra Pradesh (Telangana Area) Ijara and Kowli Land Cancellation of Irregular Pattas and Abolition of Concessional Assessment Act. 1961 (Andhra Pradesh Act XXXVI of 1961).

24. The Assam State Acquisition of Lands Belonging to Religious or Charitable Institution of Public Nature Act, 1959 (Assam Act IX of 1961).

25. The Bihar Land Reforms (Amendment) Act, 1953 (Bihar Act XX of 1954).

26. The Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 (Bihar Act XII of 1962), (except Section 28 of this Act).

27. The Bombay Taluqdari Tenure Abolition (Amendment) Act, 1954 (Bombay Act I of 1955).

28. The Bombay Taluqdari Tenure Abolition (Amendment) Act, 1957 (Bombay Act XVIII of 1958).

29. The Bombay Inams (Kutch Area) Abolition Act, 1958 (Bombay Act XCVIII of 1958).

30. The Bombay Tenancy and Agricultural Lands (Gujarat Amendment) Act, 1960 (Gujarat Act XVI of 1960).

31. The Gujarat Agricultural Lands Ceiling Act, 1960 (Gujarat Act XXVII of 1961).

32. The Sagbara and Mehwassi Estates (Proprietary Rights Abolition, etc.) Regulation, 1962 (Gujarat Regulation I of 1962).

33. The Gujarat Surviving Alienations Abolition Act, 1963 (Gujarat Act XXXIII of 1963), except in so far as this Act relates to an alienation referred to in sub-clause (d) of clause (3) of Section 2 thereof.

34. The Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961 (Maharashtra Act XXVII of 1961).

35. The Hyderabad Tenancy and Agricultural Lands (Re-enactment, Validation and Further Amendment) Act, 1961 (Maharashtra Act XLV of 1961).

36. The Hyderabad Tenancy and Agricultural Lands Act, 1950 (Hyderabad Act XXI of 1950).

Schedule 9, Entry 24

(1) Where the Ninth Schedule as amended is read aolng with Art. 31-B it is clear that the challenge to the Assam State Acquisition of Lands Belonging to Religious or Charitable Institution of Public Nature Act 1959 (9 of 1961) on the ground that it contravenes Articles 26 and 19 is barred. A 1966 Assam 51 (54).

Schedule 9, Entry 26

(1) It was within the legislative competence of the legislature to have enacted both the parent Act, Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act (12 of 1962) and the Amending Act 1 of 1973 and the mere fact that in some respects the statutory provisions may override the provisions of the general or customary Hindu Law will not make them suffer from any unconstitutional inhibitions regarding the equality and property clauses in Part III of the Constitution The parent Act as amended does conform to the directive principles of State policy more so as they have been admittedly included in the 9th Schedule of the Constitution. **A 1977 Pat 171 (178) (DB).**

Schedule 9, Entry 34

(1) Maharashtra Agricultural Lands (Ceiling on Holdings) Act (XXVII of 1961 as amended by Act XIII of 1962), Preamble and Section 23 is valid — Mention of principal Act without mention of Amending Act in Item 34 of Schedule 9 of the Constitution by Constitution (7th Amendment) Act, 1964, includes all amendments up to the date of the Constitution (7th Amendment) Act. **A 1968 SC 1395 (1400): 1968 Lab IC 1525.**

Schedule 9, Entry 35

(1) Entries 35 and 36 relate to the Maharashtra Act (45 of 1961) and Hyderabad Act (21 of 1950) respectively. Article 31-B gives full protection to an Act and its provisions in the schedule against any challenge on the ground of inconsistency or abridging of any of the rights conferred by Part III of the Constitution. **A 1970 SC 126 (128).**

Schedule 9, Entry 36

(1) Inclusion under Entry 36 Hyderabad Act 21 of 1950 — Act is protected by Article 31-B. **A 1970 SC 126 (128).**

37. The Jenmikaram Payment (Abolition) Act, 1960 (Kerala Act III of 1961).

38. The Kerala Land Tax Act, 1961 (Kerala Act XIII of 1961).

39. The Kerala Land Reforms Act, 1963 (Kerala Act I of 1964).

40. The Madhya Pradesh Land Revenue Code, 1959 (Madhya Pradesh Act XX of 1959).

41. The Madhya Pradesh Ceiling on Agricultural Holdings Act, 1960 (Madhya Pradesh Act XX of 1960).

42. The Madras Cultivating Tenants Protection Act, 1955 (Madras Act XXV of 1955).

43. The Madras Cultivating Tenants (Payment of Fair Rent) Act, 1956 (Madras Act XXIV of 1956).

44. The Madras Occupants of Kudiyiruppu (Protection from Eviction) Act, 1961 (Madras Act XXXVIII of 1961).

45. The Madras Public Trusts (Regulation of Administration of Agricultural Lands) Act, 1961 (Madras Act LVII of 1961).

46. The Madras Land Reforms (Fixation of Ceiling on Land) Act, 1961 (Madras Act LVIII of 1961).

47. The Mysore Tenancy Act, 1952 (Mysore Act XIII of 1952).

48. The Coorg Tenants Act, 1957 (Mysore Act XIV of 1957).

49. The Mysore Village Offices Abolition Act 1961 (Mysore Act XIV of 1961).

50. The Hyderabad Tenancy and Agricultural Lands (Validation) Act, 1961 (Mysore Act XXXVI of 1961).

51. The Mysore Land Reforms Act, 1961 (Mysore Act X of 1962).

52. The Orissa Land Reforms Act, 1960 (Orissa Act XVI of 1960).

53. The Orissa Merged Territories (Village Offices Abolition) Act, 1963 (Orissa Act X of 1963).

54. The Punjab Security of Land Tenures Act, 1953 (Punjab Act X of 1953).

55. The Rajasthan Tenancy Act, 1955 (Rajasthan Act III of 1955).

56. The Rajasthan Zamindari and Biswedari Abolition Act, 1959 (Rajasthan Act VIII of 1959).

Schedule 9, Entry 38

(1) Kerala Land Tax Act (13 of 1961) is not confiscatory — Act is protected by inclusion in Ninth Schedule. **A 1971 Ker 65 (FB).**

Schedule 9, Entry 39

(1) Kerala Land Reforms Act (1 of 1964) (as amended by Act 35 of 1969) is included in the 9th Schedule of the Constitution. The result is only that the provisions thereof shall not be deemed to be void or ever to have become void on the ground that such Act, Regulation or provision is inconsistent with or takes away or abridges any of the rights conferred by any provision in the Fundamental Rights chapter of the Constitution; the inclusion has no effect of widening the scope of the provisions of the Act, the position may probably be different if the case is covered by a particular provision which was found to be unconstitution and in spite of that was included in the Ninth Schedule. Thus Act I of 1964 cannot apply to the land irrespective of the land being agricultural land. 1972 Ker LJ 752 (756) (DB).

Schedule 9, Entry 46

(1) Article 31-B and Sch. 9 to Constitution (as amended by Constitution (Seventeenth Amendment) Act (1964) by including Madras Land Reforms (Fixation of Ceiling on Land) Act (58 of 1961)) in that schedule have cured the defects of constitutional invalidity in that Act since the date of its enactment and it is not necessary for the State Legislature to re-enact it. **A 1972 SC 425.**

Schedule 9 Entry 52

(1) Orissa Land Reforms Act (16 of 1960), Sections 2 (5-a), 2 (13), 2 (3), 36-A, 37 (a) and (b), 37-A, 37-B, 38, 39, 40, 40-A, 43, 45, 51, 52 and 76 (as amended by Act 9 of 1974) — Provisions are constitutionally valid except a part in Section 2 (13). ILR (1975) Cut 843.

Schedule 9, Entry 55

(1) Section 15-A of Rajasthan Tenancy Act (3 of 1955) cannot be struck down as invalid because it does not provide for payment of compensation at market value for land included within the ceiling limit. **A 1972 Raj 218 (220) (FB).**

57. The Kumaun and Uttarakhand Zamindari Abolition and Land Reforms Act, 1960 (Uttar Pradesh Act XVII of 1960).

58. The Uttar Pradesh Imposition of Ceiling on Land Holdings Act, 1960 (Uttar Pradesh Act I of 1961).

59. The West Bengal Estates Acquisition Act, 1953 (West Bengal Act I of 1954).

60. The West Bengal Land Reforms Act, 1955 (West Bengal Act X of 1956).

61. The Delhi Land Reforms Act, 1954 (Delhi Act VIII of 1954).

62. The Delhi Land Holdings (Ceiling) Act, 1960 (Central Act 24 of 1960).

63. The Manipur Land Revenue and Land Reforms Act, 1960 (Central Act 33 of 1960).

64. The Tripura Land Revenue and Land Reforms Act, 1960 (Central Act 43 of 1960).

[d][**65.** The Kerala Land Reforms (Amendment) Act, 1969 (Kerala Act 35 of 1969).

66. The Kerala Land Reforms (Amendment) Act, 1971 (Kerala Act 25 of 1971).]

[e][**67.** The Andhra Pradesh Land Reforms (Ceiling on Agricultural Holdings) Act, 1973 (Andhra Pradesh Act I of 1973).

68. The Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) (Amendment) Act, 1972 (Bihar Act I of 1973).

69. The Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) (Amendment) Act, 1973 (Bihar Act IX of 1973).

70. The Bihar Land Reforms (Amendment) Act, 1972 (Bihar Act V of 1972).

71. The Gujarat Agricultural Lands Ceiling (Amendment) Act, 1972 (Gujarat Act 2 of 1974).

72. The Haryana Ceiling on Land Holdings Act, 1972 (Haryana Act 26 of 1972).

73. The Himachal Pradesh Ceiling on Land Holdings Act, 1972 (Himachal Pradesh Act 19 of 1973).

74. The Kerala Land Reforms (Amendment) Act, 1972 (Kerala Act 17 of 1972).

75. The Madhya Pradesh Ceiling on Agricultural Holdings (Amendment) Act, 1972 (Madhya Pradesh Act 12 of 1974).

Schedule 9, Entry 58

(1) Determination of ceiling area — Tenure holder to get two additional hectares for each adult son — Provision cannot be challenged on ground of discrimination inasmuch as no such benefit is given in case of an adult unmarried daughter since the Act is included in Sch. IX of the Constitution. 1980 All LJ 123 (126).

Schedule 9, Entry 59

(1) Since the West Bengal Estates Acquisition Act 1 of 1954 is included in the Ninth Schedule by the Constitution (Seventeenth Amendment) Act and by reason of Article 31-B this inclusion saves the Act from any attack on the ground of unconstitutionality, with retrospective effect, the constitutionality of the Act cannot be challenged. A 1965 Cal 539 (540).

Schedule 9, Entry 65

(1) Kerala Land Reforms (Amendment) Act, 35 of 1969 came into force on 1-1-1970. It was included in the 9th Schedule of the Constitution by the 29th Amendment of the Constitution in June 1972. **Held** that the inclusion in 9th Schedule gave legal validity to the Act from the date it came into force i.e. 1-1-1970. A 1976 Ker 92 (93).

Schedule 9, Entry 66

(1) What is saved by Article 31-B are the provisions of J. and K. Act (2 of 1980) as they stood on 14-5-1954 when the Act was included in the Ninth Schedule and not any other different provision which was enacted by the State Legislature subsequent to that Act. **A 1959 J and K 35 (39) (FB).**

Schedule 9, Entry 68

(1) It was within the legislative competence of the legislature to have enacted the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) (Amendment) Act, 1972 (Bihar Act 1 of 1973). A 1977 Pat 171 (178) (DB).

76. The Madhya Pradesh Ceiling on Agricultural Holdings (Second Amendment) Act, 1972 (Madhya Pradesh Act 13 of 1974).

77. The Mysore Land Reforms (Amendment) Act, 1973 (Karnataka Act 1 of 1974).

78. The Punjab Land Reforms Act, 1972 (Punjab Act 10 of 1973).

79. The Rajasthan Imposition of Ceiling on Agricultural Holdings Act, 1973 (Rajasthan Act 11 of 1973).

80. The Gudalur Janmam Estates (Abolition and Conversion into Ryotwari) Act, 1969 (Tamil Nadu Act 24 of 1969).

81. The West Bengal Land Reforms (Amendment) Act, 1972 (West Bengal Act XII of 1972).

82. The West Bengal Estates Acquisition (Amendment) Act, 1964 (West Bengal Act XXII of 1964).

83. The West Bengal Estates Acquisition (Second Amendment) Act, 1973 (West Bengal Act XXXIII of 1973).

84. The Bombay Tenancy and Agricultural Lands (Gujarat Amendment) Act, 1972 (Gujarat Act 5 of 1973).

85. The Orissa Land Reforms (Amendment) Act, 1974 (Orissa Act 9 of 1974).

86. The Tripura Land Revenue and Land Reforms (Second Amendment) Act, 1974 (Tripura Act 7 of 1974).]

[f][87. [g][* * * * * *]]

88. The Industries (Development and Regulation) Act, 1951 (Central Act 65 of 1951).

89. The Requisitioning and Acquisition of Immovable Property Act, 1952 (Central Act 30 of 1952).

90. The Mines and Minerals (Regulation and Development) Act, 1957 (Central Act 67 of 1957).

91. The Monopolies and Restrictive Trade Practices Act, 1969 (Central Act 54 of 1969).

92. [g][* * * * * *]

93. The Coking Coal Mines (Emergency Provisions) Act, 1971 (Central Act 64 of 1971).

94. The Coking Coal Mines (Nationalisation) Act, 1972 (Central Act 36 of 1972).

95. The General Insurance Business (Nationalisation) Act, 1972 (Central Act 57 of 1972).

96. The Indian Copper Corporation (Acquisition of Undertaking) Act, 1972 (Central Act 58 of 1972).

97. The Sick Textile Undertakings (Taking Over of Management) Act, 1972 (Central Act 72 of 1972).

98. The Coal Mines (Taking Over of Management) Act, 1973 (Central Act 15 of 1973).

99. The Coal Mines (Nationalisation) Act, 1973 (Central Act 26 of 1973).

100. The Foreign Exchange Regulation Act, 1973 (Central Act 46 of 1973).

101. The Alcock Ashdown Company Limited (Acquisition of Undertakings) Act, 1973 (Central Act 56 of 1973).

102. The Coal Mines (Conservation and Development) Act, 1974 (Central Act 28 of 1974).

103. The Additional Emoluments (Compulsory Deposit) Act, 1974 (Central Act 37 of 1974).

104. The Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (Central Act 52 of 1974).

105. The Sick Textile Undertakings (Nationalisation) Act, 1974 (Central Act 57 of 1974).

106. The Maharashtra Agricultural Lands (Ceiling on Holdings) Amendment) Act, 1964 (Maharashtra Act XVI of 1965).

107. The Maharashtra Agricultural Lands (Ceiling on Holdings) (Amendment) Act, 1965 (Maharashtra Act XXXII of 1965).

108. The Maharashtra Agricultural Lands (Ceiling on Holdings (Amendment) Act, 1968 (Maharashtra Act XVI of 1968).

109. The Maharashtra Agricultural Lands (Ceiling on Holdings) (Second Amendment) Act, 1968 (Maharashtra Act XXXIII of 1968).

110. The Maharashtra Agricultural Lands (Ceiling on Holdings) (Amendment) Act, 1969 (Maharashtra Act XXXVII of 1969).

111. The Maharashtra Agricultural Lands (Ceiling on Holdings) (Second Amendment) Act, 1969 (Maharashtra Act XXXVIII of 1969).

112. The Maharashtra Agricultural Lands (Ceiling on Holdings) (Amendment) Act, 1970 (Maharashtra Act XXVII of 1970).

113. The Maharashtra Agricultural Lands (Ceiling on Holdings) (Amendment) Act, 1972 (Maharashtra Act XIII of 1972).

114. The Maharashtra Agricultural Lands (Ceiling on Holdings) (Amendment) Act, 1973 (Maharashtra Act L of 1973).

115. The Orissa Land Reforms (Amendment) Act, 1965 (Orissa Act 13 of 1965).

116. The Orissa Land Reforms (Amendment) Act, 1966 (Orissa Act 8 of 1967).

117. The Orissa Land Reforms (Amendment) Act, 1967 (Orissa Act 13 of 1967).

118. The Orissa Land Reforms (Amendment) Act, 1969 (Orissa Act 13 of 1969).

119. The Orissa Land Reforms (Amendment) Act, 1970 (Orissa Act 12 of 1970).

120. The Uttar Pradesh Imposition of Ceiling on Land Holdings (Amendment) Act, 1972 (Uttar Pradesh Act 18 of 1973).

121. The Uttar Pradesh Imposition of Ceiling on Land Holdings (Amendment) Act, 1974 (Uttar Pradesh Act 2 of 1975).

122. The Tripura Land Revenue and Land Reforms (Third Amendment) Act, 1975 (Tripura Act 3 of 1975).

123. The Dadra and Nagar Haveli Land Reforms Regulation, 1971 (3 of 1971).

124. The Dadra and Nagar Haveli Land Reforms (Amendment) Regulation, 1973 (5 of 1973).]

[h][**125.** Section 66A and Chapter IVA of the Motor Vehicles Act, 1939 (Central Act 4 of 1939).]

126. The Essential Commodities Act, 1955 (Central Act 10 of 1955).

127. The Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (Central Act 13 of 1976).

Schedule 9, Entry 104

(1) After inclusion of the COFEPOSA in the Ninth Schedule by the Constitutional Amendment which came into force on 10-8-75, Article 31-B of the Constitution becomes applicable to it. The effect is that after inclusion, any action taken under it cannot be challenged on the ground of infringement of fundamental rights. (1976) 1 Cal LJ 148 (155) (DB)

Schedule 9, Entry 125

(1) Though Chapter IV-A of the Motor Vehicles Act is not open to any constitutional challenge having been included in the 9th Schedule of the Constitution, it is open to any aggrieved person to challenge any Scheme on the ground that it is not a valid scheme as required by the provisions of Chapter IV-A of the Act. **A 1977 SC 441 (442). (1976 Jab LJ 851, Reversed.)**

128. The Bonded Labour System (Abolition) Act, 1976 (Central Act 19 of 1976).

129. The Conservation of Foreign Exchange and Prevention of Smuggling Activities (Amendment) Act, 1976 (Central Act 20 of 1976).

130. g[* * *.]

131. The Levy Sugar Price Equalisation Fund Act, 1976 (Central Act 31 of 1976).

132. The Urban Land (Ceiling and Regulation) Act, 1976 (Central Act 33 of 1976).

133. The Departmentalisation of Union Accounts (Transfer of Personnel) Act, 1976 (Central Act 59 of 1976).

134. The Assam Fixation of Ceiling on Land Holdings Act, 1956 (Assam Act I of 1957).

135. The Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958 (Bombay Act XCIX of 1958).

136. The Gujarat Private Forests (Acquisition) Act, 1972 (Gujarat Act 14 of 1973).

137. The Haryana Ceiling on Land Holdings (Amendment) Act, 1976 (Haryana Act 17 of 1976).

138. The Himachal Pradesh Tenancy and Land Reforms Act, 1972 (Himachal Pradesh Act 8 of 1974).

139. The Himachal Pradesh Village Common Lands Vesting and Utilization Act, 1974 (Himachal Pradesh Act 18 of 1974).

140. The Karnataka Land Reforms (Second Amendment and Miscellaneous Provisions) Act, 1974 (Karnataka Act 31 of 1974).

141. The Karnataka Land Reforms (Second Amendment) Act, 1976 (Karnataka Act 27 of 1976).

142. The Kerala Prevention of Eviction Act, 1966 (Kerala Act 12 of 1966).

143. The Thiruppuvaram Payment (Abolition) Act, 1969 (Kerala Act 19 of 1969).

144. The Sreepadam Lands Enfranchisement Act, 1969 (Kerala Act 20 of 1969).

145. The Sree Pandaravaka Lands (Vesting and Enfranchisement) Act, 1971 (Kerala Act 20 of 1971).

146. The Kerala Private Forests (Vesting and Assignment) Act, 1971 (Kerela Act 26 of 1971).

147. The Kerala Agricultural Works Act, 1974 (Kerala Act 18 of 1974).

148. The Kerala Cashew Factories (Acquisition) Act, 1974 (Kerala Act 29 of 1974).

149. The Kerala Chitties Act, 1975 (Kerala Act 23 of 1975).

150. The Kerala Scheduled Tribes (Restriction on Tranfer of Lands and Restoration of Alienated Lands) Act, 1975 (Kerala Act 31 of 1975).

151. The Kerala Land Reforms (Amendment) Act, 1976 (Kerala Act 15 of 1976).

152. The Kanam Tenancy Abolition Act, 1976 (Kerala Act 16 of 1976).

Schedule 9 Entry 149

(1) After inclusion of the Chitties Act, 1975 (Kerala) in the IXth Schedule and the protection afforded by Article 31B of the Constitution, we have difficulty to hold that a statute can be attacked as violative of fundamental rights. The very object and purpose of inclusion in the Ninth Schedule is to place the Act outside the pale of attack on the ground of violation of Part III of the Constitution. A challenge on the ground of violation of fundamental rights is therefore not open after inclusion of the Act in the Ninth Schedule. 1979 Ker LT 688 (689, 690) (DB).

153. The Madhya Pradesh Ceiling on Agricultural Holdings (Amendment) Act, 1974 (Madhya Pradesh Act 20 of 1974).

154. The Madhya Pradesh Ceiling on Agricultural Holdings (Amendment) Act, 1975 (Madhya Pradesh Act 2 of 1976).

155. The West Khandesh Mehwassi Estates (Proprietary Rights Abolition, etc.) Regulation, 1961 (Maharashtra Regulation I of 1962).

156. The Maharashtra Restoration of Lands to Scheduled Tribes Act, 1974 (Maharashtra Act XIV of 1975).

157. The Maharashtra Agricultural Lands (Lowering of Ceiling on Holdings) and (Amendment) Act, 1972 (Maharashtra Act XXI of 1975).

158. The Maharashtra Private Forests (Acquisition) Act, 1975 (Maharashtra Act XXIX of 1975).

159. The Maharashtra Agricultural Lands (Lowering of Ceiling on Holdings) and (Amendment) Amendment Act, 1975 (Maharashtra Act XLVII of 1975).

160. The Maharashtra Agricultural Lands (Ceiling on Holdings) (Amendment) Act, 1975 (Maharashtra Act II of 1976).

161. The Orissa Estates Abolition Act, 1951 (Orissa Act I of 1952).

162. The Rajasthan Colonisation Act, 1954 (Rajasthan Act XXVII of 1954).

163. The Rajasthan Land Reforms and Acquisition of Landowners' Estates Act, 1963 (Rajasthan Act 11 of 1964).

164. The Rajasthan Imposition of Ceiling on Agricultural Holdings (Amendment) Act, 1976 (Rajasthan Act 8 of 1976).

165. The Rajasthan Tenancy (Amendment) Act, 1976 (Rajasthan Act 12 of 1976).

166. The Tamil Nadu Land Reforms (Reduction of Ceiling on Land) Act, 1970 (Tamil Nadu Act 17 of 1970).

167. The Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Amendment Act, 1971 (Tamil Nadu Act 41 of 1971).

168. The Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Amendment Act, 1972 (Tamil Nadu Act 10 of 1972).

169. The Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Second Amendment Act, 1972 (Tamil Nadu Act 20 of 1972).

170. The Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Third Amendment Act, 1972 (Tamil Nadu Act 37 of 1972).

171. The Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Fourth Amendment Act, 1972 (Tamil Nadu Act 39 of 1972).

172. The Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Sixth Amendment Act, 1972 (Tamil Nadu Act 7 of 1974).

173. The Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Fifth Amendment Act, 1972 (Tamil Nadu Act 10 of 1974).

174. The Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Amendment Act, 1974 (Tamil Nadu Act 15 of 1974).

175. The Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Third Amendment Act, 1974 (Tamil Nadu Act 30 of 1974).

176. The Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Second Amendment Act, 1974 (Tamil Nadu Act 32 of 1974).

Schedule 9, Entry 155

(1) Notification dated 24-2-1962 and the West Khandesh Mehwasi Estate (Proprietary Rights Abolition etc.) Regulation (1961) issued by Governor of Maharashtra — Struck down by High Court as being violative of Article 19 (i) (f) — Subsequent inclusion of Regulation of 1961 in Ninth Schedule — **Held** that after inclusion its Constitutional validity could no longer be assailed. **A 1978 SC 916 (918).** (ILR (1969) Bom 584, **Reversed.**)

177. The Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Amendment Act, 1975 (Tamil Nadu Act 11 of 1975).

178. The Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Second Amendment Act, 1975 (Tamil Nadu Act 21 of 1975).

179. Amendments made to the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 (Uttar Pradesh Act I of 1951) by the Uttar Pradesh Land Laws (Amendment) Act, 1971 (Uttar Pradesh Act 21 of 1971) and the Uttar Pradesh Land Laws (Amendment) Act, 1974 (Uttar Pradesh Act 34 of 1974).

180. The Uttar Pradesh Imposition of Ceiling on Land Holdings (Amendment) Act, 1976 (Uttar Pradesh Act 20 of 1976).

181. The West Bengal Land Reforms (Second Amendment) Act, 1972 (West Bengal Act XXVIII of 1972).

182. The West Bengal Restoration of Alienated Land Act, 1973 (West Bengal Act XXIII of 1973).

183. The West Bengal Land Reforms (Amendment) Act, 1974 (West Bengal Act XXXIII of 1974).

184. The West Bengal Land Reforms (Amendment) Act, 1975 (West Bengal Act XXIII of 1975).

185. The West Bengal Land Reforms (Amendment) Act, 1976 (West Bengal Act XII of 1976).

186. The Delhi Land Holdings (Ceiling) Amendment Act, 1976 (Central Act 15 of 1976).

187. The Goa, Daman and Diu Mundkars (Protection from Eviction) Act, 1975 (Goa, Daman and Diu Act 1 of 1976).

188. The Pondicherry Land Reforms (Fixation of Ceiling on Land) Act, 1973 (Pondicherry Act 9 of 1974).

[c][**Explanation.**—Any acquisition made under the Rajasthan Tenancy Act, 1955 (Rajasthan Act III of 1955), in contravention of the second proviso to clause (1) of article 31A shall, to the extent of the contravention, be void.]

[a] Added by the Constitution (First Amendment) Act, 1951, S. 14 (18-6-1951).
[b] Added by the Constitution (Fourth Amendment) Act, 1955, S. 5 (27-4-1955).
[c] Added by the Constitution (Seventeenth Amendment) Act, 1964, S. 3 (20-6-1964).
[d] Inserted by Constitution (Twenty-ninth Amendment) Act, 1972, S. 2.
[e] Inserted by Constitution (Thirty-fourth Amendment) Act, 1974, S. 2.
[f] Inserted by Constitution (Thirty-ninth Amendment) Act, 1975, S. 5.
[g] Omitted by Constitution (Forty-fourth Amendment) Act, 1978, S. 44.
[h] Inserted by Constitution (Fortieth Amendment) Act, 1976, S. 3.

JAMMU AND KASHMIR

(a) After entry 64, the following entries shall be added, namely:—

"64A. The Jammu and Kashmir State Kuth Act (No. I of Svt. 1978).

64B. The Jammu and Kashmir Tenancy Act (No. II of Svt. 1980).

64C. The Jammu and Kashmir Alienation of Land Act (No. V of Svt. 1995).

64D. The Jammu and Kashmir Big Landed Estates Abolition Act (No. XVII of Svt. 2007).

64E. Order No. 6-H of 1951, dated the 10th March, 1951, regarding Resumption of Jagirs and other assignments of land revenue, etc.

64F. The Jammu and Kashmir Restitution of Mortgaged Properties Act, 1976 (Act XIV of 1976).

Schedule 9, Entry 182

(1) W. B. Restoration of Alienated Land Act (1973), Act is protected by Art. 31-B read with Schedule 9, Entry 182 of the Constitution of India and cannot be challenged on ground of infringement of fundamental rights in Part III. (1976) 2 Cal LJ 180 : A 1977 (NOC) 126.

64G. The Jammu and Kashmir Debtors' Relief Act, 1976 (Act XV of 1976)."

(b) Entries 87 to 124, inserted by the Constitution (Thirty-ninth Amendment) Act, 1975, shall be re-numbered as entries 65 to 102 respectively.

Tenth Schedule.— [Repealed by Constitution (Thirty-sixth Amendment) Act, 1975, S. 5 (26-4-75)].

[THE] CONTEMPT OF COURTS ACT (70 OF 1971)

[The text of the Act printed here is as on 29-8-80.]

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24. Repeal.

STATEMENT OF OBJECTS AND REASONS

It is generally felt that the existing law relating to contempt of Courts is somewhat uncertain, undefined and unsatisfactory. The jurisdiction to punish for contempt touches upon two important fundamental rights of the citizen, namely, the right to personal liberty and the right to freedom of expression. It was, therefore, considered advisable to have the entire law on the subject scrutinised by a special committee. In pursuance of this, a Committee was set up in 1961 under the Chairmanship of the late Shri H. N. Sanyal the then Additional Solicitor General. The Committee made a comprehensive examination of the law and problems relating to contempt of Court in the light of the position obtaining in our own country and various foreign countries. The recommendations which the Committee made took note of the importance given to freedom of speech in the Constitution and of the need for safeguarding the status and dignity of Courts and interests of administration of justice.

2. The recommendations of the Committee have been generally accepted by Government after considering the views expressed on those recommendations by the State Governments, Union Territory Administrations, the Supreme Court, the High Courts and the Judicial Commissioners. The Bill seeks to give effect to the accepted recommendations of the Sanyal Committee.

3. The notes on clauses explain in detail the provisions of the Bill—Gaz. of Ind., 29-2-1968, Pt. II, S. 2, Ext., p. 104.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

—Amended by Act 45 of 1976.

[THE] CONTEMPT OF COURTS ACT (70 OF 1971)

[24th December 1971.]

An Act to define and limit the powers of certain Courts in punishing contempts of Courts and to regulate their procedure in relation thereto.

BE it enacted by Parliament in the Twenty-second Year of the Republic of India as follows:—

NOTE.— For J. C. Report see Gaz. of Ind., 23-2-70, Pt. II, S. 2, Ext., p. 33.

Preamble

(1) Contempt of Courts Act 1971 which replaces the contempt of Courts Act 1952 is for more comprehensive legislation and lays down the law in respect of several matters which hitherto had been the subject of judi-

1. Short title and extent.— (1) This Act may be called THE CONTEMPT OF COURTS ACT, 1971.

(2) It exceeds to the whole of India :

Provided that it shall not apply to the State of Jammu and Kashmir except to the extent to which the provisions of this Act relate to contempt of the Supreme Court.

NOTE.— The Act has been extended to Sikkim by S. O. 298(E)/75 and enforced from 16-5-75 — See Gaz. of Ind., 16-5-75, Pt. II, S. 3 (ii), p. 1227.

Preamble (contd.)

cial exposition. It has also brought the law into line with modern trends of thinking in other countries respecting the powers of Courts to punish for contempt. 1975 Cri LJ 1359 (1362) (DB).

(2) Contempt of Courts Act (1971) is the statute which defines and limits the powers of Courts in punishing contempt of Courts. 1976 Cri LJ 158 (159) (DB) (Ker).

(3) Penal provisions under the Act of 1971 do not violate Art. 19 (1) of the Constitution. ILR (1975) 2 Delhi 868 (894).

(4) By reason of Section 13 of the Act the Courts will not initiate contempt proceedings unless the contemner substantially interferes or tends to interfere with the due course of justice. Even prior to 1971 Act the law was no different: the Courts would not initiate proceedings for contempt without the due care and caution they deserve and could not act in cases where there was mere technical contempt. ILR (1975) 2 Delhi 868 (894)

(5) Proceedings started under repealed Act — Can be continued under that Act. 1973 All Cri R 411 : 1973 All LJ 954.

(6) The law relating to contempt as it stands in United States of America cannot be followed in India as the American Constitution does not contain any provision parallel to Article 19 (2) of the Constitution of India. **A 1971 SC 1132 (1141, 1143) : 1971 Cri LJ 844.**

Cases under Old Act of 1952.

(7) Contempt of Courts Act (1952) cannot be held nugatory on the ground of absence of a definition of the term "contempt". A 1954 Pat 203 (206) : 1954 Cri LJ 533 (DB) ** **A 1969 Delhi 201 (207) : 1969 Cri LJ 884 (FB) ** 1968 Ker LT 299 (FB) ** A 1968 Ker 301 (309) (DB).**

(8) Contempt of Courts Act (1952) does not put any unreasonable restriction on the fundamental rights of a citizen granted by Article 19 (1) (a) of the Constitution. A 1954 Pat 203 (206) (DB) ** **A 1969 Delhi 201 (206): 1969 Cri LJ 884 (FB) ** A 1971 SC 1132 (1141) ** 1968 Ker LJ 197 (FB).**

(9) Contempt of Courts Act (1952) is not violative of Article 19 (1) (a) of the Constitution merely because by practice the High Courts do not take evidence in contempt cases. The very nature and purpose of contempt proceedings require speedy disposal. Court is bound to consider contemner's affidavit and follow the principles. Contemner has ample safeguards. A 1967 Andh Pra 299 (311, 312) : 1967 Cri LJ 1470 (DB).

(10) Procedure under the Contempt of Courts Act (1952) provided for the summary trial of the contempt of Court is not violative of Article 14. **A 1968 Punj 217 (230) : 69 Pun LR 673 (FB).**

(11) There is nothing invalid in practice and procedure followed in matters of contempt prior to Constitution on account of Article 21. **A 1960 Pat 430 (440) : 1960 Cri LJ 1254 (FB).**

(12) There is no inconsistency of any kind between the Contempt of Courts Act (1952) and Article 13 inasmuch as Article 19 (2) forms part of Part III of the Constitution itself. **A 1960 Pat 430 (440) : 1960 Cri LJ 1254 (FB).**

(13) The Contempt of Courts Act is not a codifying and consolidating Act — It creates no new powers but merely recognises the powers which already exist and seeks to define and limit them. A 1939 Oudh 131 (136, 137) : 40 Cri LJ 421.

(14) The Contempt of Courts Act has been enacted in order to remove doubts which had arisen as to the powers of a High Court but does not imply that the Legislature recognised that no such power did in fact exist. **A 1926 All 623 (632) : 48 All 711 (SB).**

(15) The offence of contempt may be committed also in respect of proceedings that are imminent but not actually commenced provided the person charged with contempt had knowledge that proceedings were about to be launched. When a proceeding can be called imminent may sometimes be a disputed question and will have to be decided on the facts of a particular case but that is hardly a valid reason for holding that there can be no contempt if no proceeding is pending in Court. 1970 Lab IC 930 (935). (A 1953 All 600, **Dissented from.**)

(16) Resort to contempt proceedings for the purpose of securing execution of the Court's orders for the benefit of a private litigant is not to be encouraged . 1970 Mad LJ (Cri) 139 (DB) (Mys).

Section 1

(1) The Code of Criminal Procedure cannot be applied to Contempt of Court petitions and hence an Advocate General cannot claim to prosecute the contempt petition as a public prosecutor by virtue of Code of Criminal Procedure. 1975 Cri LJ 1359 (1362) : ILR (1974) HP 827 (A 1966 Raj 170; 1942 Nag LJ 449; A 1948 EP 61, **Dissented from.**)

Cases under the Old Act of 1952.

(2) The Act of 1952 does not deal with the offence of contempt of Courts which is pre-

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2. Definitions — In this Act, unless the context otherwise requires.

(a) "Contempt of Court" means civil contempt or criminal contempt;

(b) "civil contempt" means wilful disobedience to any judgment, decree, direction, order, writ or other process of a Court or wilful breach of an undertaking given to a Court;

(c) "criminal contempt" means the publication (whether by words, spoken or written, or by signs, or by visible representations, or otherwise) of any matter or the doing of any other act whatsoever which—

(i) scandalises or tends to scandalise, or lowers or tends to lower the authority of any Court; or

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Section 1 (contd.)

judicial to the security of the State. Hence a State legislation dealing with such a kind of special contempt cannot be struck down as being repugnant to this Act which is one passed by the Parliament. A 1956 Punj 169 (171): 1956 Cri LJ 1015 (DB).

(3) The intention of contempt proceedings is solely not the enforcement of orders but to see that a person who has brought the authority and administration of law into disrespect is punished. (1968) Mad LJ (Cri) 766 · (1968) 2 Andh WR 587 (DB).

(4) The law of contempt of Court is a special law within the meaning of Section 41, I. P. C. Section 4 of that Act makes a contempt of Court punishable. Contempt of Court is, therefore, an offence within the meaning of Chap. IV of the I. P. C. and a defence such as mistake of fact under Section 79. I. P. C. would be open. **ILR (1968) 1 Ker 384 (406) · 1968 Ker LJ 197 (FB).**

(5) Except to the extent that certain forms of contempt in the face of the Court are described in Sections 175, 178, 179, 180 and 228, I. P. C., there is no statutory definition of the offence of contempt of Court although, of course, there is statutory recognition of such an offence in the Contempt of Courts Act, 1952. **ILR (1968) 1 Ker 384 (404): 1968 Ker LJ 197 (FB).**

(6) Contempt jurisdiction is reserved and exercised for what essentially brings the administration of justice into contempt or unduly weakens, it, as distinguished from a wrong that might be inflicted on a private party by infringing a decretal order of Court. A 1970 Mad 14 (16) (DB).

(7) Contempt is an offence not because of its capacity to cause damage to the party but because of its adverse effects to the cause of justice itself. A 1953 All 153 (157): 1953 Cri LJ 402.

SECTION 2 — SYNOPSIS

1. General.
2. Essentials of contempt.
3. Civil Contempt.
   (A) Wilful disobedience.
   (B) Breach of undertaking.
4. Criminal contempt.
   (A) Scandalizing the court.
   (B) Interference with the due course of judicial proceeding.
   (C) Interference with administration of justice.
5. "Court" meaning of.

1. General

(1) Contempt of Court — Mens rea is not required. **1980 Cri LJ 845: (1979) 2 AP LJ (HC) 363.**

(2) Expression 'contempt of Court' though not statutorily defined, is not vague or indefinite. There is nothing unconstitutional in judicial determination by Courts as to the meaning of that expression. **A 1969 Delhi 201 (206, 207): 1969 Cri LJ 884 (FB).**

(3) The principal distinction between the civil contempt and the criminal contempt is that, whereas the function of taking action against a contemner in a civil contempt is to enforce compliance and not so much as to punish him; the function of proceedings in a criminal contempt is to behold the majesty of the law and the dignity of courts In a civil contempt when there is compliance rarely a punishment is imposed, except levying costs. In a criminal contempt normally a punishment would be imposed unless the contemner honestly repents and offers apology which is acceptable to the court as a genuine one. In a matter relating to civil contempt there is an order for the benefit of a party against some other party and the enforcement is for the benefit of one party against the other. On the contrary in a criminal contempt there is some kind of interference with the judicial proceedings or there is a scandalization of the courts to undermine their authority. ILR (1977) Bom 1658: (1976) 2 UCR 358 (Bom) (DB).

(4) Doing of a thing in lawful manner empowered by the statute during the pendency of a case in a Court of law, by itself, cannot amount to a civil contempt under Section 12 nor can it be said to be a criminal contempt under Section 15. In such a case, the question of mala fides or bona fides would not at all arise nor would it be relevant. A 1975 MP 134 (135, 136).

(5) Proceedings ab initio void — All orders passed and all undertakings given would be void — Disobedience of orders or breach of undertakings does not amount to contempt of court. 1980 Mah LJ 404 (413).

(6) Highly placed police officials disregarding order of Court — Even if order obtained by fraud remains valid unless revised — Violation amounts to contempt. 1980 Cri LJ 57: 1979 Pat LJR 174.

(7) Contempt is of two kinds: (a) that which interferes with the due course of justice and pollutes the stream of justice in so far as it concerns parties to a cause, as for instance, when comments are made on a pending case; (b) that which is calculat-

(ii) prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding; or

(iii) interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner;

(d) "High Court" means the High Court for a State or a Union territory, and includes the Court of the Judicial Commissioner in any Union territory.

Section 2 — Note 1 (contd.)

ed to bring a Judge into contempt or lower his authority or to interfere with the lawful process of the Court. A 1953 Orissa 33 (38): 1953 Cri LJ 349 (DB).

(8) There are three categories of contempt: (i) contempt in respect of orders of Court, (ii) contempt by letters or pamphlets addressed to the Judge who is to decide the case with the intention either by threats or flattery or bribery to influence his decisions, and (iii) constructive contempt depending upon the influence of an intention to obstruct the course of justice. A 1955 Andhra 156 (159): 1955 Cri LJ 1028 (DB).

(9) Contempts of Court are of three kinds, namely, those which (1) scandalize the Court (2) abuse the parties concerned in causes before the Court or (3) prejudice the mankind against persons before the cause is heard. A 1938 Mad 248 (249) (DB) ** **A 1943 Lah 329 (325): 45 Cri LJ 445 (FB)** ** A 1955 Hyd 264 (267): 1955 Cri LJ 1590 (DB) ** 1969 Ker LT 513 (519) (DB).

(10) The subordinate authorities are bound to acquaint themselves with the decisions of High Court and in case these rulings are not followed in appropriate cases they are liable to be proceeded with for contempt. 1972 Tax LR 1952 (1953): 37 Cut LT 1232.

(11) Appeal filed before Supreme Court — No ground for not complying with High Court's order unless stay obtained 1978 Cri LJ 789 (All) (DB).

(12) Justification cannot be pleaded in defence in contempt proceedings. A 1975 All 52 (61) (DB).

(13) Clause (ii), Section 2 (c) is strictly confined to judicial proceeding while clauses (i) and (iii) do not use the expression 'the due course of any judicial proceeding' and therefore they are wide enough to cover the Court in its judicial as well as administrative capacity. **A 1973 Orissa 244 (279) (FB).**

(14) Ordinarily until an accused is arrested it cannot be said that any proceeding in a court are imminent against that person because he may never be arrested or he may be arrested after a lapse of months or years When an impugned statement though made before the arrest the accused was published after the arrest of the accused, the publication is when proceedings are imminent and can be subject matter of a charge for contempt of Courts. **A 1970 SC 1694 (1697).**

[A 1968 Ker 301 **Reversed.**]

(15) The position of a contemner is that of an accused person. Whoever alleges that a contemner has disobeyed the orders passed by the Court has to prove this fact. At the same time it is not the requirement of law that oral evidence alone should be led to prove that the contemner had knowledge of the order. Finding can also be given on the basis of circumstantial evidence brought on record. 1976 Tax LR 303: (1975) 101 ITR 180 (DB) (Punj).

(16) Educational Tribunal is a Court for all intent and purposes — High Court entitled to entertain application of contempt of the order of the Educational Tribunal, if the order of the Tribunal has been wilfully disobeyed. (1978) 19 Guj LR 751 (757) (DB).

(17) A member of the Board of Revenue while sitting as a Member of the State Transport Appellate Tribunal set up under the Motor Vehicles Act does not function as a Court within the meaning of the Contempt of Courts Act, 1971 All Cri R 182.

(18) Order of Rent Controller and Appellate Authority under Section 31 of W. B. Premises Tenancy Act has a force of a decree of Civil Court. Such order being executable under the Code of Civil Procedure, the disobedience of such order is not a matter which should be dealt with under the Contempt of Courts Act. ILR (1971) 1 Cal 23 (DB).

(19) Substance of charge was that contemners were guilty of criminal contempt having uttered words which tended to bring into contempt the authority of the court besides interfering with or obstructing proceedings of Court — Matter falling within purview of Section 228 Penal Code — Application under Contempt of Courts Act not maintainable. 1977 WLN (UC) 265 (268) (DB) (Raj).

(20) Section 456 of the Criminal Procedure Code (1974) corresponding to the Section 522 of the Code of Criminal Procedure of 1898 in express terms empower a Court to restore possession of immovable property when a person is convicted of an offence attended by criminal force or criminal intimidation etc. whereby any person has been dispossessed of any immovable property. Since there is no similar or even remotely analogous provision thereto in the Contempt of Courts Act, 1971; therefore, it would be inept to read any inherent power to pass such ancillary orders under the provisions of this statute. 1977 Pun LJ (Cri) 342 : 1978 Cri LJ 612 (DB).

2. **Essentials of contempt.**— (1) There is no contempt in refusing to obey orders of the Court where the party charged, without fault on his part, is unable to comply therewith. 1979 Ker LT 346 (349) : ILR (1979) 1 Ker 497 (DB).

(2) There can be no comprehensive or final definition of what would constitute contempt of Court; but any conduct which has the effect of diminishing the prestige and authority of the Court, which is likely to lower the esteem of the Court in the minds of the public and which gives an impression that, with impunity, the orders of the High Court could be disobeyed by

Section 2 — Note 2 (contd.)

mere stratagem or contrivance, would certainly amount to contempt. (1969) Mad LW (Cri) 25 (27, 28) (DB).

[See also A 1953 Orissa 33 (38) : 1953 Cri LJ 349 (DB). (Any act which is calculated to disturb the confidence of the public in the unquestioned effectiveness of the orders of the Court even against the highest executive authority is contempt of Court.)]

(3) Letter written by contemner to Union Home Minister regarding corruption in judiciary — Sole object in writing the letter was to invite the attention of the concerned authorities to increasing corruption — No improper motive or malicious intention attributable — Not a fit case for taking action against contemner. 1978 Cri LJ 1440 (1444) : 1978 Raj LW 224 (DB)

(4) Act of contemner must be calculated to obstruct or interfere with the course of justice and the due administration of law. **ILR (1971) 1 Delhi 14 (FB).**

(5) A person cannot be punished for contempt of Court unless he is proved to have knowledge of the contents of the order of the Court which is alleged to have been violated. 1971 All WR (HC) 157 ** A 1972 Pat 465 (472).

[See also A 1970 SC 1767 : 1970 Cri LJ 1520. (Contempt for breach of prohibitive order of Court — Knowledge of exact order sufficient — Official communication not a condition precedent when there is no reason to doubt authenticity of it.) ** 1974 Cri LJ 529 (536) (All) ** ILR (1971) 1 Cal 373. (Contempt proceedings — Appeal by contemner against sentence of fine — Ad interim stay granted on last day for payment of fine — Communication of the order to Sheriff's office by party's Advocate on same day — Advocate's letter in absence of suspicion about its genuineness authenticity or bona fides should be accepted as sufficient intimation of Court's order.)]

[See however A 1972 Cal 84 (87, 88). (No liability will arise if the order claimed to have been flouted has not been served on the contemner but only communicated to him and the act complained of is anterior to such communication.)]

(6) The mere statement in an application for transfer that a Magistrate is friendly with a party who happens to be an advocate and enjoys his hospitality or has friendly relations with him will not constitute contempt unless there is an imputation of some improper motives as would amount to scandalizing the court itself and as would have a tendency to create distrust in the popular mind and impair the confidence of the people in the courts. **A 1972 SC 989 (993 to 995) : 1972 Cri LJ 620.**

(7) Proceedings in contempt — Vague and general allegations not sufficient to make out a case for proceedings in contempt of Court. **1972 UJ (SC) 462 (2) (463).**

(8) When allegations have been made and in the show cause notice those allegations have been made mention of, the contemner has to give some explanation to them provided he had knowledge. If that explanation in response to the show-cause notice turns out to be contemptuous to find fault with him for that would be like luring one into a trap. That by itself cannot constitute contempt which has to be proved dehors the same and independently. 1977 Cut LR (Cri) 279 : 1977 Cri LJ (NOC) 253 (Orissa) (DB).

(9) Contempt — Stay order — Delay and laches in communicating it by superior authority to concerned authority — Latter carrying out the stayed action — **Held**, both authorities commit contempt — However, unqualified apology accepted. 1978 BLJ 717 : 1979 Cri LJ (NOC) 85 (DB) (Pat).

[See however 1978 Cri LJ 612 (614) (DB) (Punj). (Order of allotment of land — Considerable delay in implementation — Consequent order of Naib Tahsildar directing possession under challenge — **Held** that the inevitable delay in implementation by officials, not sufficient to hold that they were in gross contempt.)]

(10) Injunction — Order of Court for imprisonment and attachment of property — Person to be arrested not specified nor particulars of property mentioned — Order illegal — Disobedience of order by Government — Does not amount to contempt. **A 1980 SC 600 (604) : 1980 Lab IC 384.**

(11) Party not applying for production of certain document by opposite party — Circumstances under which opposite party refused to produce the same not known — It cannot be held that opposite party was guilty of contempt. ILR (1971) 21 Raj 209.

(12) Contempt of Court — Judgment of Supreme Court declaring resolution of Town Municipal Council allowing conversion of certain lecture hall into a cinema hall as bad on ground of contravention of Town Planning Scheme — Chief Officer and President calling a meeting of Municipal Council which passed a resolution recommending to Government to revoke the Town Planning Scheme — No direction given to the licencee to stop exhibition of the films in the hall as they had no power to do so — **Held** that Chief Officer and President were not guilty of any contempt but the licencee was guilty of contempt in exhibiting the films in the hall which could not be used as cinema hall according to the judgment of the Supreme Court. **A 1976 SC 994 : 1976 Cri LJ 722.**

(13) Previous order by Civil Judge, in a suit for dissolution of partnership, for inventory at the instance of petitioner — Subsequent suit in Munsif's Court by plaintiff for injunction — Temporary injunction granted — Order for inventory in effect nullified — In absence of prohibitory order by Civil Judge, issue of temporary injunction by Munsif, held did not amount to contempt. 1971 All WR (HC) 885.

(14) Where pending a civil suit filed by the employee challenging the employer's notice to terminate the contract of service, no interim injunction was asked for, and the employer issued second notice terminating the services, the employer's act would not constitute contempt of Court.

The order terminating service does not threaten the employee to withdraw the whole or part of his suit. The mere circumstance that the reliefs claimed have become infructuous on account of the termination order would not establish contumacy. The plaintiff is free to amend his plaint and ask for a relief against the ter-

Section 2 — Note 2 (contd.)

mination order. **A 1974 SC 642 (644) : 1974 Cri LJ 594. (A 1971 Cal 178, Reversed.)**

(15) Interim injunction to Electricity Board not to give effect to notification enhancing rate for supply of electricity — Increase of rates — Order clearly showing that payment was not to be made as per revised rates — No contempt of order of Court. (1980) 1 Cal LJ 528 (530).

(16) Dismissal of teacher by management — Termination by Deputy Director of Education — High Court staying order of termination — Management not reinstating teacher nor allotting any work — Paying authority started giving salary — Held that there being no positive orders for reinstatement and payment of salary, if the manager thought that his suspension order revived, it cannot be said that he was guilty of contempt. 1977 All LJ 268 : 1977 Cri LJ (NOC) 171.

(17) The court while quashing the order of dismissal of a Government servant under Article 226 of the Constitution did not say anything about the consequential relief of arrears of salary. It was held that it could not be said that the Court had impliedly issued a mandamus requiring the Government to pay to the petitioner arrears of salary. Hence the failure of the Government or its officers to pay the amount did not amount to contempt. 1975 Cri LJ 1283 (1286, 1287) (All).

(18) Government servant — Termination of service — Order of termination is effective after it is communicated to servant — Order by High Court maintaining status quo — Termination order, however, already communicated before order of status quo — No contempt of court committed. 1973 Chand LR (Cri) 445 (449) (Punj) ** ILR (1976) Him Pra 80 (84).

[See also 1980 UJ (SC) 142 (144) : (1980) 1 Serv LR 526. (Incumbent relieved from post much before the Court granted maintaining status quo — Absence of order from Court directing authorities to reinstate incumbent — No contempt could be said to have been committed by the authorities.)]

(19) Complaint case under Section 264, I. P. C. — Lawyers advising co-complainant to compromise or withdraw the case — No contempt of Court — It is open to the complainant to accept that advice or reject it. 1972 All Cri R 436 (438).

(20) Complaint under Section 364, I. P. C. — Some lawyers for accused obtaining signatures of other lawyers on vakalatnama to prevent them from accepting Vakalatnama for the complainant — No action under the Act possible — Every person has got a right to engage as many lawyers as he chooses. 1972 All Cri R 436 (438).

(21) Criminal complaint dismissed as compromised — No further action taken on it — No contempt if some Criminal act is again committed against complainant. 1971 Sim LJ (HP) 274.

(22) In law, there is nothing to indicate or suggest that before a party seeks to prosecute a Receiver in respect of an offence committed by him with reference to the property coming into his possession in the capacity of a Receiver, he must obtain the prior leave or sanction of the Court which appointed the Receiver. Therefore a party seeking to prosecute a Receiver cannot be held guilty of contempt. (1970) 2 MLJ 462 : 83 Mad LW 459.

(23) A person cannot be prosecuted for committing contempt of Court if he is instrumental in the breach of a convention which is against the law for, such a convention creates no legal obligation and cannot bind parties — Wrong information supplied by a party to his counsel with a view to secure wrongful gain cannot per se be declared to be contempt of Court. A 1959 All 211 (213) : 1959 Cri LJ 406 (DB).

(24) Suit regarding a matter of national importance pending — Expression of opinion only about the matter which is of ex facie judicial nature is a contempt of court. (Obiter dicta). **ILR (1971) 1 Delhi 14 (FB).**

3. Civil contempt.— (1) A civil contempt is a failure to obey the order issued for the benefit of the opposite party and the principal object of action taken in respect of it is to secure the enforcement of the order. A 1951 Pat 443 (444) : 52 Cri LJ 558 (DB) ** A 1955 Mad 121 (129) (DB) ** A 1954 Orissa 167 (170) : 1954 Cri LJ 988 (DB) ** 1964 (1) Cri LJ 449 (451) (Cal) (DB) ** (1961) 65 Cal WN 722 (DB).

(2) Final order of appointment of receiver passed by Court with consent of parties — Contemner undertaking to hand over talkies to receiver, and not to interfere in the running of the talkies — Flagrant breach of undertaking — Amounts to civil contempt. ILR (1979) 1 Delhi 280 (281) (DB).

(3) The High Court can initiate contempt proceedings suo motu even in a civil contempt. No particular form of procedure is necessary so long as the proceedings are initiated giving an opportunity to the contemner to defend himself. Article 21 of the Constitution is not in any way violated thereby. A 1974 Mad 313 (316) : (1974) 1 Mad LJ 155.

(4) Declaratory judgment of High Court declaring that A was entitled to continue in service of Rubber Board until validly terminated — Chairman of Board not permitting A to resume his duties is guilty of civil contempt. 1976 Ker LT 879 (DB).

(5) Framing of charges by Magistrate against an accused does not amount to 'Civil Contempt' except in special circumstances. 1980 All LJ 892.

(A) Wilful disobedience

(5A) Disobedience has to be wilful but an element of obstinacy, rebellion or defiance need not be present — 'Wilful' has the same meaning in law of contemnt as in other branches of law — No need to prove contumacity — It is synonymous with wilfulness. A 1979 Delhi 202 (211) : ILR (1979) 2 Delhi 156 (DB)

[See also 1977 Cri LJ 1174 (1177) : 1976 BLJR 667 (Pat) (Civil Contempt — Essential ingredient is "wilful disobedience" and not any or every disobedience due to various reasons. The expression connotes purposeful and clear intention to flout.) ** 1976 Ker LT 879 (DB). (Expression "wilful" is intended only to exclude casual or acci-

Section 2 — Note 3 (contd.)

dental or unintentional act.) ** (1971) 73 Pun LR 344. (Wilful default required — Mere negligence not sufficient.)]

(6) A contemptuous disobedience of the order of the High Court must necessarily interfere with and obstruct the administration of justice and amounts to contempt. **A 1973 Orissa 244 (270) (FB).**

(7) S. D. M. Labouring under a bona fide impression that possession of land was not delivered to any party by the receiver — Receiver in fact handing over possession but failing to report action taken — Property attached as per orders of High Court under bona fide belief that possession was not handed over — Later on S. D. M coming to know of his mistake vacating order of attachment — S. D. M. not liable for contempt of Court. 1978 Raj Cri C 194 (195).

(8) There can be wilful disobedience only if there is some material to indicate that the person proceeded against has custod or control of the documents ordered to be produced or that he was in a position to produce them in the Court and he wilfully kept them away from the Court 1978 Cri LJ 466 (467) ** (1977) 2 Mad LJ 464 (DB). (Appln No. 3219 of 1975, in C. S. No 85 of of 1970 D/- 19-10-1976 (Mad), **Reversed.)**

(9) Merely because an order is enforceable by a party to the action in whose favour it has been made, it cannot be said that disobedience to it cannot be contempt of Court A 1973 Cal 483 (485).

(10) Mere inaction on the part of the Government or its servants to take any action to reinstate a decree-holder whose dismissal has been declared to be void or ineffective and grant him all the benefits and privileges of his service will not amount to contempt of Court, but, if the conduct of the particular Government servant, whose duty it is to give effect to the decree, shows that he has wilfully and deliberately refrained from giving effect to the decision of the civil Court, a case of contempt of Court may arise. **1975 Cri LJ 679 (685 to 687) : (1974) 2 Punj 56 (FB).**

(11) Arbitration proceedings — Injunction granted by Court — Disobedience of order every day — Order of Court is meant to be obeyed and if the person chooses to disobey it every day he cannot avoid the consequences by pleading that he has been previously punished. This would amount to putting premium on contumacious disobedience and reduce Courts to mere helpless spectator. 1980 Cri LJ (NOC) 109 (DB) (Delhi)

(12) Where the attention of the contemners was drawn to the fact that time bound orders of the Court were not carried out and that as a result thereof the contempt petitioner was denied the benefit of the just relief granted to him by the Court and still they did not make further inquiries and even when they were warned of the consequences of contempt, they persisted in disregarding the order of the Court, the conclusion as to wilful disregard could justly be drawn. (1978) 19 Guj LR 378 (383) (DB).

(13) Contempt — Disobedience to writ of certiorari — Writ of certiorari quashing certain orders — Action in disregard of such quashing amounts to disobedience. 1977 Cri LJ 1174 (1178) : 1976 B LJR 667.

(14) The Reader in the D. M.'s Court is under a duty to accept a prohibitory order issued by the H. C. to the D. M. In refusing to accept the order and placing the same before the D. M. immediately on receiving the information of the order he wilfully disobeys and commits contempt of the High Court. 1974 Cri LJ 529 (539) (All).

(15) For obeying the order of the Court, it is not necessary for the officer to approach any of the higher authorities. They are obliged to obey the order of the Court irrespective of any advice given by superiors. 1977 Cri LJ 1809 (1817) : (1978) 2 Mah LR 159 (DB) (Bom).

(16) Orders of Courts — State officials must follow them — Their correctness or validity not to be judged by officials. 1975 Cri LJ 1766 (1770) : 1975 MPLJ 706 ** 1973 Cri LJ 137 (140) : 1972 BLJR 199.

[See also A 1973 Ker 216 (217). (High Court's direction to reconsider — Government's refusal to reconsider the matter saying it to be unnecessary amounts to flouting the order of Court.) **(Reversed** on another point in **1975 Ker LT 551 : A 1975 Ker 189.)]**

(17) High Court directing forest officer to release timber in favour of petitioner on his furnishing security — Security amount deposited — Obtaining orders for release of timber — Forest Officer refusing to comply with orders amounts to Contempt of Court. 1978 Sim LC 367 (HP).

(18) Disrespect for orders of Courts — High Court directing its officer to serve rule nisi — Police officer behaving with him in nasty and irresponsible manner is reprehensible. (1969) 71 Pun LR 715.

(19) Where a senior judicial Officer with an experience of 23 years, when serving as a Commissioner of Hindu Religious Endowments, Orissa, refused to be bound by a decided case of Orissa High Court on ground that he had moved the Supreme Court against that High Court decision and as such the matter was sub judice, while, in fact, only a petition was pending in High Court for certificate to appeal to Supreme Court, the judicial Officer was deliberately avoiding to follow the decision by giving wrong and illegitimate reasons and his conduct was clearly mala fide and amounted to disobedience and disregard of Court by acting in opposition to the authority, justice and dignity thereof and thereby bringing the administration of law into disrepute **A 1972 SC 2466 (2468, 2469) : 1973 Cri LJ 19.**

(20) High Court during the writ proceedings ordered stay of the order of the Commissioner of Endowments, Orissa. The order was communicated to the Commissioner, still he took action to flout the stay order of the High Court. The Commissioner was therefore held to have committed contempt of High Court. 1972 (2) Cut WR 1876.

(21) Stay of the orders of the Commissioner of Endowments of Orissa by High Court — Communication of stay orders to the Commissioner — Commissioner defying stay order and issuing orders for implementation of orders stayed — Show cause notice to the Commissioner — Commissioner justi-

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fying his action and not expressing regret — **Held** Commissioner was guilty of contempt of High Court. (1972) 2 Cut WR 1857.

(22) Maintenance pendente lite and expenses of proceedings ordered to be paid to wife — Husband wilfully failing to comply with orders in order to harass wife — Husband guilty of contempt of Court. 1974 Pun LJ (Cri) 430.

(23) Order of Court restraining alienation of suit land in any manner whatsoever — Party hardpressed to sell land to clear off taccavi loans and fine without permission of Court — Amounts to contempt of Court. 1977 Pun LJ (Cri) 201 (204).

(24) A corporation (Municipal Board in the case) is liable to be punished by imposition of fine and by sequestration for contempt for disobeying orders of competent Courts directed against them. A command to a Corporation is, in fact, a command to those who are officially responsible for the conduct of its affairs. If they, after being apprised of the order directed to the Corporation, prevent compliance or fail to take appropriate action, within their power, for the performance of the duty of obeying those orders, they and the corporate body are both guilty of disobedience and may be punished for contempt. **A 1970 SC 1767 (1770): 1970 Cri LJ 1529.**

(25) Disregard of Court's interim injunction — Contemner not party to proceedings — Having notice of injunction against him — Contemner guilty — Apology accepted. 1974 KLT 826.

(26) Complaint for offence under Section 420, I. P. C. — Compounding — Acquittal on basis of undertakings — Breach of undertakings, held amounted to wilful disobedience of order of Court. **A 1979 SC 1536 (1536): 1979 Cri LJ 960.**

(27) Disobedience of Court's order alleged — Order not produced — Action for contempt not possible. (1977) 79 Pun LR (D) 145: 1977 Cri LJ (NOC) 10: 1977 Chand LR (Cri) 23 (Delhi).

(28) Charge of contempt of Court for disobeying its order — Burden of Proof — Those who assert that alleged contemners had knowledge of order must prove this fact beyond reasonable doubt — In case of doubt benefit ought to go to person charged. **A 1970 SC 1767 (1770, 1771): 1970 Cri LJ 1520.**

(29) Every judgment-debtor has a right to challenge the decree in a superior court and to obtain the stay of its operation. If he proceeds to obtain such an order, it does not mean that he intends to disobey the decree till the operation of the decree is stayed. A 1975 All 213 (214).

(30) Contempt of Court — Petition for revoking licence to exhibit films on basis of Supreme Court judgment — District Magistrate refusing to act on photostat copy of judgment unless a certified copy was produced and granting renewal of license for few days under bona fide belief that it was not prohibited by High Court judgment — No wilful disobedience — **Held** no contempt. **A 1976 SC 994 (996): 1976 Cri LJ 722.**

(31) Proceedings for contempt are quasi criminal in nature and the Court must be satisfied about the guilt of the appellant beyond reasonable doubt, before action is taken thereon. Where a Court directs a party to produce a particular deed, but it is not proved that the document is in the custody of the party so directed, his failure to produce it cannot be regarded as wilful and he cannot be convicted of contempt. A 1974 Mad 313 (317, 318): (1974) 1 Mad LJ 155.

(32) Labour Court's award ordering employer to deposit amount for payment to employee — Writ petition by employer challenging award dismissed — In special appeal High Court by interim order permitting employee to withdraw half of amount deposited under award on condition that if appeal was allowed amount drawn would be deducted from his Provident Fund — Appeal allowed — Application by employer to enforce payment out of Provident Fund under High Court's Interim Order — Filing of objections by employee held did not amount to contempt of High Court by wilful disobedience of its interim order. 1976 Cri LJ 359 (359): 1976 All LJ 637.

(33) Decree holding termination of services of employee and ordering reinstatement — Employee reinstated — No direction in the decree about payment of arrears of salary for a period prior to reinstatement — Competent authority having power to treat the prior period on duty or otherwise treated is as not on duty — **Held** there was sufficient compliance with the decree and there was no wilful disobdience or flouting of the decree. (1979) 1 Serv LR 190 (192) (DB) (Punj).

(34) Disobedience of the order of High Court — Party injuncted from changing nature of the land by constructing building — Party only putting roof on the building constructed before the order reached him — No change in the nature of the land — No disobedience of the order of Court. (1974) 1 Cri LT 365 (Punj).

(35) The petitioner was removed from the office of Pradhan of Gaon Sabha. He filed a writ petition and the court passed an interim order staying further proceedings for removal. Thereafter the officer took away from the petitioner the papers and documents relating to the office of the Pradhan. **Held,** the act of the officer did not amount to disobedience of the interim order as the order of removal became effective as soon as it was passed and the interim order was of no utility and was not capable of being disobeyed. The recovery of documents from the petitioner, which he had kept without any authority of law, was not a part of proceedings of removal and hence the officer had committed no contempt. (1975) 1 All LR 670 (All).

(36) Disobedience of compromise decree or consent order — Does not amount to contempt. **A 1979 SC 1528 (1532): 1979 Cri LJ 952.**

(37) Wilful disobedience of orders of Court — Question as to — Mistaken advice given by counsel — Party acting due to misapprehension of the correct legal position and in good faith without any motive to defeat or defy the order of Court —

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Tendering unqualified apology — Not necessary to take a servious view. 1977 Cri LJ 1809 (1819) : 1977 Mah LJ 508 (DB) (Bom).

[See also (1970) Mad LJ (Cri) 139 (Mys) (Misrepresentation of order of Court — Writ petition — Observation in the order in writ petition that petitioner was precluded from raising ground as to principles of natural justice not being followed as the same was not taken in affidavit in support of writ petition — **Held,** order gave room for doubt whether petitioner was under bona fide belief that such a ground could be taken in a suit to be filed subsequently by the petitioner — It could not be held that petitioner was wilfully making any misrepresentation while making above allegation in her suit.) ** ILR (1970) Cut 1130. (Disobedience to orders of court — Though conduct of opposite party was not only not commendable but also was objectionable there was no intention to disrespect court or its authority — No contempt.)]

(38) Disobedience of the order of Court — Prohibitory order — No authorised copy sent to the respondents — Respondent showing willingness to obey if authorised order received — No disobedience of the order of the Court. (1974) 1 Cri LT 421 (Punj).

(39) Disobedience to orders of Court — Application for contempt that respondent violated order for staying operation of order against petitioner during pendency of appeal — Principle that contemner should not be permitted to proceed further in a case until he is purged of contempt — Applicabilty — Principle is too wide subject to various exceptions — Basis of facts cannot also be overlooked — Contempt not prima facie established — Principle would not apply. A 1974 Cal 69 (73, 74).

(40) Order of reversion of A and promotion of B to that Post passed on 31-5-1974 — Stay of it passed on 6-6-1974 — Post that A avoided service of order on 1-6-1972 till 6-6-74 — B assuming charge of the post on 1-6-1974 — Order of promotion takes effect immediately it was passed irrespective of the date when it was communicated to A or B — **Held;** There was no wilful disobedience of stay order by the authority passing the orders of reversion of A and promotion of B. ILR (1976) HP 80 (85).

Case law under the old Act of (1952)

(41) An action by way of a writ is an action in personam and disobedience of the order therein is punishable in contempt. A 1954 Hyd 33 (33) (DB) ** **A 1969 SC 329 (335).**

(42) It is competent for the person against whom a writ has been issued to raise the objection, at any point of time that the writ is not in conformity with judgment or is in excess thereof. A 1965 Cal 484 (487, 488) : 1965 (2) Cri LJ 471.

(43) Disregard of an order in rem such as grant of probate, is contempt. (1968) 1 Mys LJ 273.

(44) However highly placed the State official may be; who is responsible, he may be sent to prison by the High Court if he is guilty of flouting the orders of the High Court or of interfering with the course of justice or with the right of a subject to come to the Court for redress of his grievances. A 1952 Cal 562 (563) : 1952 Cri LJ 1255 (DB).

(45) Disobedience to an order of injunction would be a contempt although the order was passed in circumstances in which the Court was not justified in passing it. (1950) 55 Mys HCR 148 (149, 150) ** A 1969 Andh Pra 47 (54) : 1969 Cri LJ 149 (DB).

[See however 1966 Raj LW 637 : ILR (1966) 16 Raj 756 (DB).]

(46) The person who acts in contravention of order restraining him from proceeding with a certain action commits a contempt despite the fact that he acted in the belief under advice that the order is wrong in law. A 1937 Cal 601 (602).

(47) Person wilfully disobeying order of Court prohibiting him from performing marriage of minor in his custody, is guilty of criminal contempt. A 1940 Nag 203 (207) : 41 Cri LJ 803.

(48) Disobedience to an order by Chief Judge of Presidency Small Cause Court under Section 6-A, Mussalman Wakf Act, directing to furnish accounts within 30 days on the plea that the property in respect of which it is made is not wakf property, amounts to Contempt of Court. A 1942 Bom 154 (154) (DB). (Affirmed in **A 1945 PC 147).**

(49) Accused evading warrant of arrest and misrepresenting in revision application that he was in jail is guilty of contempt of Court. A 1940 All 386 (387) : 41 Cri LJ 741 (DB).

(50) It is a serious contempt to assault, ill-treat or threaten a process-server or a bailiff engaged in his duty. A 1959 Punj 627 (629) : 1959 Cri LJ 1466.

(51) The failure of a Counsel to comply with the order of the Court which while refusing him permission to withdraw from the cause directed him to conduct the case amounts to a contempt of the Court. A 1958 Mad 122 (125).

(52) If a third party interferes with the property although alleging himself to be the representative-in-interest of the party under restraint and the latter merely keeps quiet without in any way aiding or abetting him he cannot be said to have committed a contempt by disobeying the order of Court. A 1938 PC 295 (299, 300) ** A 1965 Orissa 222 (224) : 1965 (2) Cri LJ 796 (DB).

(53) Although a direction which a Court is authorised to give by a statute may, in the context in which the word direction is used in the statute, amounts to an order, the disobedience of which would be contempt, a direction which the Court is authorised to give only in its consultative capacity cannot amount to any such order. A 1945 Sind 81 (89, 92, 93) (FB) ** 1964 (1) Cri LJ 362 (365, 366) (All).

(54) Violation of an order which is of an ambiguous and contingent character the directions in it being dependent on certain other facts which are left undetermined by the order cannot amount to a contempt. A 1958 Cal 474 (481) : 1958 Cri LJ 1162 ** (1967) 9 Law Rep 141 (DB).

(55) Disobedience to an order of Court made without jurisdiction does not amount

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to a contempt. **A 1949 Lah 131 (155): 50 Cri LJ 598 (FB).**

[But see A 1966 Mad 53 (55, 56): 1966 Cri LJ 146 (DB).]

(56) Where a Commissioner while executing the order of Court, exceeds in his rights, disobedience to him does not amount to contempt of Court. A 1959 All 211 (213, 214) : 1959 Cri LJ 406 (DB).

(57) Where a decree directed the General Manager of the Eastern Railway to withdraw forthwith the order of suspension passed against the plaintiff, disobedience of the mandatory injunction will not ipso facto constitute contempt of Court if the time prescribed by Section 82 (2), C. P. C. has not expired. A 1960 Cal 454 (455) : 1960 Cri LJ 903 (DB).

Wilful disobedience necessary.

(58) Disobedience of orders of Court in order to constitute punishable contempts must be wilful. A 1953 Nag 179 (180): 1953 Cri LJ 1025 ** A 1951 Orissa 230 (231) (DB) **** A 1960 SC 190: 1960 Cri LJ 282.** (A 1952 Orissa 215, **Reversed.**) ** 1968 Cri LJ 268 (270) (Punj) ** 1968 Cr LJ 704 (Punj) ** A 1967 All 295 (299): 1967 Cri LJ 682 ** 1966 All Cri R 413: 1966 All WR (HC) 693 ** A 1965 Cal 484 (486): 1965 (2) Cri LJ 471 ** A 1960 All 231 (234): 1960 Cri LJ 442 (DB).

(59) The mere unintentional disobedience to judgment order or process of Court amounts to a contempt in theory only and does not render the respondent liable to punishment. A 1954 Pat 513 (520): 1954 Cri LJ 1593 (DB) ** A 1957 Pat 528 (533): 1957 Cri LJ 1156.

[See however 1964 (1) Cri LJ 449 (453): 68 Cal WN 693 (DB).]

(60) Knowledge of the order of Court and the deliberate disregard of it are essential to constitute contempt. A 1952 Cal 919 (927): 1953 Cri LJ 136 ** A 1955 All 483 (486): 1955 Cri LJ 1223 (DB) ** ILR (1953) 3 Raj 85 (92) ** (1968) 2 Andh WR 587 (DB) ** A 1969 Andh Pra 47 (53) : 1969 Cri LJ 149 (DB) ** A 1969 Punj 60 (62) : 1969 Cri LJ 320 (DB) ** A 1967 All 394 (396, 398): 1967 Cri LJ 980.

[See also (1968) 2 Andh WR 208 (DB) ** 1969 Cri LJ 1571 (1573) (DB) (Delhi) ** A 1958 Punj 180 (182) : 1958 Cri LJ 685 ** A 1965 Orissa 222 (224) : 1965 (2) Cri LJ 796 (DB).]

(61) There can be no disobedience by a person of an order passed by a Court which has not been brought home to him by personal service on him in the manner required by law A 1952 Mad 180 (180): 1952 Cri LJ 389 ** A 1952 Cal 702 (705) ** (1968) 70 Punj LR 214: 1968 Cur LJ 116.

(62) Mere non-attendance in Court where there is no credible evidence of the summons having been served on a person is not sufficient to show that he has committed the offence of contempt of the summons. A 1952 Pat 243 (244): 1952 Cri LJ 796.

(63) In the matter of a prohibitory order it is not necessary that the order should have been served upon the party against whom it has been granted in order to justify committal for breach of such an order, provided it is proved that the person complained against had notice of the order aliunde. **A 1962 SC 1089 (1093): 1962 (2) Cri LJ 236 ** A 1964 Assam 92 (97, 98): 19 (2) Cri LJ 139 (FB) ** A 1962 Pat 280 (281, 282): 1962 (2) Cri LJ 87 (FB) ** A 1947** Bom 468 (471).

(64) In the case of prohibitive orders, the fact that they were not served on the officers concerned is not a defence to their liability for contempt of Court, if they came to know of the orders from a source whose authenticity they cannot doubt. (1967) 1 Andh WR 129 (DB) ** **A 1968 SC 1348 (1350): 1968 Cri LJ 1514 **** (1968) 2 Andh WR 208 (DB).

Disobedience by Public Officers or Courts.

(65) An officer who deliberately disobeys the order of the Court and the officer by whose negligence such disobedience became possible both must be held to have committed contempt of the Court which passed the order. A 1958 Orissa 69 (74): 1958 Cri LJ 541 **** A 1968 Delhi 208 (210): 1968 Cri LJ 1265 (FB).**

(66) Intentional disobedience to an order of a superior Court amounts to a contempt on the part of the subordinate judicial officer. A 1952 All 56 (58): 1952 Cri LJ 223 ** A 1953 Madh B 60 (61): 1953 Cri LJ 570 **** A 1961 SC 1367 (1370): 1961 (2) Cri LJ** 438 ** A 1967 All 394 (396, 398): 1967 Cri LJ 980 ** 1966 All WR (HC) 204 ** A 1961 Ker 194 (196): 1961 (2) Cri LJ 89.

(67) Order by High Court to Officer — He cannot judge correctness of order himself and take any action contrary to or inconsistent with the same on the basis of his own judgment. A 1969 Mad 232 (233).

(68) A subordinate judicial officer who avoids or circumvents the order of the Superior Court commits contempt of Court. A 1950 Dacca 19 (Prs. 19, 20): 51 Cri LJ 1561 (DB) ** A 1955 All 161 (162): 1955 Cri LJ 436 (DB) ** 1967 Cri LJ 1441 (1442) (Pat).

(69) Failure to return the documents to the record of Appellate Court, after express notice, is an act of grave contempt on the part of the party concerned. 1962 Ker LT 354.

(70) Appeal against conviction by accused dismissed by High Court and accused directed to surrender to bail — Additional District Magistrates not carrying out orders — Time allowed to accused which was in contravention of Rule 43 (5) of the Criminal Rules and Orders — Additional District Magistrates members of Indian Administrative Service inexperienced in Court procedure and relying on Bench Clerk — **Held,** that the Additional District Magistrates were guilty of contempt of Court but in the circumstances High Court would accept apology tendered by them — Laxity in judicial administration in the District deplored. A 1969 Cal 602 (604) (DB).

(71) An officer of Court such as a receiver commits contempt of Court if he fails to obey an order of the Court even where the breach complained of is a failure to pay a

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sum of money. The fact that somebody has stood surety for the payment cannot render him immune from the consequences of his disobedience. A 1932 Bom 638 (641, 642).

(72) Where a Court Sub-Inspector deliberately flouted the order of Court for confining the accused in the jail and confined him in the Court lock-up by obtaining an order from the sub-divisional officer to enable him to do so it was held that both he and the sub-divisional officer who passed the order on the mere representation of the Court Sub-Inspector and without even ascertaining what were the terms of the order of the Court had committed contempt. A 1951 Pat 451 (2) (452. 453) (DB).

[See also A 1968 Bom 273 (277): 1968 Cri LJ 903 (DB).]

(73) An officer who is charged by an order of Court, passed in favour of a party, with the duty of giving effect to it commits contempt by his failure to do so for a long time although such failure is not due to any intention to flout the order. A 1951 Cal 397 (398) (DB).

[But see 1968 Cri LJ 704 (Punj).]

(74) An officer to whom summonses are sent by Court for service upon a subordinate of his commits contempt by refusing to serve the same unless such refusal is based on the ground of non-availability of the subordinate officer. A 1958 Raj 293 (294): 1958 Cri LJ 1348.

(75) Failure by Police to make any report on the matter referred to them under Section 202, Cr. P. C., is a contempt of the authority of the Magistrate. A 1959 Manipur 30 (31): 1959 Cri LJ 742.

(76) A municipal commissioner even though he has the power to decide a question of title as between an applicant for permission to build and a party opposing the application would be committing a contempt if he were to exercise that power and refuse the permission where the applicant in a proceeding before the High Court to which the municipal corporation was a party had obtained a direction to the corporation to give the permission and leave the objecting party to get his title decided in a civil suit. A 1958 Andh Pra 170 (172): 1958 Cri LJ 349

(77) Although a bailiff in attempting to deliver possession used force in a manner which was not warranted by the rules of the High Court a charge of contempt of Court was held could not be sustained against him. A 1956 Cal 249 (253): 1956 Cri LJ 734 (DB).

(78) Where all that the Government undertook before Court in a proceeding was that certain confiscated goods will not be sold within a month from the date on which their order in revision is communicated to the petitioner it was held that the Government did not commit a contempt by not deciding the revision within a month. **A 1957 SC 478 (482).**

(79) The disobedience of directions of the High Court by a subordinate court which is not intentional but which is only due to its carelessness and ignorance of the law does not amount to contempt of Court. A 1953 Pat 99 (100): 1953 Cri LJ 816 (DB) ** A 1967 Andh Pra 219 (229): 1967 Cri LJ 984 (DB).

(80) Where a mandatory direction issued by the High Court to certain officers was not served on them personally they cannot be committed in contempt for a disobedience of the direction. A 1953 Cal 96 (98): 1953 Cri LJ 306.

(81) Where the District Magistrate, being away on tour when an order of the High Court releasing certain detenus reached his office, was not aware of it and some delay was caused due to the inexperience of his clerks in releasing the detenus it was held that he had committed no contempt. **A 1953 SC 436 (437): 1953 Cri LJ 1837.**

(82) But for the fact that the order had not been communicated to him in time by his superior officer the Magistrate would have committed a contempt of the High Court by proceeding with the trial of a case notwithstanding the stay order passed by the High Court. A 1952 Orissa 167 (167): 1952 Cri LJ 924 ** **A 1969 SC 189 (193): 1969 Cri LJ 401.**

(83) A Magistrate cannot be said to commit a contempt of Court by not taking action on an order of a Superior Court delivered to him at his house. A 1956 All 417 (420): 1956 Cri LJ 852 (DB).

(84) A person ordered to be released on a writ of habeas corpus cannot be arrested before he reaches home only under a civil process. Therefore if he is arrested under a warrant of commitment issued under Bengal State Prisoners Regulation 3 of 1818 immediately on release, even in the Court itself when it is not sitting or within the precincts of the Court when it is sitting, it would not amount to a contempt. **A 1945 Cal 107 (119) (SB).**

(85) An order of allotment of land by the Rehabilitation Authorities is not a proceeding for delivery of possession, and, therefore such an order made with full knowledge of an order of the High Court staying proceedings for delivery of possession does not amount to contempt of Court. (1951) 53 Pun LR 276 (277).

(86) The failure of a subordinate Judge or Magistrate to enquire into the truth of the information given to him by a party by the production of a letter from the advocate who appeared in the superior Court to the effect that the superior Court has ordered stay of the proceedings pending before him and to stay the proceedings accordingly would not amount to a contempt of Court. A 1951 Pat 494 (497): 52 Cri LJ 638 (DB) ** A 1954 Pat 554 (555): 1954 Cri LJ 1789 ** **A 1961 SC 1367 (1370): 1961 (2) Cri LJ 438.**

[But see A 1969 Pat 151 (153) ** A 1960 Orissa 18 (20, 21, 22): 25 Cut LT 53: 1950 Cri LJ 261 (2) ** A 1959 Punj 205 (205): 1959 Cri LJ 643: 61 Pun LR 321.]

Disobedience by third parties.

(87) Where party is not bound by an order of the Court his disobedience thereto is no contempt even though his interest is only an interest derived from the party against whom the order was made. A 1952 Cal 452 (453): 1952 Cri LJ 971 ** A 1938 PC 295 (299, 300): 17 Pat 770 ** ILR (1950)

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All 333 (345) (DB) ** A 1962 Pat 280 (282): **1962 (2) Cri LJ 87 (FB).**
[**But see** (1968) 2 Andh WR 208 (DB) ** ILR (1964) Andh Pra 571 (DB).]

(88) A direction given by Under Secretary to Board of Revenue to Magistrates to ignore decision of State High Court, which is binding on them, is a flagrant interference with administration of justice by Courts and clear contempt of Court. **A 1961 SC 1315 (1316): 1961 (2) Cri LJ 437.** (ILR (1958) Cut 496, Affirmed.)

(89) A writ issued in equity binds only the person named therein and therefore the disobedience of it by any other person, although he claims interest through the person bound, would not amount to contempt. **A 1949 Pat 39 (40) : 49 Cri LJ 639 (SB)** ** A 1967 Andh Pra 219 (226) : 1967 Cri LJ 984 (DB).

(90) A Court has undoubted jurisdiction to commit for contempt a person not included in an injunction and/or not a party to the action, who knowing of the injunction, aids and abets a defendant in committing a breach of it. A 1967 Andh Pra 219 (226) : 1967 Cri LJ 984 (DB) ** 1968 Cri LJ 671 (672) : 72 Cal WN 927 ** A 1965 Orissa 222 (224) : 1965 (2) Cri LJ 796 (DB).

(91) An order of injunction passed against a Municipal Corporation is binding upon all individuals who act on behalf of the corporation even though they were not parties to the suit in which the order was passed and if those persons with knowledge of the order disobey it they would become liable for contempt. A 1958 Punj 180 (183) : 1958 Cri LJ 685.

(B) Breach of undertaking

(92) Breach of undertaking given to Court is a serious matter and amounts to contempt of Court. **1979 UJ (SC) 528.**

(93) Breach of an undertaking recorded by the court will amount to contempt only when the undertaking is apart from an agreement between the parties which the Court has accepted and when the disobedience is wilful. Where, in an eviction suit an agreement between the parties under which the tenant was to pay up the arrears by a particular date was recorded by the court but the tenant failed to do so due to losses in his business and difficulty in collecting money, held the breach did not amount to contempt. 1970 All LJ 1077.

(94) A party cannot be committed for contempt on the ground that upon one of the possible constructions a breach of the undertaking given to the Court had been committed, and for the purpose of relief of this character, the undertaking must be clear and the breach must be clear beyond all question. 1970 Mad LJ (Cri) 139 (Mys).

(95) Breach of an undertaking in consent decree — Breach must be wilful and not merely casual, accidental or unintentional to amount to contempt. On facts breach held wilful. (1973) 77 Bom LR 107.

(96) Consent decree — Breach of undertaking given to Court — **Held**, undertaking to Court and legal rights being entirely different and separate matters, despite rights of parties to obtain stay of execution, breach of undertaking to Court amounts to contempt of Court. A 1976 Cal 475 (477).

(97) Order passed in view of undertaking — Order held not mere consent order — Its breach amounted to breach of injunction of Court. **A 1976 SC 1909.**

(98) Consent decree — Term — 'A' entitled to execute decree for possession in case 'B' committed default and B giving an undertaking to deliver possession to 'A' whenever he becomes liable to deliver possession — 'B' refusing to deliver possession to 'A' under the terms of the decree — **Held** on facts that the undertaking given by B was an additional safeguard and not an alternative remedy given to A and the breach of the undertaking by B amounted to contempt of Court. (1973) 77 Bom LR 107.

(99) Where in an eviction case the tenant applied for extension of time and he undertook to surrender the premises unconditionally on a particular date the undertaking is given to the Court and not to the other party. If he does not honour the undertaking he is liable for contempt. 1972 Ker LJ 259 : 1972 Ker LT 869

(100) Rent control case -- Tenant giving undertaking to vacate premises within a particular period and making payment damages till he would remain in possession — Breach of undertaking amounts to contempt as undertaking has the same force as injunction made by Court. (1980) 1 Rent LR 584 (589) (Delhi).

(101) On tenant giving undertaking to vacate premises appeal in H. C. dismissed — Deliberate breach of undertaking — Tenant is guilty of contempt. A 1980 Delhi 39.

(102) Conditional stay order passed by Court not on basis of undertaking by party — Compliance of condition left to discretion of party — Party not complying — No contempt of Court. 1977 Cri LJ 365 (All).

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(103) Breach of an undertaking given to a Court by a party in a pending proceeding on the faith of which the Court sanctions a particular course of action is misconduct amounting to contempt. A 1955 Cal 182 (183) : 1955 Cri LJ 654 (DB) ** A 1929 Bom 417 (417) ** A 1953 Cal 627 (629) : 1953 Cri LJ 1414 (DB) ** (1964) 68 Cal WN 148 (DB) ** 1964 All Cr R 358 : 1964 All WR (HC) 504.
[**But see** (1966) 7 Law Reports 326 : (1966) 2 Mys LJ 288 (DB).]

(104) Where an order restraining a certain party from doing something was passed after he had given his undertaking not to do that thing his disobedience amounts to contempt even though the order was not served on him. A 1932 Cal 705 (707) : 33 Cri LJ 945 (DB).

(105) A person commits contempt of Court by making a false representation in his application for the purpose of obtaining a favourable order. 1966 All WR (HC) 776 : 1966 All Cri R 484

(106) Where the Court stays execution of a decree for ejectment on the judgment-debtor giving it an undertaking to vacate

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by a certain time judgment-debtor's failure to vacate accordingly amounts to contempt. ILR (1946) 2 Cal 499 (508) ** (1963) 67 Cal WN 819 (DB) ** 1961 (2) Cri LJ 222 (224, 225) (Cal).

(107) Since in case of compromise, a Court can accept an undertaking from a party to the suit, before the decree recording the terms of compromise is passed, such undertaking can be enforced by proper committal proceedings for contempt. A 1950 Bom 336 (337) ** (1938) 42 Cal WN 203 (205).

[But see A 1960 Madh Pra 280 (282) : 1960 MPLJ 642.]

(108) In case of a consent decree passed by a Court, disobedience of the undertaking given by one of the parties to the other party does not amount to contempt. A 1951 Pat 231 (237) (DB) ** A 1948 Cal 294 (296) : 49 Cri LJ 567 ** 1967 All LJ 442 ** A 1959 Punj 322 (323, 324) : 1959 Cri LJ 809 : 61 Pun LR 372.

(109) The failure to keep to the terms of an undertaking to the Court when the undertaking cannot be considered to be an unqualified one cannot be treated as a contempt. A 1952 Cal 591 (593, 594) : 1952 Cri LJ 1301 ** (1964) 68 Cal WN 148 (DB).

(110) Litigants before the High Court would not be permitted to break the undertakings they gave before it nor would they be permitted to have recourse to the orders of a Subordinate Court in the prosecution of their scheme to flout the orders of the High Court. A 1952 Cal 669 (670) : 1952 Cri LJ 1385.

4. Criminal contempt.— (1) Criminal contempt cannot be confused with contumacious conduct. **A 1977 SC 1334 (1335) : 1977 Cri LJ 1003.** (A 1975 All 52, **Reversed.**)

(2) An act of criminal contempt must be tested on the touchstone of its pontentiality for scandalising or lowering the authority of any Court or interfering or tending to interfere with or obstruct the administration of justice in any manner. Therefore, it is not necessary that the consequences of actually scandalising or lowering the authority of the Court or obstruction or interference with the administration of justice must result. 1973 Cri LJ 1211 (1214, 1215) (All).

(3) Contempts which are criminal consist in a conduct which offends the majesty of law and undermines the dignity of Court. A 1951 Pat 443 (444) : 52 Cri LJ 558 (DB) ** A 1954 Orissa 167 (170) : 1954 Cri LJ 988 (DB).

(4) Every abuse of the process of the Court may not necessarily amount to contempt of Court; abuse of the process of the Court calculated to hamper the due course of a judicial proceeding or the orderly administration of justice is a contempt of Court. **A 1980 SC 946 (949 to 951) : 1980 Cri LJ 684.**

(5) The Munsif who occupied a room in the Dak Bunglow initially with the permission of the S. D. O. passed an order of temporary injunction in a suit instituted in his Court restraining the S. D. O. from evicting a judicial officer from the hutment attached to the Dak Bunglow. After the order was served on the S. D. O. he wrote to the Munsif to vacate the room in the Dak Bunglow, locked the room and later on ordered for an inventory to be made of the personal effects and Court-records found in the room. No official reason was given for the extraordinary steps taken to evict the Munsif.

Held, that the act had a tendency to obstruct or interfere with the course of justice, besides lowering the authority of the Munsif in the estimation of the public and amounted to contempt of Court. (1970) Assam LR 259 (DB).

(6) Posting of teachers — Order of Court — Slight delay in posting caused due to the Municipal Council requiring to consider its own arrangements — Does not amount to criminal contempt. (1976) 42 Cut LT 540 (545) (DB).

(7) Application for injunction restraining opposite parties from constructing house — No interim injunction issued — Only notice given — Opposite party proceeding with construction work — They have not committed any criminal contempt. 1979 Ker LT 262 (269) (DB).

(8) Application to Court — Not a single application bona fide — Every application a daring 'raid' on the Court and each found to be abuse of Court — Calculated to obstruct the due course of judicial proceeding and administration of justice — Amounts to criminal contempt. **A 1980 SC 946 (950, 951).**

(9) In cases involving matters of national importance, if the matter concerned is *ex facie* of a judicial nature, any public discussion or expression of opinion about the matter, which has to be decided by the Court, would be actionable for contempt The matter of appointment of Chief Justice of India, involved in this case, could not be said to be such a matter. ILR 1974 (1) Delhi 1.

(10) News item regarding Supreme Court decision — Contemner alleging that news item was motivated account as obtained from Chief Justice and other Judges of High Court — Contemner held guilty under Section 2 (c) (i) and (ii). **1976 Cri LJ 405 (411) : 1975 Cut LR (Cri) 383 (FB).**

(11) Resolution of Bar Association that Chief Justice was not acting in fair and independent manner but favouring particular section of Bar in passing notifications under Clause 14 of U. P. High Courts (Amalgamation) Order, 1948 — Members actively associated with resolution and responsible for its publication in newspapers are guilty of "criminal contempt". A 1975 All 52 (63, 64) (DB).

(12) Publication in press of notification appointing Commission of Enquiry under Section 3 of Commissions of Enquiry Act whether amounts to contempt of Court when some of the matters which were subjects of enquiry by the Commission are connected with the criminal revision pending before the High Court — **Held,** it did not amount to contempt of Court particularly when the notification is published in whole and not in part.

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The fact that some of the matters which were connected with the criminal revision petition were the subject of inquiry by the commission of inquiry, would not attract liability for contempt of court. **A 1972 SC 1515 (1519, 1520) : 1973 Cri LJ 453.**

[**See also** A 1973 Cal 233 (241). (It is now well-settled that since the Commission of Inquiry, in conducting the inquiry, is performing a statutory duty, although such inquiry may be parallel in nature, the question of contempt of Court would not arise merely because of the pendency of identical questions before a Court of law, Civil or Criminal, and no injunction can be issued restraining the Commission of Inquiry from proceeding with the inquiry or restraining the State Government or any other authority from publishing the report of the Inquiry Commission.)]

(13) No distinction can be made between judicial and administrative functions performed by a Judge and vilificatory criticism of Judge functioning even in purely administrative matters amounts to criminal contempt. ILR (1975) 2 Delhi 868 (DB).

(14) If a letter containing allegations of his mala fide action is addressed to the Judge it would amount to contempt of Court and not only the defamation of the Judge. (1974) Chandi LR (Cri) 174 (DB).

(15) Scandalising the Court — Distinction between defamation of a Judge and contempt of Court explained — It is only when publication is calculated to interfere with due course of justice that it will be punishable as contempt. **A 1971 SC 221 (230) : 1971 Cri LJ 268.**

(16) Letters written by accused to Judicial Magistrate — Language used having effect of scandalising and lowering his authority and also substantially interfering with course of justice — Contemner punished. 1976 Cri LJ 1958 (1962) (DB) (Kant)

(17) Notification by Chief Justice in exercise of power under Clause 14 of U. P. High Courts (Amalgamation) Order (1948) — Concurrent jurisdiction conferred on Lucknow Bench and Allahabad Bench in regard to cases of certain districts of U P. formerly under jurisdiction of Oudh Chief Court — Resolution by Avadh Bar Association criticising that notification — Scandalous remarks against Chief Justice in the resolution that he acted in partisan manner under influence of Allahabad Bar — Members of Association (actively associated with resolution) were punishable for criminal contempt — No protection available to such members under Art. 19 of the Constitution. A 1975 All 52 (59, 60, 61) (DB).

(18) The contemner's averment that he entertained an apprehension that the High Court may impose substantive punishment and may refuse bail is a contumacious aspersion on the Court that it does not exercise its judicial powers according to the facts and circumstances of the case and the Court is already determined to impose substantive punishment and refuse bail. This aspersion clearly comes within the mischief of Section 2 (c) (i) and (iii) **A 1973 Orissa 244 (281, 282) (FB).**

(19) If a Judge is suspected to have acted mala fide and in corrupt manner the proper procedure is to report the matter to the High Court instead of giving a notice containing contemptuous matter. An Advocate has no duty to warn a Judge against corrupt action and commit contempt of Court. (1974) Chandi LR (Cri) 174 (DB).

(20) Using of insulting language in face of Presiding Officer of Court — Contemners, guilty of contempt of Court. **A 1979 (NOC) 96 : ILR (1978) 2 Punj 63 : 1979 Cri LJ (NOC) 165 (FB).**

(21) Case of criminal contempt — Charge though not criminal is of quasi-criminal nature and must be proved beyound reasonable doubt. 1976 MP LJ 456 (460) (DB).

(22) Prisoner entitled to be released by the operation of Section 397-A, Cr. P. C — Superintendent of Jail refusing to release him under bona fide misconception — Superintendent is not guilty of contempt. 1977 Cri LJ 79 : 1976 J & K LR 499.

(22A) If a matter amounts to criminal contempt the same is cognizable by a Division Bench and an application for proceedings for criminal contempt can be moved either by the Advocate General or by a party with the consent in writing of the Advocate General. 1980 All LJ 892.

(A). Scandalizing the Court

(23) The allegation that "justice is sold" or "justice is auctioned" by judiciary, is not only serious, but heinous type of scandalising the Court. Although such a serious and grave contempt deserves to be punished with deterrent punishment of imprisonment of maximum term of 6 months, but when the unconditional apology had been tendered and the contemner was really repentant of his action, and no effort was made at all to plead any justification or to raise controversy of the fact, ends of justice was thought to be met by punishing the contemner with a fine of Rs. 100/- only, in addition to acceptance of apology. 1980 WLN 276 (280, 284, 285, 286, 287) : 1980 Raj LW 230 (DB).

[**See also A 1970 SC 2015 (2018, 2019, 2024) : 1970 Cri LJ 1670.** (Where a person charged the judiciary as "an instrument of oppression" and the judges as "guided and dominated by class hatred, class interests and class prejudices, instinctively favouring the rich against the poor", it is clearly an attack upon Judges calculated to raise a sense of disrespect and distrust of all judicial decisions.) °° 1974 Cri LJ 428 (429, 430) (All). (An editorial in a newspaper written in a reckless spirit employing the most intemperate language making sweeping allegations against the Bench and the Bar held amounts to contempt.)]

(24) Criticism of judiciary by press — Decision on the question whether discretion to take action for contempt of Court should be exercised one way or the other must depend upon the totality of facts and circumstances of the case. **A 1978 SC 727 (733, 734).**

(25) A publication by newspaper's editor, of news scandalising magistrate attracts Sec. 2 (c) That the editor has not been the author of the

Section 2 — Note 4 (contd.)

impugned news item constitutes no defence for him to escape liability for contempt of the Court, inasmuch as he is obliged to remove disparaging remarks appearing against the Court, in the articles for publication. However, the accused-editor having tendered unqualified apology and under the circumstances, was let off with a warning. ILR (1973) 52 Pat 358.

[See also A 1975 All 52 (65) (DB). (Person who gives publicity to a scandalising attack on a Judge or Court is as much guilty of criminal contempt as the person who makes the attack.)]

(26) Publication of articles in newspaper describing a Judge as corrupt, incompetent and in the habit of abusing his powers amounts to contempt committed by scandalizing the Court. 1971 WLN 495 (Raj) ** 1979 Cri LJ (NOC) 148 (DB) (J & K).

[See also 1973 All LJ 954. (Allegation of use of improper means in obtaining adjournment, on acceptance of money by advocate or at the instance of Magistrate — Amounts to contempt of Court within the section.) ** A 1971 SC 221 (225, 226, 231) : 1971 Cri LJ 268. (Newspaper article containing scandalous allegations against High Court Judge — Article calculated to obstruct administration of justice — Article exceeding bounds of fair and reasonable criticism — Clear imputation of impropriety, lack of integrity and oblique motives to a Judge in matter of deciding a suit which undoubtedly constituted contempt of Court.) ** 1973 Cri LJ 1340 (1342) (Raj). (Publication of news item which creates and tends to create an apprehension in the minds of the people regarding the integrity, ability or fairness of the Presiding Officer of the Court and also to deter actual and prospective litigant from placing complete reliance upon the court's administration of justice can be punished summarily as contempt.) ** 1974 Chandi LR (Cri) 174 (DB). (It is the grossest contempt to allege that a Judge had acted with prejudice, bias and malice in the course of his judicial duties, that he decided a case not according to his own convictions but to please somebody else and that he had abused his power as a Judge and acted dishonestly and in bad faith. The fact that these scandalous allegations were contained in a notice under Section 80 of the Civil Procedure Code would not prevent them from being contempt of Court.) ** (1970) 72 Pun LR 822. (Issue of a notice under Section 80 of Civil P. C. to the Judge casting aspersions on the integrity and impartiality of the Judge and threatening him that if he ordered execution of the alleged non-executable decree in question, he would be personally liable for repayment of the amount and damages to the judgment-debtor, amounts to scandalising the Court.)]

(27) Judgment criticised even if vitiated by errors, imputation of unfairness, bias or dishonesty to the Judge amounts to scandalous attack on Court, punishable under the Act. 1976 Cri LJ 158 (162) (DB) (Ker).

(28) Action for contempt of Court — Proof that judgment criticised was rendered wrong, held, foreign to the issue — Contemner's honest belief in the truth of his statements by itself was no defence. 1976 Cri LJ 158 (159) (DB) (Ker).

(29) Scandalizing the Court — Notice sent to Judge by litigant imputing mala fides and threatening legal action — It amounts to criminal contempt — Publication is not necessary. 1976 Cri LJ 746 (748) (DB) (Andh Pra).

(30) Scandalous and scurrilous notice sent to Judge by litigant — It amounts to criminal contempt — Fact that notice was sent after disposal of suit makes no difference. 1976 Cri LJ 746 (749) (DB) (Andh Pra).

(31) Scandalising the Court — One has right to express fair criticism of act or conduct of Judge in his judicial capacity. A 1971 SC 221 (230) : 1971 Cri LJ 268.

(32) If a scandalous attack is made on a Judge in his administrative or other capacity of non-adjudicatory nature, it can amply form basis of contempt proceedings. A 1975 All 52 (62) (DB).

[See also A 1973 Orissa 244 (271) (FB). (Official capacity cannot be differentiated into judicial and administrative capacities. They are inter-linked. Any aspersion on the administrative capacity of the Judges or the Court which undermines, lowers, or tends to undermine or lower its authority and dignity by imputing motives so as to create a distrust in the public mind as to the capacity of Judges to mete out even-handed justice, is scandalising the Court.)]

(33) Even though a letter containing serious allegations against the presiding officer of a Criminal Court may have been delivered in private capacity to a Magistrate it may still lead to the consequences which are regarded as the essence of criminal contempt. In such circumstances the absence of publication is wholly immaterial. 1973 Cri LJ 1211 (1216) (All).

(34) Where the accused, a Judicial Officer, against whom disciplinary proceedings and contempt proceedings were pending, on decision in disciplinary proceedings before the latter proceedings, alleged that the Chief Justice got the other Judges who participated in the disciplinary proceedings and the contempt proceedings to be decided subsequently, committed to a particular view in the contempt proceedings by making them party to the order in disciplinary proceedings, the allegation being without foundation and a scurrilous allegation on impartiality of such other Judges and their worthiness of being Judges as such, amounted to contempt. 1974 Cri LJ 70 (72, 73) (SB) (Orissa).

(35) Letter to Chief Justice, Supreme Court about conduct of District Judge — Suggestion also made that High Court will not make proper enquiry as he was related to Chief Justice — Held, it amounted to contempt. 1976 Cri LJ 440 (444) (DB) (Orissa).

[See also A 1974 SC 710 (720, 723, 724) : 1974 Cri LJ 631. (Suspension of judicial officer by High Court — Allegations of mala fides, bias, improper motive and prejudice against High Court judges in grounds of appeal to Governor — Amounts to gross contempt.)]

(36) Questioning judgment of High Court and calling it as incorrect by a subordinate authority is gross violation of judicial discipline and amounts to contempt of Court. (1972) 74 Pun LR 693.

(37) Contemner's prayer of choosing Judges merely because some have expressed adverse views is itself a gross contempt. A 1973 Orissa 244 (286) (FB).

(38) Baseless allegations against an officer of Court reflecting adversely on the working of Court — Persons making are guilty of contempt

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of Court — Unfounded allegation that the Stenographer of the Court wrongly transcribed the order of the Court as a result of which a direction for the payment of salary was included instead the suspension allowance in the order reflects adversely on the working of the Court. 1978 Cri LJ 789 (DB) (All).

(39) The act of informing a Court that some one is trying to scandalize it, and describing the manner in which the Court is sought to be so scandalized, by itself would not result in committing contempt of Court. 1976 Cri LJ 507 (511) (DB) (All).

(40) False statement cannot scandalise or lower the authority of any Court — Does not amount to criminal contempt. 1980 UPLR (Cri) 9 (10) (DB) (All).

(41) Altercation in the Chambers of the Munsiff-Magistrate between Advocate and Court clerk S — Held that it was no more than a mere small tiff of which no one should have taken any serious notice. S's complaint demonstrates that what next happened in the Court hall was a mere verbal wrangle when the Court was not in session. Such small skirmishes through which there is no 'deposing of the authority, justice or dignity of the Court', do not constitute contempt of Court. (1969) MLJ (Cri) 659 (661) (DB) (Mys).

(42) High Court Judge addressing on political controversies — If on facts it appears that the Judge did say things or matters about politics, such utterances or views or observations will be the personal opinions expressed by the Judge, and, therefore, the protective umbrella of the Court cannot be used by way of bringing critics on the charge of contempt of Court. **A 1977 SC 809 (812) : 1977 Cri LJ 579.**

(43) Proceedings for contempt for scandalizing the Court — Committals for such contempt do not become obsolete and in such a situation the Judge need not institute action for libel. **A 1971 SC 221 (230) : 1971 Cri LJ 268.**

Case Law under the old Act of (1952)

(44) Anything done or published, which is calculated to bring a Court or a Judge of that Court into contempt or lower his authority is a contempt inasmuch as it would amount to scandalizing a Court or a Judge. **A 1950 Sind 1 (1, 2) : 51 Cri LJ 810 (FB) °° A 1940 Sind 239 (246) : 42 Cri LJ 1 (FB) °°** A 1958 Orissa 168 (171) : 1958 Cri LJ 1055 (DB) °° A 1969 Orissa 117 (126) : 1969 Cri LJ 763 (DB) °° **1968 Ker LT 299 (FB) °°** A 1967 Cal 153 (157) : 1967 Cri LJ 350 (DB) °° A 1966 Cal 411 (419) : 1966 Cri LJ 883 °° A 1967 Cal 216 (229) °° A 1964 Cal 572 (578, 579, 581, 582, 583) : 1964 (2) Cri LJ 660 (DB) °° **A 1962 All 315 (327, 328) : 1962 (2) Cri LJ 1 (FB).**

(45) The Law of contempt with reference to scandalizing the Court itself as enunciated by the decisions of the Indian Courts and the Privy Council on the date of the Constitution is "existing law" within the meaning of Article 19 (2) of the Constitution. **ILR (1968) 1 Ker 384 (522) : 1968 Ker LJ 197 (FB).**

(46) Contempt by scandalising the Court is not confined to defamation or aspersions against any particular Judge or bench and in connection with any particular case but would embrace defamation or aspersions cast against a whole Court in general. **A 1935 All 1 (2, 5) (DB) °° 1967 Andh Pra 299 (322) : 1967 Cri LJ 1470 (DB) °° A 1961 Pat 437 (438, 439) : (1961) 2 Cri LJ 674 (FB).**

(47) Scandalising the Court may manifest itself in various ways, but in substance, it is an attack on individual judges or the Court, as a whole, with or without reference to particular cases, casting unwarranted and defamatory aspersions upon the character or ability of the judges. A 1967 Andh Pra 299 (317) : 1967 Cri LJ 1470 (DB) °° A 1970 Bom 48 (51). (Direct attack through newspaper article against particular trial judge by calling his judgment of conviction as strange and whimsical — Article also containing sweeping remarks ridiculing entire lower judiciary — Article falls under category of scandalizing Court and constituted contempt of Court.)

(48) The ground on which unjustified and excessive criticism of the judiciary is treated as contempt of Court is that such unwarranted, unjustified and unoccasioned malicious criticism tends to undermine the prestige and dignity of the judiciary. A 1970 Bom 48 (52).

(49) Contempt is not confined to cases which directly interfere with the administration of justice in pending cases. Any conduct, even though it may be after the termination of a pending case, is contempt of Court where it tends to bring the authority of a Court into disrespect or when it amounts to an insult offered to the Judge or the dignity of the Court. **A 1926 All 623 (628) (SB) °° A 1935 Cal 419 (429, 430) : 36 Cri LJ 1053 (FB) °°** A 1958 Punj 273 (280) : 1958 Cri LJ 952. (Imputation of corruption levelled against Judge.) °° A 1967 Andh Pra 299 (323) : 1967 Cri LJ 1470 (DB) °° A 1966 All 588 (589) : 1966 Cri LJ 1361 °° A 1960 Orissa 132 (136) : 1960 Cri LJ 1120 °° A 1961 Pat 1 (9, 10) : 1961 (1) Cri LJ 134 °° A 1959 Pat 373 (373, 374) : 1959 Cri LJ 1013.

(50) Rajasthan Co-operative Societies Act (13 of 1965), Sections 37 and 77 (3) — Interlocutory order passed under Section 77 (3) by Assistant Registrar to stay proceedings before Magistrate under Section 37 till further orders with the sole purpose to maintain status quo — No case for contempt of Court is made out against the Assistant Registrar (Obiter). 1969 Cri LJ 1193 (1197) (DB) (Raj).

(51) A slander on the entire subordinate judiciary in a province, amounts to a clear case of contempt irrespective of the truth or otherwise of the allegations contained in the slander. **A 1935 All 38 (39, 40) : 36 Cri LJ 620 (DB).**

[**But see 1968 Ker LT 299 (FB) °° A 1938 Bom 197 (198) : 39 Cri LJ 440).**]

(52) Attributing improper motives to the Judges of the Court exceeds the limits of fair and bona fide criticism and amounts to gross contempt. **A 1953 SC 75 (76) : 1953 Cri LJ 519 °° A 1954 Assam 201 (205) : 1954 Cri LJ 1609 (FB) °° A 1942 Mad 711 (711) : 44 Cri LJ 162 (SB) °°** A 1958 Punj 273 (280) : ILR (1958) Punj 1272 : 1958 Cri LJ 952 °° **A 1968 Punj 217 (238) : 1968 Cri LJ 775 (FB).** (Statement alleging interference by High Court Judge with administration of justice in a subordinate Court amounts to contempt of Court.) °° A 1968 Andh Pra 370 (374) (DB) °° A 1967 All 586 (589) : 1967 Cri LJ 1594 : 1967 Ker LT 118 (DB) °° A 1966 All 588 (589) : 1966 Cri LJ 1361 °° 1966 All WR (HC) 561 °° A 1961 J & K 76 (79, 80) : 1961 (2) Cri LJ 766 (DB)

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** A 1961 Pat 1 (8, 9) : 1961 (1) Cri LJ 134 (DB) ** 1960 MPLJ 441 (DB) ** A 1961 Mys 12 (20, 21) : 1961 (1) Cri LJ 111 ** A 1961 Punj 113 (117, 118, 119, 120) : 1961 (1) Cri LJ 426.

[See also A 1955 Pat 135 (137) : 1955 Cri LJ 520 (DB). (Held, publication did not suggest dishonest motives to Judge.)]

(53) An allegation that a Judge had abused his powers as such and acted dishonestly and in bad faith, prejudice, bias and malice in the course of his judicial duties amounts to serious contempt. A 1941 Bom 228 (232) : 42 Cri LJ 723 (DB) ** **A 1940 Sind 239 (249) : 42 Cri LJ 1 (FB)** ** A 1958 Orissa 168 (171) : 1958 Cri LJ 1055 (DB) ** A 1968 Andh Pra 207 (213) : 1968 Cri LJ 888 (DB) ** **1968 Ker LJ 197 (FB)** ** A 1967 Cal 153 (155) ** 1967 Cri LJ 350 (DB) ** A 1966 All 495 (497) : 1966 Cri LJ 1106 ** A 1963 Bom 254 (261, 262) : 1963 (2) Cri LJ 603 (DB).

(54) A criticism that the Judges of the High Court act, in discharging their judicial function, upon extra judicial considerations, sectional prejudices and with unconstitutional practices and discriminations amounts to a contempt. A 1954 Hyd 175 (177) : 1954 Cri LJ 1281 (DB) ** **1968 Ker LT 299 (FB)** ** **1968 Ker LJ 197 (FB)** ** A 1967 Andh Pra 299 (317) : 1967 Cri LJ 1470 (DB) ** A 1967 Madh Pra 104 (106, 107) : 1967 Cri LJ 498 (DB) ** A 1967 Raj 203 (207) : 1967 Cri LJ 1057 (DB) ** A 1965 Pat 360 (362) : 1965 (2) Cri LJ 394 (DB) ** **A 1960 Pat 430 (446, 447) : 1960 Cri LJ 1254 (FB).**

(55) Sending to the Chief Justice scurrilous and extremely offensive communication containing allegations and abuses against him and copies of the same to the Prime Minister, Home Minister, the Rajpramukh and the anti-corruption Committee constitutes a gross contempt. A 1954 Hyd 180 (181, 182) : 1954 Cri LJ 1300 (DB).

[See also A 1961 Pat 360 (361) : 1961 (2) Cri LJ 362 (DB).]

(56) Scurrilous abuses of Judges by themselves may or may not amount to contempt of Court, but when they, read in the context in which they are, give rise to the inference that the Judges by their conduct have put themselves in a position in which they cannot function with independent minds and deal even-handed and impartial justice as between the Crown and the subjects then there can be no doubt that they amount to contempt by scandalizing the Court, even if the conduct commented upon is not one in a cause which had been tried or which is pending trial. **A 1935 Cal 419 (424) : 36 Cri LJ 1053 (FB)** ** **A 1945 Cal 107 (123) (SB).**

(57) Accusing judicial officers of incompetence and their work as one which did not inspire public confidence amounts to contempt. **A 1954 SC 10 (15) : 1954 Cri LJ 238** ** A 1958 Orissa 168 (171) : 1958 Cri LJ 1055 (DB) ** A 1958 Punj 273 (280) : 1958 Cri LJ 952 ** A 1951 Vindh Pra 14 (15) ** **A 1967 SC 1494 (1497) : 1967 Cri LJ 1380** ** A 1967 Andh Pra 299 (318) : 1967 Cri LJ 1470 (DB) ** A 1965 Pat 227 (237, 238) : 1965 (1) Cri LJ 48 (DB) ** (1963) 1 Cri LJ 543 (544, 545) (Madh Pra). (Public Prosecutor alleging in transfer application that the newly appointed Addl. Sessions Judge would find it difficult to deal instantly with important points of law that would crop up.) ** 1961 (2) Cri LJ 109 (111) : 1960 Ker LT 338 (DB) ** A 1960 Orissa 132 (134, 135, 136) : 1960 Cri LJ 1120.

(58) Remarks that "in many instances judgments of High Court were corrected by Supreme Court and in many instances Supreme Court held that High Court has abused powers given to it" tend to lower the authority of the High Court and bring the Judges into contempt. A 1958 Orissa 168 (183) : 1958 Cri LJ 1055 (DB).

(59) Describing the proceedings of High Court as tamasha constitutes a contempt of Court. **A 1945 Cal 107 (121) (SB).**

(60) A criticism suggesting that public confidence has suffered by the manner in which the High Court wrote its judgments and to restore that confidence judgments should be written differently amounts to contempt. **A 1935 Lah 212 (212) : 36 Cri LJ 837 (SB).**

(61) A Judge or a Magistrate who contemptuously refers to the order of another Judge as a foolish order and characterises the Judge a foolish Judge commits a serious contempt. **A 1949 Lah 270 (273) : 51 Cri LJ 44 (FB).**

(62) A statement that a Judge ignores arguments and authorities in the cases tried by him and hence the life and liberty of persons tried by him are always in peril amounts to a serious contempt. **A 1929 Pat 72 (77) : 30 Cri LJ 741 (FB).**

(63) Allegations in an application presented to a Magistrate having the double effect of creating a feeling of embarrassment to the Magistrate in the discharge of his duties as a Court thereby preventing him from doing justice freely and unhesitatingly and of impairing the confidence of the litigants in placing reliance upon the Court's administration of justice, amounts to contempt. A 1959 Madh Pra 238 (240) : 1959 Cri LJ 842 (DB).

(64) Allegation by Solicitor engaged in case that Judge has prejudged issue of fact before evidence has been called on either side amounts to contempt of Court known as scandalizing Court. **A 1942 Bom 331 (331, 332) : 44 Cri LJ 93.**

(65) A pamphlet which contains reflections of a serious nature on the conduct and character of one of the parties to a pending proceeding and also states that the ultimate decision would be in favour of that party in which case there would be a miscarriage of law and justice amounts to a clear contempt. **A 1939 Cal 672 (673) : 41 Cri LJ 148 (SB).**

(66) A criticism of the judgment of the lower Court when the matter is pending in appeal before the higher Court is in the nature of a preliminary trial by the person who has criticised the judgment and an affront to the dignity of the appellate Court and as such amounts to a contempt. **A 1933 Cal 118 (123) : 34 Cri LJ 662 (DB).**

(67) A criticism that an order passed by the Court has emboldened the opposite party to commit acts injurious to the complaining party does not amount to a contempt as there is nothing in it which amounts to a contemptuous reference to the Court. **A 1937 Pat 124 (125, 127) : 38 Cri LJ 412 (DB).**

(68) Judicial officers and Magistrates are not entitled to criticise the judgments of the High Court to which they are subordinate and if they

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do that even in the course of their judgments they commit a contempt of the High Court. A 1953 Madh B 60 : 1953 Cri LJ 570.

(69) An open insult and disrespect shown to a judicial officer amounts to a contempt of Court. 1954 BLJR 46 (51).

(70) A person who disturbs the Court by talking loudly in the corridor of the Court and defies the authority of police official who, upon the Court's orders, asks him to observe silence, interferes with administration of justice and such conduct amounts to contempt of Court. 1963 (2) Cri LJ 62 (63) (All).

(71) Counsel's statement before Full Bench that his client does not wish matter to be argued before the Bench as constituted amounts to a deliberate and intentional insult to the Court. A 1932 Lah 485 (485) (FB).

(72) Counsel who sign applications or pleadings containing matter scandalizing the Court without reasonably satisfying themselves about the prima facie existence of adequate grounds therefor with a view to prevent or delay the course of justice, are themselves guilty of contempt of Court and they cannot claim any privilege. A 1959 Madh Pra 238 (240) : 1959 Cri LJ 842 (DB) °° A 1968 Andh Pra 370 (374) (DB) °° A 1959 Orissa 89 (94, 95) : 1959 Cri LJ 636 (DB).

(73) Threatening a Judge on account of a certain judicial act of his to expose him by publishing a pamphlet amounts to a contempt of Court inasmuch as that is calculated to lower the prestige of the Court and make people lose confidence in the justice administered by that Court. A 1956 Him Pra 49 (50) : 1956 Cri LJ 1317.

(74) If a threat of action at law is held out to a Magistrate unless he apologises, for what he did acting in his judicial capacity, even if what he did was not strictly justifiable, that constitutes contempt. A 1966 Madh Pra 342 (345) : 1966 Cri LJ 1448 (DB).

(75) Accusing a Judge of discourteous treatment of the bar coupled with a warning that if he persisted to do so measures would be taken amounts to a contempt. A 1950 Sind 1 (1, 3) : 51 Cri LJ 810 (FB) °° A 1961 Cal 495 (498) : 1961 (2) Cri LJ 334 (FB).

(76) Comments having tendency to overawe Public Prosecutor coupled with threat constitutes contempt. A 1961 Pat 1 (9, 10) : 1961 (1) Cri LJ 134 (DB) °° A 1961 Pat 217 (221, 222) : 1961 (1) Cri LJ 698 (DB).

(77) Attacks made by a party to a proceeding on opponents' advocate outside the Court after termination of the proceedings and having no relation to the proceedings which had terminated cannot be considered to be scandalising the Court or administration of justice. A 1956 Mad 621 (625) (DB).

(78) Fair and reasonable criticism of the conduct and character of the Judges in relation to the judicial duties discharged by them does not amount to a contempt. A 1954 SC 10 (13, 14) : 1954 Cri LJ 238. (A 1950 All 556 (FB), Reversed.) °° A 1950 Sind 1 (2) : 51 Cri LJ 810 (FB) °° A 1954 Cal 403 (403) : 1954 Cri LJ 1160 (DB) °° A 1954 Pat 203 (210) : 1954 Cri LJ 533 °° A 1959 Pat 262 (266, 267) : 1959 Cri LJ 754 (DB).

[See also A 1960 Pat 326 (328) : 1960 Cri LJ 979 (DB).]

(79) To say that a Judge, in his judicial capacity, made remarks which could not be expected from any sane man does amount to a serious contempt. A 1959 Pat 262 (267, 268) : 1959 Cri LJ 754 (DB).

(80) Private communications with Judges touching upon merits of case — Such communication tends to bring Courts into disrepute and undermine respect of people for laws and Courts. A 1969 Delhi 319 (320) (DB).

(81) Bona fide complaints against judicial officers addressed to authorities to seek redress for some grievances and not intended to exert pressure upon them in the exercise of judicial functions or to diminish their authority as Judges by vilifying them cannot be treated as contempts. A 1950 All 549 (553, 554) : 51 Cri LJ 1500 °° A 1958 J & K 19 (19) : 1958 Cri LJ 636 (FB) °° 1968 MPLJ 725 (DB) °° 1965 (2) Cri LJ 268 (269) : 1964 All WR (HC) 347 (DB) °° (1963) 1 Cri LJ 818 (819) (Cal).

(82) Letter to superior Court asking it to see and verify as to real situation in cases pending before lower Court — On facts, held, contempt proceedings were not warranted — Discouraging approach to superior Court with request to scrutinise proceedings pending before lower Court, held, not commendable. A 1969 Delhi 291 (294, 295) (DB).

(83) A defamatory attack on a Judge unless it is also calculated to interfere with the due course of justice or proper administration of law by such Court will not be treated as a contempt of Court. A 1954 SC 10 (14) : 1954 Cri LJ 238 °° (1965) 2 Andh LT 170 (DB) °° A 1959 Punj 319 (321, 322) : 1959 Cri LJ 896 (DB).

(84) When allegations made against a judicial officer in an application for transfer of a proceeding from his Court are found to have been based on mistaken and misconceived view of the facts, it is a technical contempt of which the Court does not take notice. A 1968 Punj 217 (231) : 1968 Cri LJ 775 : 69 Pun LR 678 (FB).

(85) A petition addressed to the executive authorities, however much vile an attack it may contain against a Magistrate in respect of his disposal of a particular case, cannot amount to a contempt inasmuch as it neither interferes with the due administration nor is it calculated to lower the prestige of the Court by undermining public confidence. A 1954 All 308 (309) : 1954 Cri LJ 645 (FB).

(86) Criticism of Judges in relation to something done by them which has absolutely no relevance to their position as Judges does not amount to a contempt. A 1943 PC 202 (204, 205) : 46 Cri LJ 318. ((1942) Oudh WN 6 (20) (DB), Reversed.)

(87) Any criticism of a retired Judge is not likely to interfere with the due administration of justice and hence does not constitute contempt. A 1962 Assam 96 (98) (DB).

(88) Criticism of the executive acts of a Judicial officer where he possesses both executive and judicial functions does not amount to contempt. A 1950 All 549 (551) : 51 Cri LJ

Section 2 — Note 4 (contd.)

1500 °° A 1961 Ker 321 (324) : 1961 (2) Cri LJ 771.

(89) A Court does not perform any judicial act by rejecting a complaint and hence a criticism of the rejection cannot be considered to be a criticism of a judicial act amounting to a contempt. A 1937 Pat 124 (126) : 38 Cri LJ 412 (DB).

(90) Appearing before a Court in a state of drunkenness without anything more is not a contempt of Court. A 1956 All 258 (263) : 1956 Cri LJ 679 (DB).

(91) Though notings in Secretariat files may be confidential, once copies of such notings are taken out and circulated, they cease to be confidential and any remarks therein which are prima facie derogatory to the dignity of Court. may amount to contempt. A 1959 Orissa 116 (117) : 1959 Cri LJ 884 (DB).

(B) Interference with due course of judicial proceedings.

(92) Accused substantially interfering with due course of judicial proceedings commits criminal contempt. 1974 Pun LJ (Cri) 203 : (1974) 1 Cri LT 332.

(93) If a wrong or misleading statement is deliberately and wilfully made by a party to a litigation with a view to obtain a favourable order, it would prejudice or interfere with the due course of judicial proceeding and thus amount to contempt of court. But it must be established satisfactorily that any deliberate and wrong statement was made and there was a favourable order in consequence of the statement. A 1974 SC 1252 (1255, 1256) °° 1978 Cri LJ 560 (568) : 1978 Cal HC (N) 64 (DB).

(94) Publication of an article in magazine pending an appeal against conviction for murder expressing opinion on the merits of case amounts to interference with course of justice and as such is contempt of Court. 1971 Cri LJ 1586 (1588, 1589) (All).

(95) Objectionable reference to proceedings in newspaper — Proceedings not actually pending in a Court at time of publication — Contempt not committed. 1970 Cri LJ 1283 (1284) (All).

(96) Where an article published in a newspaper referred to a case under S. 3 (7) of the Essential Commodities Act and under Sec. 465, Penal Code, which was pending in the Court of the Magistrate, and, it was clearly said in the article that the ration cards which had been recovered from the possession of the accused were forged, and a demand had also been made that he should be suspended, and prosecuted, the imputation clearly amounted to contempt of Court. 1970 Cri LJ 1283 (1284, 1285) (All).

(97) Opposite party proceeding with departmental enquiry against P in spite of his knowledge of writ petition by P pending in Court — Conduct held amounted to contempt of Court. 1970 Lab IC 930 (934) (Cal).

(98) Interference with course of justice — Commission of enquiry appointed under S. 3, Commissions of Enquiry Act (1952) to enquire into an incident — Incident subject-matter of pending criminal trial — Matters involved in both more or less same — Inquiry must stay pending trial or it would amount to contempt — Such an enquiry is bound to interfere with even and ordinary course of justice. A 1970 Punj 331 (332, 333).

(99) Interference with due course of justice — Suit for injunction restraining employer from terminating plaintiff-employee's services — Services terminated pending that suit — Plaintiff non-suited thereby — Termination of service amounted to contempt of Court before which suit was pending. A 1971 Cal 178 (178, 179) : 1971 Cri LJ 699.

(100) When a court puts a Receiver in possession of property, the property comes under court custody, the Receiver being merely an officer or agent of the court. Any obstruction or interference with the court's possession sounds in contempt of that court. Any legal action in respect of that property is in a sense such an interference and invites the contempt penalty of likely invalidation of the suit or other proceedings. But, if either before starting the action or during its continuance, the party takes the leave of the court, the sin is absolved and the proceeding may continue to a conclusion on the merits. A 1977 SC 2304 (2306).

(101) The petitioner, the Administrator of Sri Jagannath Temple, Puri promulgated the Jatri Panda Control Order regulating the conduct and activities of the Sevaks of the Temple with a view to provide necessary facilities to the pilgrims. Some persons filed a writ petition to quash the aforesaid Order as being bad in law. When the writ petition was pending, a letter was addressed by them calling upon the Administrator to withdraw the Order within 48 hours failing which the Administrator was to remain responsible for whatever consequences that may ensue.

Held that the approach made to the Administrator in the letter, was in the nature of a threat having the tendency to interfere with the course of justice by deterring the Administrator from pursuing his opposition to the writ petition and as such contempt of the Court was committed thereby. (1971) 2 Cut WR 579.

(102) Contempt of Court — Suit pending before the Court — Domestic enquiry in the same matter causes no contempt. 1978 Cri LJ 79 (80) (Cal).

(103) Company transferring its employee → Suit challenging transfer — Temporary injunction to restrain company from transferring, not granted — Domestic enquiry and dismissal for misconduct during pendency of civil suit — Do not amount to contempt of Court. 1978 Lab IC (NOC) 7 (DB) (Cal).

(104) High Court Judges deciding disciplinary proceedings against delinquent judicial officer commit no contempt of the High Court merely because they did so while contempt proceedings were simultaneously pending before them against the same officer. A 1974 Orissa 1 (4, 5) (FB).

(105) Application to file an enquiry report as additional evidence under O. 41, R. 27, Civil P. C. was held not a contempt of Court, even if the report in a parallel enquiry is contumacious. 1977 Cri LJ (NOC) 101 (Gauhati).

(106) Court directing parties to submit written submissions on points at issue before judgment is delivered — Submissions made cannot be said to be private communications as they were made in pursuance of the Order of the Court — These submissions form part of the records and cannot be said to prejudice, interfere or tend to interfere with due course of justice within Section 2 (c) (ii) — Do not constitute criminal contempt. A 1980 SC 107 (107) : 1980 Cri LJ 191.

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(107) Temple Managing Committee by resolution moving A from post of "Gurav" of temple — Writ petition by A to quash resolution — Pending petition A forcing Secretary of Committee to execute certain documents to support his claim in writ petition — Act of obtaining documents held did not amount to contempt of Court. A 1976 Goa 23 (24).

(108) Where an order of State Government under Section 4 (1) of M. P. Adhiniyam (13 of 1973) is challenged by a text book publisher whose books are excluded from study in the schools, a statement made by the concerned Minister even if prejudicially affects his business he would not be prejudiced in the matter of hearing in the pending proceeding and hence the statement would not amount to contempt. **A 1974 SC 1252 (1255) : 1974 Cri LJ 924.**

Case law under the old Act of (1952)

(109) It is the effect of the act or words complained of, that is, their tendency to interfere with the due course of justice or the likelihood of their doing so that determines their character as a contempt. The intention or motive of their author is irrelevant to that question. **A 1950 Pepsu 9 (14) : 51 Cri LJ 1219 (SB)** °° A 1958 Orissa 168 (181) : 1958 Cri LJ 1055 (DB) °° A 1958 Pat 144 (146) : 1958 Cri LJ 401 °° A 1957 All 37 (43) : 1957 Cri LJ 18 (DB) °° A 1956 Pat 321 (323) : 1956 Cri LJ 1087 (DB) °° A 1956 Sau 102 (103) : 1956 Cri LJ 1355 (DB) °° A 1955 Madh B 183 (185) : 1955 Cri LJ 1502 (DB) °° **1968 Ker LT 299 : 1968 Ker LJ 197 (FB)** °° A 1968 Ker 301 (306) : 1968 Cri LJ 1424 (DB) °° A 1967 Cal 153 (157) : 1967 Cri LJ 350 (DB) °° A 1966 Madh Pra 342 (344) : 1966 Cri LJ 1448 (DB) °° A 1963 Madh Pra 61 (67, 68, 70) : 1963 (1) Cri LJ 187 (DB) °° 1961 (2) Cri LJ 109 (111) : 1960 Ker LT 338 (DB).

(110) Interference with due course of justice — Prejudicing mankind in favour of or against party before cause is heard — Tendency to interfere with due course of justice and not intention of contemner is decisive test. **A 1970 SC 1821 (1824) : 1970 Cri LJ 1525.**

(111) The gravamen of the offence of contempt is the interference or the likelihood of interference with the course of justice. **A 1935 Cal 419 (435) : 36 Cri LJ 1053 (FB)** °° A 1958 Punj 377 (381) : 1958 Cri LJ 1225 °° A 1958 Punj 273 (282) : 1958 Cri LJ 952 °° A 1956 Andhra 84 (86) : 1956 Cri LJ 475 (DB) °° A 1956 Sau 102 (103) : 1956 Cri LJ 1355 (DB) °° A 1955 Pat 135 (138) : 1955 Cri LJ 520 (DB) °° A 1962 Ker 52 (54, 55) : 1962 (1) Cri LJ 336 (DB).

(112) Actual obstruction to or interference with the course of justice is not necessary to constitute an act or conduct into a contempt — It is enough if the act or conduct in question is calculated to do so or is likely to have that effect. A 1953 All 266 (269) : 1953 Cri LJ 630 (DB) °° A 1954 Pat 289 (296) : 1954 Cri LJ 942 (DB) °° **A 1954 SC 743 (746)** °° **A 1969 Delhi 207 (210) : 1969 Cri LJ 884 (FB)** °° **A 1968 Punj 217 (233) : 1968 Cri LJ 775 (FB)** °° **1968 Ker LT 299 : 1968 Ker LJ 197 (FB)** °° **A 1959 Cal 174 (176) : 1959 Cri LJ 316 (FB)** °° A 1969 Orissa 117 (128) : 1969 Cri LJ 763 (DB) °° A 1969 Pat 140 (144) : 1969 Cri LJ 631 °° A 1968 Ker 301 (306) : 1968 Cri LJ 1424 (DB) °° **A 1967 Ker 177 (180)** : 1967 Cri LJ 1147 (DB) °° A 1965 All 606 (608) : 1965 (2) Cri LJ 707 °° A 1964 Pat 446 (449, 450) : 1964 (2) Cri LJ 439 (DB) °° 1963 (2) Cri LJ 219 (222) : 1962 MPLJ 1121 (DB) °° ILR (1960) 1 All 25 °° A 1959 Ker 266 (271, 272) : 1959 Cri LJ 1075 (DB).

(113) Acts which are calculated to interfere with the course of justice including libels or insults to Judges and publications prejudicing the fair conduct of proceedings fall within the category of criminal contempts. A 1955 Mad 121 (129) : 1955 Cri LJ 505 (DB) °° A 1969 Pat 140 (144) : 1969 Cri LJ 631 °° A 1965 Mad 415 (415, 416) : 1965 (2) Cri LJ 371 (DB) °° A 1961 Pat 217 (221, 222) : 1961 (1) Cri LJ 698 (DB) °° 1964 (1) Cri LJ 449 (451) (DB) (Cal) °° (1961) 65 Cal WN 722 (DB). (Entry upon land in disobedience of order of injunction.)

(114) Where an act is complained of as a contempt on the ground that it interfered with due course of justice it is essential that there should have been pending proceedings at the time when the act is alleged to have been done. **A 1943 Lah 329 (335) : 45 Cri LJ 445 (FB)** °° A 1947 Cal 414 (415, 416).

(115) Purpose of contempt, jurisdiction is to uphold majesty and dignity of law courts and the image of such majesty in the minds of public cannot be allowed to be distorted. Auction for contempt is not for the purpose of placing Judges in a position of immunity from criticism but is aimed at protection of freedom of individuals and the orderly and equal administration of laws. **A 1969 Delhi 214 (218) (SB).**

Pendency of proceedings.

(116) A criminal case is sub-judice even when a person has been arrested and is under custody. It is not necessary that an enquiry or trial should have actually commenced. **A 1950 Pepsu 9 (19) : 51 Cri LJ 1219 (SB)** °° **A 1943 Lah 329 (335) : 45 Cri LJ 445 (FB)** °° A 1954 Kutch 2 (3) : 1954 Cri LJ 390 °° A 1963 Madh Pra 61 (65, 66, 67) : 1963 (1) Cri LJ 187 (DB) °° A 1962 Pat 2 (6) : 1962 (1) Cri LJ 62.

[See also A 1961 Pat 217 (222, 223, 224) : 1961 (1) Cri LJ 698 (DB).]

[But see A 1957 All 37 (41) : 1957 Cri LJ 18 (DB) °° A 1953 All 600 (604) : 1953 Cri LJ 1337 (DB).]

(117) Actual pendency of proceedings is not necessary to attract a comment on any occurrence within the fold of contempt. It is sufficient even if proceedings in respect of that occurrence are imminent and that is known to the publisher. A 1955 Orissa 36 (42) : 1955 Cri LJ 547 (DB) °° A 1939 Mad 257 (259) : **40 Cri LJ 533 (SB)** °° 1969 Ker LT 513 (518) : 1969 Ker LJ 453 °° A 1968 Ker 301 (307) : 1968 Cri LJ 1424 (DB). (In cognizable offences it is enough if proceedings under Chap. XIV, Cr. P. Code have been commenced by police.) °° A 1962 Pat 2 (6) : 1962 (1) Cri LJ 62 (DB) °° A 1961 Pat 217 (224, 225) : 1961 (1) Cri LJ 698 (DB) °° A 1961 Pat 217 (221, 222) : 1961 (1) Cri LJ 698 (DB).

[See however 1966 Cri LJ 214 (216) : 1965 MPLJ 844 (DB).]

(118) During the time between the conviction of an accused person on an indictment and his appeal to the Court of criminal appeal the case is not ended at all, but is still sub-judice or pending and therefore if a comment interfering with justice is made even when only an

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appeal is pending there may be contempt. A 1952 Nag 259 (262, 263).

(118A) Where pending proceedings in a case, the Public Prosecutor applies under Sec. 494, Cr. P. Code for withdrawal of prosecution of one of the accused, giving reasons therefor, no contempt is committed by the Public Prosecutor. (1969) 71 Punj LR 299 (302).

Withholding applications to High Court.

(119) Any official, however high placed he may be, commits contempt on the ground of interference with due course of justice when he withholds an application addressed by a prisoner to the High Court. A 1945 Nag 33 (35, 49) (DB) ** A 1954 All 351 (352) : 1954 Cri LJ 354 (DB).

(120) Officers of Government who withheld certain habeas corpus applications addressed to the High Court on their own opinion that in the circumstances the applications were not necessary were held to have interfered with the due course of justice and thereby committed contempt. A 1950 East Punj 259 (261) : 51 Cri LJ 1316 (DB).

[See however A 1944 Lah 196 (203, 204) : 46 Cri LJ 174 (SB). (Withholding an application under Section 491, Criminal P. C., amounts only to a technical contempt.)]

(121) Any officer of the Government who is found to have unduly delayed the transmission of applications addressed to the High Court by detenus, to seek redress for certain grievances, commits contempt and is liable to be punished. A 1952 Cal 562 (563) : 1952 Cri LJ 1255.

(122) Making of a false affidavit by a Sub-Inspector of Police by way of return to a petition for writ of habeas corpus under Sec. 491, Cr. P. Code to the effect that the alleged detenu is not in his custody, resulting in the dismissal of the writ petition, cannot but obstruct and impede the administration of justice; and for that reason, it is punishable as contempt of Court. A 1961 Punj 18 (20, 21) : 1961 (1) Cri LJ 146.

(123) Tampering with the dates found in an application of a prisoner addressed to the High Court by itself constitutes contempt on the part of the jail authorities. A 1945 Nag 33 (38) (DB).

(124) A person who forces or attempts to force a party to refrain from instituting a suit or a party or prosecution witness to withdraw or abandon the prosecution or defence or an action or proceeding, is guilty of contempt of Court. A 1959 Punj 182 (183, 184, 185) : 1959 Cri LJ 513 (DB).

Threat to parties.

(125) Any kind of threat or any action which may amount to a threat held out to a person, who has approached the civil Courts for a redress of his grievances, with a view to induce him to forego the assistance of the Civil Courts, amounts to a contempt of Court. A 1956 All 160 (160) : 1956 Cri LJ 195 (DB) ** A 1962 SC 1172 (1178) : 1962 (2) Cri LJ 262 ** 1969 Lab IC 880 (884) : (1969) 1 Andh WR 559 (DB) ** A 1968 SC 1513 (1517) : 1968 Cri LJ 1661 ** 1967 Cri LJ 1225 (1226) (All) ** A 1966 All 305 (314, 315) : 1966 Cri LJ 632 ** A 1964 Pat 245 (246, 247) : 1964 (1) Cri LJ 691 (DB).

(126) It is now well settled that any conduct by which the course of justice is perverted, either by a party or a stranger, is contempt. (1969) 1 An WR 559 (563, 564) (DB).

(127) Addressing a threatening notice to the opposite party in the suit to withdraw a plea he has taken in his pleadings amounts to a contempt. A 1935 All 117 (118, 119) (DB) ** A 1940 Nag 110 (112, 113) : 41 Cri LJ 709.

(128) A letter to a third party by one of the parties to a proceeding to persuade the opposite party to settle his claim in order to save the political party of which he was a member from ill fame amounts to a contempt inasmuch as its aim is to bring pressure on the opposite party and thereby to interfere with the course of justice. A 1953 Cal 53 (55) : 1953 Cri LJ 214.

(129) An article by an editor against whom proceedings under Section 500, Penal Code are pending characterising the complainant as a king of liars and threatening him as well as the witnesses with future proceedings if the action against him failed amounts to a contempt. A 1941 Oudh 67 (69) : 42 Cri LJ 221 (DB).

(130) Mere notice by solicitor on behalf of parties defamed demanding apology, during pendency of criminal case, does not amount to contempt of criminal Court. A 1967 Cal 178 (184) : 1967 Cri LJ 455 (DB).

(131) A person who is not a party to the case and who feels aggrieved by certain references made to him in the written statements by the accused commits no contempt by interference with due course of justice by merely demanding apology and compensation from the accused but not the withdrawal of the statement itself. A 1941 Nag 241 (243) : 43 Cri LJ 98 ** A 1940 All 114 (116) : 41 Cri LJ 390 (DB) ** A 1960 Madh Pra 115 (117) : 1960 Cri LJ 484 (DB).

(132) A notice by a stranger to the suit to one of the parties demanding that he should expunge certain defamatory statements from his pleading would not amount to a contempt of Court when the statement in question is absolutely irrelevant to the suit and cannot therefore affect its fair trial if it is expunged. A 1952 All 408 (410, 411, 412) : 1952 Cri LJ 786.

(133) Where the counsel in the course of his cross-examination of the complainant intimidates him with the threat that it would go to the detriment of his family if he did not withdraw his case he commits a contempt by interfering with the course of justice. A 1957 Punj 105 (105) : 1957 Cri LJ 657.

Interference with possession of receiver.

(134) A person whether a party to the suit or an outsider who interferes with the possession of receiver is guilty of contempt. A 1945 Sind 75 (80) : 47 Cri LJ 408 ** A 1958 Punj 471 (475) : 1958 Cri LJ 1529 ** A 1940 Cal 487 (488) (DB) ** 1964 (1) Cri LJ 449 (451, 452, 453) : 68 Cal WN 693 (DB) ** (1962) 66 Cal WN 983.

(135) The case of interference with or obstruction to a receiver appointed by a Court is treated as a contempt of a criminal nature and the fact that the order appointing him was improperly procured is no justification for interference with his possession. A 1934 Bom 452 (455) ** 1964 (1) Cri LJ 449 (451) : 68 Cal WN 693 (DB) ** A 1958 Punj 471 (475) : 1958 Cri LJ 1529.

Section 2 — Note 4 (contd.)

(136) An attempt to interfere with receiver's possession constitutes contempt even if the person who interferes was not personally served with the order which appointed the receiver. A 1932 Cal 705 (707) : 33 Cri LJ 945 (DB).

(137) Interference with possession of the official liquidator appointed under Companies Act, 1913, constitutes contempt of authority of Court under which the company is being wound up. A 1958 Punj 445 (452) : 1958 Cri LJ 1439.

(138) Refusal by a party who is aware of the appointment of a receiver to deliver possession to him when called upon to do so would amount to criminal contempt. A 1954 Orissa 167 (170) : 1954 Cri LJ 988 (DB).

(139) A mere decision of Court to appoint a receiver without designating a person to that office does not amount to an effective order and hence the collection and disbursement by a person of the money intended by the Court to fall within the power of the receiver does not amount to a contempt, even though that person is aware of the decision. 1941 Rang LR 747 (753, 754).

(140) An official liquidator like a receiver appointed by the Court is an officer of the Court — Notice of attachment under S. 46 (5A), Income-tax Act (1922), by Income-tax Officer to official liquidator — Prior consent of Court not obtained — Notice amounts to contempt of Court. (1958) 24 Cut LT 479.

[See also A 1962 Punj 433 (441).]

Interference with counsel.

(141) Abuses, insults or aspersions cast on counsel in the course of the discharge of their duties and tending to deter them from duty amount to contempt of Court. A 1956 Mad 621 (623) (DB) °° (1947) 48 Cri LJ 757 (762, 763) (Lah) °° A 1966 Bom 19 (27, 28) : 1966 Cri LJ 9 (DB).

(142) A Judge or a Magistrate who insults and intimidates a counsel in a cause for something done by him legitimately is guilty of contempt. **A 1949 Lah 270 (272, 273) : 51 Cri LJ 44 (FB).**

(143) Words or action used in face of the Court or in the course of proceedings to be a contempt must be such as would interfere or tend to interfere with the course of justice. Words used in argument before Court, however irrelevant, very rarely amount to a contempt when they relate to an opponent whether counsel or litigant. **A 1945 PC 134 (135) : 72 Ind App 189.**

(144) Defamatory statements made against advocates after the termination of a case stand on a different footing from insults offered to such advocates while actually conducting cases and they do not amount to a contempt of Court. **A 1926 All 623 (628) (FB).**

(145) A police officer who arrests the counsel while he comes out casually when conducting a criminal case and takes him away to the thana in handcuffs is clearly guilty of a substantial contempt. A 1956 Raj 179 (184) : 1956 Cri LJ 1350 (DB).

(146) Arrest of counsel proceeding to file or appear in case by police amounts to contempt when there is something in nature of mala fides, and the arrest is intended to interfere with due course of justice or calculated so to interfere. **A 1944 Lah 196 (199, 200) : 46 Cri LJ 174 (SB)** °° A 1956 Raj 179 (183) : 1956 Cri LJ 1350 (DB) °° 1961 (2) Cri LJ 875 (877) : 1961 MPLJ 1310 (DB).

(147) An arrest of a counsel in the Court precincts, when he is not appearing in any case or when such arrest does not prevent him from appearing in a case does not amount to contempt of Court. A 1956 Raj 179 (183) : 1956 Cri LJ 1350 (DB).

(148) Article demanding that counsel should not undertake defence of accused amounts to contempt of Court. A 1941 Pat 185 (190) : 42 Cri LJ 225 (DB).

Acts lawfully done are not contempts.

(149) Taking a legitimate step during the pendency of a proceeding would not amount to the party interfering with the course of justice even though the effect of his action would be to render the proceedings infructuous. **A 1953 Madh B 245 (247) : 1953 Cri LJ 1675 (FB).**

(150) A superior judicial officer, who has the duty to supervise the work of his subordinate officers, commits no contempt when he calls for a report from any such officer by sending an entire application made to him, which besides the allegations against the officer also contains matter having a tendency to interfere with the due course of justice in a case pending before him. **A 1953 SC 185 (186) : 1953 Cri LJ 911.**

(151) A superior Police Officer commits no contempt in making legitimate enquiries, during pendency of a criminal trial with a view to find out the truth and with a view to ascertain whether the action of his subordinate in connection with the investigation of an offence was bona fide or not. A 1960 Orissa 137 (139) : 1960 Cri LJ 1124.

(152) Where the Bishop of a diocese threatened the plaintiff in a suit against the church with ex-communication if the suit was not withdrawn it was held that the Bishop had not committed any contempt inasmuch as his threat was only that he would assert his legal rights if the suit was not withdrawn. A 1952 Trav-Co 75 (76) : 1952 Cri LJ 394.

(153) When an advocate bona fide answered a question put to him by the Court, he would not be guilty of contempt of Court. A 1955 Andhra 156 (161) : 1955 Cri LJ 1228 (DB).

(154) An expression of opinion by Investigating Officer in his report that it is difficult to sustain the complaint cannot be regarded as contumacious in respect of the Court before which the complaint is lodged. A 1961 Mys 12 (18) : 1961 (1) Cri LJ 111 (DB).

(155) An application by Court Inspector at the instance of Police Superintendent stating that the Police, during the pendency of proceedings under Section 107, Cr. P. C. had come upon certain material which, in their view would not necessitate execution of a bond by the person proceeded against, does not interfere with due course of justice. A 1963 Cal 336 (337) : (1963) 1 Cri LJ 754 (DB).

[See also A 1961 Mys 12 (18) : 1961 (1) Cri LJ 111 (DB).]

Instituting proceedings against party during pendency of action.

(156) If a person takes legal action in a Court of law which is open to him, he cannot commit any contempt of Court unless the action be held to be not an approach to the Court for redress of the wrong but was really such as can be said to be abusing the process

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of the Court. A 1955 All 391 (393) : 1955 Cri LJ 1023 (DB).

(157) A party who applies to the Court for the striking out from the written statement of something which is defamatory commits no contempt of Court. A 1940 All 114 (115) : 41 Cri LJ 390 (DB).

[See also A 1966 Mad 136 (142) : 1966 Cri LJ 421 (DB).]

(158) An accused in a pending criminal case commits no contempt if he institutes criminal proceedings for defamation in regard to certain allegations made in the complaint against him in the pending case. A 1952 All 674 (678) : 1952 Cri LJ 1160 (DB).

(159) A party to proceedings who has been defamed by the other party while deposing as a witness and where the defamatory statement is irrelevant to the subject-matter in issue in the proceedings commits no contempt if he, even before the termination of the proceedings, bona fide commences a criminal action for defamation to vindicate his reputation. A 1939 Oudh 225 (226, 227) : 40 Cri LJ 569 (DB).

(160) Starting proceedings under Section 476, Criminal P. C. against prosecution witnesses for giving false evidence in committing magistrate's court before commencement of sessions trial was held not to amount to contempt of Sessions Court inasmuch as the act amounted only to exercise of the right which the prosecution was legally entitled to do. A 1955 All 391 (392) : 1955 Cri LJ 1023 (DB).

(161) Instituting criminal proceedings for defamation in respect of certain statements made by the opposite party in an affidavit filed in Court does not amount to a contempt in the absence of any indication in the conduct of the complainant that he would drop the proceedings if the opposite party withdrew the defamatory allegations. A 1940 All 497 (499, 500) : 42 Cri LJ 211 (DB) ** A 1941 All 95 (97) : 42 Cri LJ 370 (DB).

(162) An accused person by sending a notice to the complainant offering to settle the dispute amicably if he withdrew the prosecution and otherwise threatening to institute criminal and civil proceedings against the complainant commits no contempt inasmuch as the threat conveyed amounts only to an intimation of his resolve to prosecute his legal rights in a certain event. A 1952 All 674 (678) : 1952 Cri LJ 1160 (DB).

(163) A superior officer who gives a charge-sheet to his subordinate while his examination as a witness in court is in progress, in respect of some statement made by him, commits contempt on the ground of interference with the due course of justice. A 1955 Raj 123 (127) : 1955 Cri LJ 1108 (DB).

(164) When an order of suspension is stayed by an interim order by High Court, passing of another order of suspension, after resumption of work by delinquent, on fresh charges does not amount to contempt. A 1959 All 686 (689).

(165) If the validity of an order of detention is pending consideration by the High Court, a fresh but illegal order of detention on revocation of the prior order would amount to contempt of Court. A 1953 Orissa 33 (39) : 1953 Cri LJ 349 (DB).

(166) Even where the application for questioning the prior detention has not been actually filed but the new illegal order of detention is passed with the knowledge of the imminence of such an application being made, the passing of the illegal order would amount to contempt of Court. A 1953 Orissa 33 (39) : 1953 Cri LJ 349 (DB).

Abuse of judicial powers.

(167) Judges and magistrates acting in abuse of their judicial powers oppressively, unjustly or irregularly can be punished for contempt. A 1953 Madh B 60 (61) : 1953 Cri LJ 570 ** A 1967 Andh Pra 219 (228, 229) : 1967 Cri LJ 984 (DB).

(168) If an authority bona fide considering that it alone has jurisdiction to determine a matter and under such belief, does not stay its hands after the institution of a suit in the civil Court, it commits no contempt. 1967 All WR (HC) 15 : 1967 All Cri R 21.

(169) It would amount to contempt of Court to misuse the process of court for obtaining a warrant against a person with no intention of proceeding against him but merely to use the warrant as a lever for blackmailing him. A 1939 Lah 143 (144) : 40 Cri LJ 571 (DB).

(170) Interference by an executive officer with the execution of the process of a Civil Court is contempt of Court. A 1953 Orissa 266 (270) : 1953 Cri LJ 1578 (DB).

Creation of prejudicial atmosphere.

(171) Conduct calculated and having tendency to produce, an atmosphere of prejudice in the midst of which the proceedings must go on is contempt of Court even though it is not likely that the mind of Magistrates or Judges charged with case would thereby be prejudiced. A 1932 Mad 26 (27) : 33 Cri LJ 270 (DB) ** A 1943 Lah 329 (337) : 45 Cri LJ 445 (FB) ** A 1957 All 457 (459) : 1957 Cri LJ 801 ** A 1966 SC 1418 (1420) : 1966 Cri LJ 1071.

(172) Any act done or writing published that has a tendency to interfere with due course of justice is contempt. If witnesses are prevented from giving evidence by dissuading or frightening them, it is contempt. 1969 Ker LJ 453 (456) : 1969 Ker LT 513 (DB).

(173) Any act done or writing published calculated to obstruct or interfere with due course of justice or lawful process of Courts is contempt of Court. A 1962 Pat 2 (7) (DB).

(174) Any conduct, not necessarily publications in newspapers and comments from public platforms, which has a tendency to inculcate a belief in the public or a section of it that a state of affairs prejudicial to a party to the litigation exists amounts to contempt. A 1953 All 266 (269) : 1953 Cri LJ 630 (DB) ** 1969 Ker LT 513 (518) : 1969 Ker LJ 453 (DB).

(175) Any act done or writing published that has a tendency to interfere with the due course of justice is contempt. If witnesses are prevented from giving evidence by dissuading or frightening them, it is contempt. Publications which have a tendency to poison the minds of the general public and threaten witnesses or parties would make the atmosphere impossible for administration of justice. Mobilising public opinion for or against parties to pending cases would certainly interfere with the administration of justice. 1969 Ker LT 513 (518) : 1969 Ker LJ 453 (DB).

(176) Publication of Court proceedings — Press-reporter of publisher of newspaper cannot

Section 2 — Note 4 (contd.)
claim an indefeasible right to put his own gloss on statements in Court by selecting stray passages out of context which may have a tendency to convey to reader to the prejudice of a party to proceedings a sense different from what would appear when they are read in their own context. While reproducing Court proceedings no words may be added, omitted or substituted if their effect is to be more prejudicial to party litigant than actual proceedings. **A 1969 Delhi 201 (213) (FB).**

(177) Conduct which is likely to affect the conduct of the parties to the proceedings and thereby the true course of justice amounts to contempt even though it is not likely to directly affect the judge's mind. A 1956 Pat 321 (323) : 1956 Cri LJ 1087 (DB) ** A 1953 Orissa 249 (252) : 1953 Cri LJ 1491.

(178) If during the pendency of a criminal case against an accused person an important piece of documentary evidence bearing on the innocence of the accused is tampered with or otherwise rendered ineffective by the action of a person, there is obstruction to the due administration of justice and that person may be liable for contempt. A 1960 Orissa 137 (138, 139) :1960 Cri LJ 1124.

(179) Attempt to approach a witness summoned by Court or by the opposite party for the purpose of discussing the evidence he should give before the Court, amounts to an improper interference with the course of justice. 1964 All Cri R 353 : 1964 All WR (HC) 498 (DB)

(180) If an important document like the acknowledgment receipt is removed from the record of the Court, there is certainly obstruction to due administration of justice and the person responsible for the loss of the receipt is liable for contempt. 1964 BLJR 481 (DB).

(181) It is only an action that tends to interfere with course of justice or with freedom of a witness to give evidence that would constitute contempt. What is prohibited is exercise of a power to punish a witness for giving evidence as such or to intimidate from giving or to induce him to prevent justice. ILR (1964) Andh Pra 811 (816, 817) (DB).

(182) Delivering speeches at public meetings with the object of influencing the decision of Court in a pending criminal case, preventing the witnesses from giving evidence at the trial and forcing the complainant to withdraw the case amounts to contempt. **A 1941 Oudh 14 (15, 16) : 41 Cri LJ 584 (DB).**

(183) Private persons by merely going about and making enquiries into the facts of a pending case cannot be said to be committing a contempt by interfering with the course of justice. It is only when they publish the results of their enquiries that can be said to be committing a contempt inasmuch as the publication would be likely to create prejudice for or against a party. **A 1950 Pepsu 9 (14) : 51 Cri LJ 1219 (SB).**

(184) Any parallel enquiry conducted by an executive officer with regard to a matter which is sub judice amounts to an attempt on his part to prejudge the merits of the case. As such, act is bound to interfere with the even and the ordinary course of justice and amounts to a contempt. A 1955 Andhra 156 (159) : 1955 Cri LJ 1028 (DB) ** A 1959 Punj 182 (184) : 1959 Cri LJ 513 (DB).

(185) An enquiry by a domestic tribunal, in good faith in exercise of powers statutorily vested in it, into the charges of misconduct against an employee does not amount to contempt of Court merely because an enquiry into the same charges is pending before a Civil or a Criminal Court. **A 1969 SC 30 (32) : 1969 Lab IC 194 : 1969 Cri LJ 267** ** **A 1969 SC 215 (226-227)** ** A 1961 SC 633 (639) : 1961 (1) Cri LJ 749 ** 1968 All LJ 95 ** A 1966 Guj 233 (235, 236) : 1966 Cri LJ 1001 (DB) ** A 1964 Pat 368 (369, 371, 372) : (1964) (2) Cri LJ 180 (DB) ** A 1962 Cal 386 (387) : 1962 (2) Cri LJ 48 (DB) ** A 1962 Madh Pra 72 (73) : 1962 (1) Cri LJ 342 (DB).

[See also A 1968 SC 1050 (1052) : 1968 Cri LJ 1234.]

(186) Bona fide exercise of power conferred upon Heads of Department by statutory rules to enquire into conduct of subordinate officials, cannot fall within mischief of law of contempt, especially when the order is not publicised. ILR (1964) Andh Pra 811 (819) (DB).

(C) Interference with administration of justice.

(187) In a general way contempt of Court may be said to be constituted by any conduct that tends to bring the authority and administration of law into disrespect or disregard or to interfere with or prejudice parties to action or their witnesses during litigation — Unfailing criterion is whether or not there has been an interference or a tendency to interfere with administration of justice. A 1970 Mad 14 (16) (DB) ** A 1969 Delhi 291 (293) (DB).

(188) "Unjudicial conduct" by a Judge covers a very wide spectrum, from instances in which the Judge has asked for too many questions or by an excess of zeal for speedily disposing of his list has prevented one side or the other or both from properly presenting their case, to instances in which a Judge has acted dishonestly or corruptly. **1978 Cri LJ 319 (PC).**

(189) Contemptuous imputations made with reference to the administrative functions of High Court amounts to contempt. **A 1974 SC 710 (719 to 722) : 1974 Cri LJ 631.**

(190) Scandalous attack on a Judge in respect of a judgment or past conduct affects adversely the due administration of justice. ILR (1972) 2 Delhi 113 ** 1976 Cri LJ 158 (162) (DB) (Ker).

(191) The act of issuing notification under Cl. 14 of the U. P. High Courts (Amalgamation) Order (1948) is an act in furtherance of the administration of justice : anything said about the Chief Justice while acting under Cl. 14 can form subject-matter of proceedings under the Contempt of Courts Act. A 1975 All 52 (DB).

(192) Contemner delivering a letter to the Presiding Judge from his friend relating to the suit before him — Contemner a party to the suit — Amounts to interference in the administration of justice. 1974 Chandi LR (Cri) 162.

(193) Article published in paper which has the effect of deterring witness from giving evidence — Amounts to contempt. 1980 Cri LJ 845 (848 to 850) : (1979) 2 APLJ (HC) 363 (DB).

[See also ILR (1975) Andh Pra 168 (174). (An intimidation or victimisation of a witness during or after the case in which he gives the evidence is contempt of the Court. Therefore, dismissal of a civil servant for giving in Court evidence prejudicial to the interest of the Government is contempt of the Court since such dismissal amounts to victimisation.)]

Section 2 — Note 4 (contd.)

(194) A threat to do violence, or the actual doing of violence, to induce or compel a party to withdraw a prosecution amounts to Contempt of Court — It amounts to interfering with due course of justice. 1973 Cri LJ 1469 (1470) (All).

(195) Contempt of Court — Chief Minister of State broadcasting speech on A. I. R. with knowledge of pendency of writ proceedings — Speech presenting case of Government to the public before it was tried by Court — Speech, held, was calculated to interfere with due administration of justice as it was likely to create atmosphere of prejudice against petitioner and also to deter other persons from making similar claims before Court. **A 1970 SC 1821 (1827) : 1970 Cri LJ 1525.**

(196) The contempt proceedings were initiated against ex-M. L. A. by the Magistrate on the ground that the former visited the house of the latter for seeking favour and influencing his mind by virtue of his status in the case, fixed for pronouncement of judgment, on the date of the visit. The former admitted his visit to the latter's house but denied having told him to show any favour and raised the plea of the visit being a visit of courtesy call. It was not the case of the contemner that the Magistrate had any grudge or ill-feeling against him : **Held**, that there being no reason why in a case, pending before him and fixed for pronouncement of Judgment, the Magistrate should falsely implicate the contemner for interference with the course of justice, the latter was guilty of offence under Section 3 of the Contempt of Courts Act. Practice of courtesy calls on the part of the legislators and on the part of other public men and men of influence or executive authorities made to the judicial officers deprecated. 1970 Cri LJ 942 (943, 944) (Punj).

(197) Magistrate taking cognizance under S. 190 (1) (b) or (c) in spite of cancellation report submitted by police — Assistant Public Prosecutor bound to conduct case — Refusal amounts to contempt of Court. 1978 Cri LJ 1041 : 1978 Chand LR (Cri) 40 (DB).

(198) Court ordering Police Sub-Inspector to produce documents — Failure to comply due to indifference and negligence — Case hearing delayed — Sub-Inspector commits "Criminal Contempt". ILR (1973) Cut 1435.

(199) Criminal complaint against Police Officer — Police Officer arresting complainant and his witnesses with object of stifling prosecution — Is guilty of gross contempt of Court. **A 1972 SC 905 (907, 908) : 1972 Cri LJ 635.**

Case law under the old Act of (1952).

(200) Any act or conduct with reference to a pending proceeding which has a tendency to deprive the Court the power to administer justice duly and impartially and to reduce it to impotence as regards effectual elimination of prejudice and prepossession amounts to contempt. A 1946 All 298 (300) : 47 Cri LJ 333 ** A 1969 Orissa 117 (128) : 1969 Cri LJ 763 (DB).

(201) A superior executive authority who sends a letter to the Magistrate dictating the terms of the order which is to be passed in pending proceeding commits contempt. **A 1949 Pat 233 (235) : 50 Cri LJ 488 (FB) ** A 1954 Orissa 1 (4) : 1953 Cri LJ 1906 (DB) ** A 1954 Pat 289 (295) (DB) ** A 1950 Cal 545 (547, 548).**

(202) A member of the legislature who issues instructions to a Magistrate relating to a pending case interferes with the administration of justice and thereby commits a contempt. A 1939 All 247 (248) (DB) ** A 1955 J & K 30 (31) (FB).

(203) Where a party approached the Magistrate in Court with the object of influencing his decision in the matter of bail in favour of certain accused, it was held that the conduct of the party was both audacious and reprehensible and constituted a contempt of Court. A 1953 Pepsu 79 (80) : 1953 Cri LJ 919 (DB) (Patiala).

(204) Putting forward a plea in an article for cancelling the bail bond of the accused and placing them under police guard till the termination of their trial amounts to a contempt inasmuch as it has the effect of interfering with the judicial discretion of the Magistrate. A 1950 Cal 129 (131) : 51 Cri LJ 610 (DB).

(205) Any private communication by a party to a case or even a stranger to a cause addressed or made to the presiding officer of a Court which is calculated to influence his decision in a pending case amounts to contempt. A 1953 All 153 (156) : 1953 Cri LJ 402 ** A 1958 All 728 (729) : 1958 Cri LJ 1260 ** A 1952 All 86 (87) ** A 1948 Oudh 114 (115) (DB) ** A 1959 Cal 174 (175, 176) (FB) ** A 1965 Mad 336 (337) (DB) ** 1962 Jab LJ 1147 (DB) ** 1961 (2) Cri LJ 109 (111) : 1960 Ker LT 338 (DB) ** A 1959 Punj 632 (638) : 1959 Cri LJ 1469.

(206) Writing recommendatory letter to a judicial officer about the facts of a case is a communication for the purpose of influencing his decision and hence amounts to a high contempt of Court. **A 1953 SC 185 (187) : 1953 Cri LJ 911.**

(207) When a person communicates to a Judge his opinion or decision on the facts of a case, which is subjudice, it constitutes contempt and his motive in so communicating is irrelevant. A 1955 Andhra 156 (161) : 1955 Cri LJ 1028 (DB).

(208) Addressing an extra judicial communication to a Magistrate expressing the writer's opinion of the character of the accused in a pending case and the manner in which he had dealt with the case amounts to a contempt. A 1949 Pat 435 (443) : 50 Cri LJ 935 (DB) ** A 1954 Pepsu 91 (93).

(209) Party sending to Judge, seized of case, letter containing threat and imputations about Judge's impartiality is guilty of contempt of serious nature. A 1940 Nag 407 (408) ** A 1934 All 317 (318) (DB).

(210) A party writing a letter in advance to a Court in anticipation of a case, commits contempt of Court. A 1952 All 108 (109) ** A 1954 Madh B 66 (67) : 1954 Cri LJ 769.

(211) Deliberate acts of suppressio veri and suggestio falsi amount to contempt, even though Judge's mind was not influenced by those acts. 1967 Cur LJ 888 (Punj).

(212) When there is no judicial proceeding pending, a letter written to a Magistrate requesting him to take steps in his executive capacity for ensuring peaceful celebration of certain ceremonies likely to be obstructed by certain persons not containing any prayer to bind over such persons, does not amount to contempt of Court. A 1939 Oudh 182 (183, 184) : 40 Cri LJ 566 (DB).

Section 2 — Note 4 (contd.)

(213) Obstruction to justice must be understood in a very wide sense and it would amount to contempt — It would include even anything done to prevent the police from investigating into a complaint regarding an offence or the subsequent Magisterial enquiry into the complaint. A 1955 All 638 (653) : 1955 Cri LJ 1451 (DB).

(214) The tendency of a statement to interfere with proper administration of law does not depend solely on its contents — Much depends on the circumstances in which it is made, its context, the person making it, the person to whom it is addressed, the nature and degree of publicity it receives and other like factors — Nor will the Court lose sight of prevailing local conditions. 1968 Ker LT 299 : 1968 Ker LJ 197 (FB).

(215) Criminal contempt consisting of words or acts obstructing or tending to obstruct the administration of justice; and contempt in procedure consisting of disobedience to judgments, orders or process of Court and involving private injury. A 1953 Cal 627 (628) : 1953 Cri LJ 1414 (DB).

(216) Officer on Special Duty appointed by State Government under Section 3 of Maharashtra Co-operative Societies Act, 1960, are 'Courts' A 1975 Bom 143 (149, 153, 157, 158) (FB). (Misc. Civil Appln. No. 11 of 1968 (Bom), Overruled.)

(217) The revenue officers functioning under the A. P. Land Encroachment Act are not Courts subordinate to the High Court. They are administrative tribunals. The functions under the Act are also administrative and executive in nature. Hence disobedience of an order of Revenue Divisional Officer by the Tahsildar does not amount to contempt of Court. (1971) 2 APLJ 213.

(218) Zila Commissioner's order lacking statutory jurisdiction — Order cannot be said to be by a 'court' — Disobedience of order not punishable. 1970 All LJ 574.

(219) English case — Local Valuation Court constituted under the General Rate Act (1967) is a court for the purposes of R.S.C. Ord. 52. (1978) 2 All ER 731 (736) (QBD).

"Case Law under the old Act of (1952)"

(220) By the word "Court" used by it the Act contemplates "a Court of justice" which as defined in the Penal Code denotes "a Judge who is empowered by law to act judicially." A 1954 Nag 71 (76) : 1954 Cri LJ 366 (DB) •• A 1964 Bom 147 (153) : 1964 (1) Cri LJ 652 : 65 Bom LR 533 (DB) •• A 1959 Bom 6 (8) : 1959 Cri LJ 30 (DB).

(221) The word 'Court' as defined in the Evidence Act is only for the purpose of that Act and cannot be made use of in interpreting that word in the Contempt of Courts Act. A 1968 All 157 (160) : 1968 Cri LJ 577.

(222) The Presiding Officer alone does not constitute a 'Court', which in fact and law, is an impersonal being or entity. It is true that one of its main limbs is the Presiding Officer but there are other more or less equally important limbs which constitute a 'Court', like the counsel practising before it, the officials of the Court, the litigants and even the witnesses who appear for one party or the other. 1966 All WR (HC) 197 : 1966 All LJ 953.

(223) In order to constitute a 'Court' in strict sense of the term, an essential condition is that the Court should have the power to give a decision or a definitive judgment which has finality and authoritativeness. A 1956 SC 66 (70) : 1956 Cri LJ 156.

(224) As the Constitution has made a distinction between "Courts" and "tribunals" in the Contempt of Courts Act of 1952 which was passed subsequent to the Constitution the word "Court" cannot be interpreted to include all Tribunals. A 1956 All 258 (265) : 1956 Cri LJ 679 (DB).

(225) A tribunal in which justice is judicially administered and which is empowered to arrive at an independent judicial decision on legal evidence is a "Court". A 1950 Assam 25 (30) : 51 Cri LJ 247 (DB).

(226) The term "Court" in the Act is wide enough to include even a tribunal provided it is entrusted with judicial functions including that of deciding litigated questions according to law that is to say, according to certain rules and procedure which would ensure its deciding them with fairness and impartiality. A 1953 All 419 (432) : 1953 Cri LJ 943.

(227) A tribunal in order to possess the status of a "Court", for the purposes of this Act should possess the capacity to deliver a definite judgment. A 1954 Nag 71 (76) : 1954 Cri LJ 366 •• A 1967 SC 1494 (1504) : 1967 Cri LJ 1380 •• A 1968 Madh Pra 232 (233) : 1968 Cri LJ 1433 (DB) •• A 1959 Bom 6 (8) : 1959 Cri LJ 30 (DB).

(228) For the purpose of Contempt of Courts Act, (a) Court is that person, Tribunal or authority which has been permanently constituted by the State for the administration of justice, (b) the pronouncement of such person, Tribunal or authority must be a decisive judgment binding on the parties; (c) such person, authority or Tribunal must arrive at its decision on the evidence which the parties have a right to adduce; (d) he or it must possess authority to summon parties and their witnesses, to compel production of documents and to take evidence and (e) he or it must possess power to have his or its judgment, decree or order enforced against the parties. A 1968 All 157 (160) : 1968 Cri LJ 577.

(229) Only those arbitrators can be deemed to be Courts who are appointed through a Court. 1963 (1) Cri LJ 507 (509, 510) : 1962 All LJ 57.

The following are "Courts".

(230) The Magistrate taking cognizance of the report under Section 173 (1) (a), Criminal P. C. irrespective of whether it is a charge-sheet or a final report. 1965 All WR (HC) 783 : 1965 All Cr R 520.

(231) Magistrate, seized of committal proceedings. A 1966 All 495 (498) : 1966 Cri LJ 1106.

(232) The authority constituted under the Payment of Wages Act. A 1963 Bom 254 (260) : 1962 (2) Cri LJ 603 : 65 Bom LR 131 (DB).

(233) Where in connection with the administration of justice a Magistrate is approached as a Court to make an order and as a Court he declines to make it even though the Magistrate says that he is not doing any judicial work on the day he is so approached. A 1962 Cal 495 (499) : 1961 (2) Cri LJ 334 (FB).

3. Innocent publication and distribution of matter not contempt.— (1) A person shall not be guilty of contempt of court on the ground that he has published (whether by words spoken or written or by signs or by visible representations or otherwise) any matter which interferes or tends to interfere with, or obstructs or tends to obstruct, the course of justice in connection with any civil or criminal proceeding pending at the time of publication, if at that time he had no reasonable grounds for believing that the proceeding was pending.

(2) Notwithstanding anything to the contrary contained in this Act or any other law for the time being in force, the publication of any such matter as is mentioned in sub-section (1) in connection with any civil or criminal proceeding which is not pending at the time of publication shall not be deemed to constitute contempt of court.

(3) A person shall not be guilty of contempt of court on the ground that he has distributed a publication containing any such matter as is mentioned in sub-section (1), if at the time of distribution he had no reasonable grounds for believing that it contained or was likely to contain any such matter as aforesaid;

Section 2 — Note 4 (contd.)

(234) Assistant Registrar discharging the function of Registrar under Section 48 read with Section 6 (2) of Bihar and Orissa Co-operative Societies Act (6 of 1935). **A 1967 SC 1494 (1499, 1502) : 1967 Cri LJ 1380.**

(235) Election Tribunal constituted under Representation of the People Act. A 1967 Andh Pra 299 (320) : 1967 Cri LJ 1470 (DB).

(235A) Rent Control Tribunal. **A 1969 Delhi** 319 (322) (DB).

(236) Financial Commissioner acting under Section 39 of Pepsu Tenancy and Agricultural Lands Act (13 of 1955). A 1969 Punj 435 (440) (DB).

The following are not "Court".

(237) A Commissioner appointed under the Public Servants (Inquiries) Act 37 of 1850. **A 1956 SC 66 (74, 75) : 1956 Cri LJ 156. (A** 1954 Pat 289, **Reversed; A 1951 Punj 49, Overruled.)**

(238) A fact finding commission appointed under the provisions of the Commissions of Inquiry Act of 1952. A 1954 Nag 71 (76) : 1954 Cri LJ 366 (DB).

(239) The committee appointed under S. 36 (1) (b) of U. P. Homoeopathic Medicine Act. 1964 (1) Cri LJ 362 (364) (All).

(240) Registrar's nominee under Section 54 (1) of Bombay Co-operative Societies Act (7 of 1925). A 1964 Bom 147 (154) (DB).

(241) The Registrar and the Assistant Registrar appointed under U P. Co-operative Societies Act. 1963 (1) Cri LJ 507 (510) : 1962 All LJ 57. (Overruled on another point in A 1965 All 263 (DB).)

(242) The Nyaya Panchayat constituted under Saurashtra Gram Panchayat Ordinance, 1949. ILR (1964) Guj 433 (DB).

(243) A coroner appointed under the Coroners Act, 1871. A 1959 Bom 6 (10) : 1960 Cri LJ 30 (DB).

(244) An arbitrator appointed by the State under Section 37 read with Section 12 of the U. P. Consolidation of Holdings Act. A 1968 All 157 (164) : 1968 Cri LJ 577.

(245) Sub-Divisional Officer holding enquiry under Section 247 (7), M. P. Land Revenue Code. A 1968 Madh Pra 253 (254) (DB).

(246) Revenue Officer appointed as inquiry officer under Section 30 (2), M. P. Land Revenue Code (20 of 1959), A 1968 Madh Pra 232 (234) : 1968 Cri LJ 1435 (DB).

(247) "Courts subordinate to the High Court" — Magistrate functioning under Section 37 of Rajasthan Co-operative Societies Act (13 of 1965). The power exercised by him under the Section is administrative in nature. 1969 Cri LJ 1193 (1196) (DB) (Raj).

(248) The common High Court of Punjab and Haryana is a High Court for the State of Punjab, a High Court for the State of Haryana and a High Court for the Union Territory of Chandigarh and thus it is within the definition of the expression 'High Court' in Section 2 and is competent to proceed with the proceedings for contempt of subordinate Court in Haryana. In view of Section 13 (2) of the General Clauses Act, 1897 the words 'a State' in Section 2 can be read as States. **A 1968 Punj 217 (231) : 69 Punj LR 673 (FB).**

(249) Panchayati Adalats are Courts judicially subordinate to the High Court. A 1951 All 667 (Pr. 22) : 52 Cri L 984 (2) (DB) •• **A 1962 All 315 (322, 324, 327) (FB). (A 1951 All 667,** Approved; **A 1956 All 258 and A 1957 All 495, Overruled.)**

Section 3

(1) Explanation to Section 3 clearly shows that the proceeding either civil or criminal shall be deemed to continue to be pending until it is heard and finally decided, that is to say, in case where an appeal or revision is competent, until the appeal or revision is heard and finally decided or, where no appeal or revision is preferred, until the period of limitation prescribed for such appeal or revision has expired. **A 1978 SC 921 (926).**

(2) A writ petition is a civil proceeding and will be said to have been instituted or pending when/after such petition is filed in the Court. Issuance of rule nisi by the Court is not a necessary criteria to enable the writ petition to be called as pending. (1974) 1 Andh LT 170.

(3) In order that the provisions of Section 3 must be effectively operative and available to a citizen, every kind of attempt whether by prejudice or otherwise to either interfere with or obstruct the course of justice in connection with civil or criminal proceeding pending must be deemed to be covered by this provision. Other-

Provided that this sub-section shall not apply in respect of the distribution of—

(i) any publication which is a book or paper printed or published otherwise than in conformity with the rules contained in section 3 of the Press and Registration of Books Act, 1867;

(ii) any publication which is a newspaper published otherwise than in conformity with the rules contained in section 5 of the said Act.

Explanation.— For the purposes of this section, a judicial proceeding—

(a) is said to be pending—

(A) in the case of a civil proceeding, when it is instituted by the filing of a plaint or otherwise;

(B) in the case of a criminal proceeding under the Code of Criminal Procedure, 1898, or any other law—

(i) where it relates to the commission of an offence, when the charge-sheet or challan is filed, or when the court issues summons or warrant, as the case may be, against the accused, and

(ii) in any other case, when the court takes cognizance of the matter to which the proceeding relates, and

in the case of a civil or criminal proceeding,

shall be deemed to continue to be pending until it is heard and finally decided, that is to say, in a case where an appeal or revision is competent, until the appeal or revision is heard and finally decided or, where no appeal or revision is preferred, until the period of limitation prescribed for such appeal or revision has expired;

Section 3 (contd.)

wise the right of exemption under Section 3 will prove illusory. 1975 Cri LJ 531 (538) (Bom).

(4) Election petition pending before High Court — Publication of article discrediting witnesses and intimidating trial Judge — Amounts to contempt of Court — Court can refuse to accept unconditional apology, even if given at the earliest opportunity. 1980 Cri LJ 845 : (1979) 2 APLJ 363 (376) (DB).

(5) Prima facie false affidavit sworn to suppress real facts from Court — Amounts to gross contempt of Court. (1974) 76 Pun LR 23. (Reversed on another point in 1974 Pun LJ (Cri) 203.)

(6) During the agitation for separate State a writ petition was filed on allegations that the imposition of curfew by the District Magistrate was without authority of law and unconstitutional. Pending that petition A contributed to a daily newspaper an article entitled "The law of curfew" referring therein to the origin of the word "curfew", its meaning, its scope and the implication and the authority or the provision of law to impose it. This was in a pure academic way, without referring either expressly or by necessary implication, to the writ proceedings pending in the High Court.

Held, that the article did not bring the Court or the Judge into contempt, nor did it amount to interfere with the course of justice. A 1975 AP 30.

(7) Where the commission of an offence is alleged it would be the filing of the charge-sheet or a challan that would mark the beginning of the pendency. 1975 Cri LJ 531 (535) (DB) (Bom).

(8) When on the day following the dismissal of a complaint as instituted by a private individual in the Court of A D. M. (J), the said individual wrote a letter containing serious allegations against the presiding officer of the Court, the proceedings in question must be held to be pending in that Court because the limitation for filing revision against the said dismissal had not expired. Whether or not the remedy of revision was availed was immaterial. 1973 Cri LJ 1211 (1215) (All).

(9) Motion for contempt of High Court — Impugned publication made after a writ application had been filed but before notice was issued thereon — Knowledge by the respondent of pendency of writ proceeding not alleged in the contempt petition, and not found on facts — Person cannot be held guilty of contempt in the circumstances. (1974) 1 Andh LT 170.

Case under the old Act

(10) Lodging of a first information report does not by itself establish that proceedings in a Court were imminent. It would depend on the facts proved in a particular case whether the proceedings are imminent or not. Where there are no other facts which tend to establish the imminence of proceedings in a Court except the lodging of F. I. R. and the accused were not arrested and if it be relevant there was no proof that arrest was imminent when the impugned statement was made, it cannot be said that proceedings were imminent when the statement was made. Ordinarily until an accused is arrested it cannot be said that any proceedings in a Court are imminent against that person because he may never be arrested or he may be arrested after a lapse of months or years.

But when such a statement though made before the arrest of the accused, was published after the arrest of the accused, the publication is when proceedings are imminent, and can be subject-matter of charge for contempt of Court. A 1970 SC 1694 (1697, 1698, 1701) : 1970 Cri LJ 1407. (A 1968 Ker 301, Reversed.)

(b) which has been heard and finally decided shall not be deemed to be pending merely by reason of the fact that proceedings for the execution of the decree, order or sentence passed therein are pending.

NOTE:— Now see the Code of Criminal Procedure, 1973 (2 of 1974) [1-4-1974].

OBJECTS AND REASONS

Clause 3.— Contempts in relation to pending proceedings constitute an important category of contempts. This clause provides for certain defences which may be pleaded in proceedings for such contempts and also defines clearly the stage up to which a judicial proceeding may be considered to be pending. Sub-clause (1) provides that want of knowledge of a criminal proceeding whether pending or imminent or of a civil proceeding which is pending would be a complete defence to a person accused of contempt on the ground that he has published any matter calculated to interfere with the course of justice in connection with such proceedings. Sub-clause (2) abolishes the rule of contempt in relation to imminent proceedings so far as civil cases are concerned. Sub-clause (3) provides in effect that a person who has no reasonable ground for believing that the publication distributed by him contained any offending matter shall not be guilty of contempt of court. The defence, however, is not allowed in the case of distribution of any publication printed or published otherwise than in conformity with the provisions of sections 3 and 5 of the Press and Registration of Books Act, 1867—S. O. R.

4. Fair and accurate report of judicial proceeding not contempt.— Subject to the provisions contained in section 7, a person shall not be guilty of contempt of court for publishing a fair and accurate report of a judicial proceeding or any stage thereof.

OBJECTS AND REASONS

"Clauses 4, 5 and 6 — These clauses seek to give recognition to some of the existing defences open to an alleged contemnor"— S. O. R.

NOTE:— Bombay Judicial Proceedings (Regulation of Reports) Act 1955 (Bom. Act 18 of 1955) which applies to the States of Gujarat and Maharashtra (and probably even to erstwhlie Bombay Area of Karnataka State) restricts publication of indecent or obscene matter, in respect of any matrimonial matter or any judicial

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Section 3 (contd.)

Malaysian Case.— (11) Innocent dissemination is in law no defence in cases of contempt of court where the dissemination is made by those who deal with the publication as a matter of trade or business and distribute it as wholesalers or distributors to subscribers. (1975) 1 Malayan LJ 69 (74).

Section 4

(1) If a party to the proceeding is likely to be deterred from prosecuting his proceeding, or people who have similar cause are likely to be dissuaded from initiating proceedings because of comment on a pending case or abuse of a party, it would amount to contempt of court. A 1970 SC 1821 (1827) : 1970 Cri LJ 1525.

Cases under the old Act

(2) Comments which have a tendency to prejudice the administration of justice in any pending case when published amount to contempt. A 1929 All 81 (82) : 30 Cri LJ 217 (SB) ** A 1950 Pepsu 9 (17) : 51 Cri LJ 1219 (SB) ** 1961 (2) Cri LJ 491 (493, 494) (DB) (MP) ** ** A 1961 Pat 217 (221, 222) : 1961 (1) Cri LJ 698 (DB) ** A 1959 Punj 41 (42) : 1959 Cri LJ 81.

[See also A 1961 Punj 101 (102) : (1961) (1) Cri LJ 308 ** A 1955 All 377 (378, 379) : 1955 Cri LJ 904 (DB).]

(3) It is the duty of newspaper editor to verify news or information supplied to him, especially when the news might be of a defamatory nature, because ultimately it is he who would be held responsible for publishing defamatory material in his paper. A 1969 Punj 201 (204).

(4) In regard to matters involving contempt of Court newspapers publish articles and speakers make speeches at their peril. An editor takes the responsibility for all that is published in the newspaper. Editing, printing and publishing of newspapers and making speeches have to be done prudently and cautiously with a full sense of responsibility. It is no excuse for the editor to say that he had no knowledge of the contents. It may be that a newspaper may be only copying in its issue matters appearing in a hand-bill but that is no valid defence because even if it is only a copy, publication of it has the effect of prejudicing a fair trial. 1969 Ker LT 513 (517, 518) (DB).

(5) Fundamental right of freedom of speech and expression — Freedom of press — Cannot override law of Contempt of Courts. A 1969 Delhi 201 (206) (FB).

(6) A publication which has a tendency to prejudice public or Court for or against any party before cause is finally heard amounts to contempt of Court. A 1943 Lah 329 (346) : 45 Cri LJ 445 (FB) ** A 1950 Pepsu 9 (17) : 51 Cri LJ 1219 (SB) ** A 1929 All 81 (82) : 30 Cri LJ 217 (SB) ** A 1969 Orissa 117 (128) : 1969 Cri LJ 763 (DB) ** A 1969 Pat 140 (146) : 1969 Cri LJ 631 ** A 1968 Ker 301 (305, 308, 309) : 1968 Cri LJ 1424 (DB) ** A 1967 Ker 177 (180) : 1967 Cri LJ 1147 ** 1966 Cri LJ 214 (215, 216) (DB) (MP) ** 1966 BLJR 502 ** A 1963 Madh Pra 61 (65) : 1963 (1) Cri LJ 187 (DB) ** ILR (1960) 1 All 25 ** A 1959 Madh Pra 50 (51, 52) : 1959 Cri LJ 199 (DB).

[See also A 1958 Mad 558 (561) : 1958 Cri LJ 1421.]

proceedings in connection with an offence under S. 497 I. P. C., whether the same be medical, surgical or physiological. Similar prohibition or restriction obtains in Tamil Nadu also—See the Madras Judicial Proceedings (Regulation of Reports) Act, 1960 (T. N. Act 21 of 1960).

Section 4 (contd.)

(7) All debates and expressions of opinion on a question which is the subject-matter of dispute before a Court should be hushed as long as the Court is seized of the controversy. Where, however, the nature of the controversy itself has a broad sweep, affecting a very large section of people and is not confined to contesting parties only, then in such a case, the Court would take notice of only such comments which pointedly refer to the proceedings before it and which may be construed to interfere with the judicial process. A 1969 All 68 (71) : 1968 Cri LJ 133.

(8) The motive of the writer of an article or the speaker at a meeting is not a relevant consideration at all in deciding the question whether contempt of Court has been committed or not. The truth or falsity of the allegations contained in the articles or speeches and the lack of intention or knowledge are also equally irrelevant matters. 1969 Ker LT 513 (516, 517) (DB).

(9) It is true that criticism of the police is not contempt of Court. But if it relates to the investigation of a case and has a tendency to effect adversely a fair investigation and consequently a fair trial to that limited extent it is contempt. 1969 Ker LT 513 (519) (DB).

(10) Abusing and vilifying parties to a pending proceeding, in relation to proceeding, amounts to contempt — Publication containing imputation against accused that he had exercised his influence in getting magistrate transferred on account of search warrant issued against him — Amounts to contempt. A 1961 Ker 321 (324) : 1961 (2) Cri LJ 771 (DB).

(11) Reports of proceedings in Court even if they are true and correct would amount to contempt if they had been published with the intent of causing prejudice to a party's case or is calculated to cause such prejudice. A 1951 Nag 26 (29) : 52 Cri LJ 452 (DB) ** A 1958 Punj 377 (381) : 1958 Cri LJ 1225.

(12) A report on a pending case which contains untrue statements and which is also likely to have the effect of driving one of the parties, though he might have an honest case, to settle it out of Court cannot but be considered as interfering with the fair trial of the case and hence a substantial contempt. A 1942 Bom 86 (90) : 43 Cri LJ 583.

(13) Comments on pending case made in such a form as may lead to the belief that it is a statement of facts by the newspaper itself rather than a representation of the substance of the allegations as made in the proceedings would amount to a contempt. A 1946 All 298 (300) : 47 Cri LJ 333.

(14) The publication in a newspaper with regard to any matter 'sub judice' in a Court of law under scare headlines and clearly intended and calculated to prejudice the mankind against a party while the cause was pending amounts to a contempt of Court. A 1955 Madh B 183 (185) : 1955 Cri LJ 1502 (DB) ** A 1938 Lah 815 (816) : 40 Cri LJ 156 (DB) ** A 1933 Cal 118 (121, 122) : 34 Cri LJ 662 (DB).

(15) Describing a party to a pending case as a notorious character tends to prejudice him in his defence and amounts to contempt. A 1956 Sau 102 (103) : 1956 Cri LJ 1355 (DB).

(16) Referring to the accused in a pending case as communists amounts to contempt as being calculated to create prejudice against them and deter persons from deposing in their favour when called upon as witnesses. A 1950 Cal 129 (133) : 51 Cri LJ 610 (DB).

(17) Where documents including pleadings filed in a suit have the tendency, if published, of severely reflecting on the conduct of the defendant and prejudicing his defence their publication amounts to a contempt. A 1936 Lah 917 (918) : 38 Cri LJ 73 ** A 1943 Lah 329 (338) : 45 Cri LJ 445 (FB) ** A 1938 Lah 815 (816) : 40 Cri LJ 156 (2) (DB) ** A 1931 All 420 (421) : 33 Cri LJ 259.

(18) Publication of a statement of a witness under Section 164 of Criminal Procedure Code before the Magistrate, when the case is about to come for trial constitutes contempt of Court. A 1958 Punj 273 (280) : 1958 Cri LJ 952.

(19) Publishing a photograph of the car which is connected with an offence long before the trial commences and at a place which is at a considerable distance from the scence of trial is no offence. A 1958 Punj 377 (383) : 1958 Cri LJ 1225.

(20) Adverse comments on a party which amounts merely to a libel without interfering with the course of justice do not amount to contempt. A 1953 Orissa 249 (252) : 1953 Cri LJ 1491 ** A 1954 Orissa 57 (58) : 1954 Cri LJ 311 (DB) ** A 1952 Nag 259 (264) ** A 1942 Bom 86 (89) : 43 Cri LJ 583.

(21) Stating conclusion in a published article on a fact which is sub judice amounts to a contempt as it would tend to influence the minds of the public and the Court to the prejudice of a party in the proceedings. A 1952 Kutch 74 (76, 77) : 1952 Cri LJ 1482 ** A 1950 Lah 84 (88) : 51 Cri LJ 801 (SB) ** A 1939 Cal 672 (673) : 41 Cri LJ 148 (SB) ** A 1955 Orissa 36 (39) : 1955 Cri LJ 547 (DB) ** A 1954 Kutch 2 (4) : 1954 Cri LJ 390 ** A 1969 All 68 (72) : 1969 Cri LJ 133.

[See also A 1958 Punj 377 (382) : 1958 Cri LJ 1225. (Mere omission of word 'alleged' with reference to the crime or criminal act would not render publication an offence in the absence of indication that the publisher intended to convey the impression that accused were guilty.)]

(22) Although criticisms of executive acts by themselves do not amount to contempt they would become so when they are made while the propriety of the acts have been challenged in Court and the matter is sub judice and the burden of criticism is that the act is illegal. A 1943 Lah 329 (337) : 45 Cri LJ 445 (FB).

(23) A general comment on the political opinions and activities of an advocate would no doubt not amount to a contempt but when in order to seek strength for the comment reference is made to his appearance in a particular case with the result that a suggestion by implication arises that the accused in that case are

5. Fair criticism of judicial act not contempt.— A person shall not be guilty of contempt of court for publishing any fair comment on the merits of any case which has been heard and finally decided.

Section 4 (contd.)

or not likely to be innocent then the comment amounts to at least a technical contempt. A 1931 Cal 257 (259) : 32 Cri LJ 675 (DB).

(24) A comment on a pending case which discusses the rights and wrongs of the matter involved in the case and suggests what the Court ought to do in the matter amounts to contempt inasmuch as its effect would be to discourage people from giving evidence or influence their evidence where they choose to appear as witnesses. **A 1939 Mad 257 (259) : 40 Cri LJ 533 (SB).**

(25) A publication by a party asserting the truth of his case and protesting against the action of the opposite party amounts to contempt as its effect would be to prejudice mankind against the other party. A 1938 Cal 772 (774) (DB) ** A 1954 Orissa 57 (62) : 1954 Cri LJ 311 (DB) ** A 1948 Oudh 131 (135) : 49 Cri LJ 212.

(26) Comment relating to the accused who are facing their trial amounts to contempt of the Court when they have a tendency to interfere with the fair trial of the accused although they may not refer either to the pending case or the facts which constitute the subject-matter of the charge against them. A 1955 Orissa 169 (170) : 1955 Cri LJ 1514 (DB) ** A 1953 Orissa 249 (252) : 1953 Cri LJ 1491 ** A 1951 All 667 (668) : 52 Cri LJ 984 (2) (DB).

(27) A comment which contains sufficient description to identify it as one relating to a pending case and possesses the tendency to prejudice the cause of the accused in that case constitutes a contempt although it does not expressly mention the name of the accused. **A 1950 Cal 129 (131) : 51 Cri LJ 610 (DB).**

[See also A 1955 Pat 141 (142) : 1955 Cri LJ 570 (DB).]

(28) An expression of opinion, on a matter sub judice, not in any way prejudicing the trial cannot be a matter for contempt of Court proceedings. A 1953 Mys 108 (103, 104) : 1953 Cri LJ 1154.

(29) A publication which contains merely a resume of the plaint allegations and no personal attack on the defendant is not likely to prejudice the defendant either in the eyes of the public or before the Court and hence would not amount to a contempt. A 1934 Cal 606 (608) ** A 1964 Punj 428 (430, 432) : 1964 (2) Cri LJ 450.

(30) The publication of the version of one side in a pending case can no doubt amount to a contempt under certain circumstances. But where what is published cannot be characterised as any version of the case at all it would not be a contempt. **A 1950 Pepsu 9 (18) : 51 Cri LJ 1219 (SB).**

(31) An omission to mention a certain contention took up by a party in a proceeding before administrative officers in the newspaper report of such proceeding does not amount to a contempt. **A 1958 Punj 377 (383) : 1958 Cri LJ 1225.**

(32) Where the criminal proceedings pending against the person adversely commented on are not legal the adverse comments do not amount to a contempt. A 1955 Hyd 264 (267) : 1955 Cri LJ 1590 (DB).

(33) It is contempt of Court to publish reports of chamber proceedings without permission of Judge concerned. A 1942 Bom 86 (87) : 43 Cri LJ 583.

(34) Publication of article, forming subject-matter of contempt of Court, in newspaper — Writer, editor and publisher are guilty. 1970 Cri LJ 1283 (1285) (All).

Section 5

(1) It is open to anyone to express fair, reasonable and legitimate criticism of any act or conduct of a judge in his judicial capacity or even to make a proper and fair comment on any decision given by him because "justice is not a cloistered virtue and she must be allowed to suffer the scrutiny and respectful even though outspoken, comments of ordinary men". A 1971 SC 221 (230).

(2) Fair and reasonable criticism of a judgment which is a public document or which is a public act of a judge concerned with administration of justice would not constitute contempt. If the criticism is likely to interfere with due administration of justice or undermine the confidence which the public rightly repose in the courts of law as courts of justice, the criticism would cease to be fair and reasonable criticism as contemplated by Section 5 but would scandalise courts and substantially interfere with administration of justice. **A 1978 SC 921 (927, 928).**

(3) When it is said that the judge had a predisposition to convict or deliberately took a turn in discussion of evidence because he had already resolved to convict the accused, or he has a wayward bend of mind, is attributing motives, lack of dispassionate and objective approach and analysis and pre-judging of the issues which would bring administration of justice into ridicule if not infamy. **A 1978 SC 921 (928).**

(4) High Court entertaining the plea under Section 5 of fair and reasonable comment of a judicial act — Supreme Court in appeal held, would not refuse defence of fair comment though short ground that case not finally decided available. **A 1978 SC 921 (926) : 1978 Cri LJ 917.**

(5) A scurrilous attack on a Judge in respect of a judgment or past conduct affects adversely on the due administration of justice. **A 1971 SC 1132 (1144) : 1971 Cri LJ 844.**

(6) Where the impugned article was a skilful attempt on the part of the writer to impute dishonesty and lack of integrity to a Judge in the matter of a suit, the imputation being indirect and mostly innuendo that it was on account of the transaction and the dealings mentioned in the article that the suit was decreed in the sum of Rs. 3 lakhs which was the full amount of damages. Implications and insinuations made in various paragraphs of the article create a strong prejudicial impact on the mind of the reader about the lack of honesty, integrity and impartiality on the part of the Judge in deciding the suit. **A 1971 SC 221 (229, 230) : 1971 Cri LJ 268.**

6. Complaint against presiding officers of subordinate courts when not contempt.— A person shall not be guilty of contempt of court in respect of any statement made by him in good faith concerning the presiding officer of any subordinate court to—

(a) any other subordinate court, or

(b) the High Court,

to which it is subordinate.

Explanation.— In this section, "subordinate court" means any court subordinate to a High Court.

Section 5 (contd.)

(7) When partiality is attributed to a Court in passing an order or deciding a case, the limits of fair comment on the merits of the case are clearly crossed and gross contempt is committed as impartiality is a basic characteristic of a Court and any attack on it seriously affects its prestige and dignity. 1979 Cri LJ 412 (DB) (All).

SECTION 6 — SYNOPSIS

1. Good faith.
2. Illustrative cases.
3. Subordinate Court.

1. Good faith.— (1) In view of Section 6 the making a statement by a contemner concerning a presiding officer of a subordinate Court is protected but the condition precedent is that such statement must have been made "in good faith." The only tangible test which can be applied for judging the good faith of a person in doing a certain act is as to whether he acted with due care and attention. It is surely not open to a person to take precipitate action only on vague information received by him from irresponsible sources and without verifying the same diligently. 1973 Cri LJ 1211 (1216) (All).

(2) The expression "good faith" has not been defined in the Contempt of Courts Act but the definition of that expression in Sec. 52, Penal Code is applicable. ILR (1975) Cut 604.

2. Illustrative Cases.— (1) Where a senior lawyer practising in rural area instead of taking recourse to procedure under Section 6 alleged that the judge has a wayward bend of mind and was pre-disposed to convict and accordingly took deliberate turn in the discussion of evidence, the criticism must be deemed to substantially interfere with the due course of justice, especially in the background that matter concerned with a mofussil place where there are one or two courts and a few lawyers and the litigating public is mostly illiterate or poorly educated. The contemner therefore could not claim the benefit of Section 13. **A 1978 SC 921 : 1978 Cri LJ 917.**

(2) Where an order of Magistrate is so patently illegal and unexpected of any judicial officer with least experience that any person is likely to be led to the impression that extraneous considerations might have prevailed with the Magistrate then a complaint to that effect by a person to the Chief Justice of High Court and sending copies of the same to the Governor and the Chief Minister would be covered by Section 6 and would not amount to a publication tending to scandalize the Court within the meaning of Section 2 (c). The mere fact that copies were sent to the Chief Justice of India who too is believed to be having supervisory control over the judiciary does not in any way amount to publication. 1973 Cri LJ 1106 (1112 to 1114) (Punj).

(3) Where the imputations against a Magistrate were made by the party recklessly without making any enquiry and they were not supported by any plausible facts, the complaint was not in good faith and constituted contempt of Court. (1975) 41 Cut LT 329 ** A 1973 All 369. (Contemner making most flagrant and offensive allegations against a magistrate and defending the same instead of showing any remorse commits gross contempt.)

(4) Lawyers and litigants every day express opinions about the validity of orders passed by Courts. Such an expression of opinion could not become contempt of court because a superintendent of Police had expressed such an opinion. 1971 All Cri R 257 (260).

(5) Where the proceedings and conviction under Section 480, Criminal P. C. by the Munsif against a party were, on appeal, held to be without jurisdiction and the party, believing that he had a cause of action against the Munsif, issued a notice under S. 80, Civil P. C. stating that the action by the Munsif against him was malicious and without reasonable cause, that could not be a basis for initiating proceedings for contempt of Court. 1972 All Cri R 571.

(6) Where a Court Inspector used the word 'vindictive' against the Magistrate in open Court with regard to the Magistrate's order for not sending a copy which was more in the nature of an executive order, the use of that word could not be said to have constituted contempt of court. A 1972 Cal 352.

(7) Allegations against advocate concerning conduct of criminal case — Not contempt within Section 3 — Advocate not an officer of the Court. 1973 All LJ 954.

3. Subordinate Court.— (1) Disciplinary Committee of Bar Council constituted under Sec. 9 of Advocates Act — Is a Court subordinate to High Court — The Committee has not merely the trappings of a Court but has also the requisite attributes of a Court — The subordination for the purposes of a Contempt of Courts Act (1971) means judicial subordination and not subordination under the hiearchy of Courts under C. P. C. or Cr. P. C. — **Held** on facts that the letter written by the Bench clerk of the Court of the Commissioner for Workmen's Compensation to the Bar Council of West Bengal calling in question the final order of the Disciplinary Committee suspending an advocate from practice was not merely unwarranted but also amounted to contempt of Court — (The Court accepted the unqualified apology tendered by the contemner). 1975 Cri LJ 1595 (1597, 1598) : 79 Cal WN 684 (DB).

Section 6 — Note 3 (contd.)

(Cases under old Act of 1952)

(2) The expression "Courts subordinate to the High Courts" would prima facie mean the Courts of law subordinate to the High Courts in the hierarchy of Courts established for the purpose of administration of justice throughout the Union. A 1956 SC 66 (69) : 1956 Cri LJ 156 ** 1971 Cri LJ 742 (745, 746) : 36 Cut LT 1282. (A Certificate Officer exercising and discharging his powers and functions under the Orissa Public Demands Recovery Act, is a "Court" within Section 3. A 1929 Cal 130, Dissented from.) ** 1970 All LJ 574 ** A 1968 Madh Pra 253 (254) (DB) ** A 1968 Madh Pra 232 (233) : 1968 Cri LJ 1433 (DB) ** 1964 (1) Cri LJ 362 (364) (All).

(3) For the purposes of this section the position of the subordinate Court must be considered in its totality in relation to the High Court and not with reference to a particular Act or provision of law under which it may be acting at the time its contempt has been committed. A 1953 All 419 (433) : 1953 Cri LJ 943.

(4) Chapter VI of the Constitution is not exhaustive of the Courts which are subordinate to the High Court much less does the provision apply to the interpretation of the expression as used in the Act. A 1960 Madh Pra 115 (116) : 1960 Cri LJ 484 (DB).

(5) Subordination contemplated by the Act is not the subjection to the mere administrative control of the High Court. A 1950 All 556 (558) : 52 Cri LJ 1062 (FB).

[See also A 1956 All 258 (266) : 1956 Cri LJ 679 (DB).]

(6) The subordination contemplated by the Act is judicial subordination. A 1950 All 556 (558) : 52 Cri LJ 1062 (FB) ** A 1956 All 258 (266) : 1956 Cri LJ 679 (DB) ** A 1955 Bom 103 (105) : 1955 Cri LJ 351 (DB) ** A 1953 All 419 (433) : 1953 Cri LJ 943 ** A 1967 SC 1494 (1504) : 1967 Cri LJ 1380 ** 1964 (1) Cri LJ 362 (365) (All)

(7) A Court may be subordinate to a High Court for purposes other than judicial controls. A 1967 SC 1494 (1504) : 1967 Cri LJ 1380.

(8) Any Court over which a High Court exercises any authority, appellate, revisional or supervisory may be subordinate to the High Court for the purposes of the Contempt of Courts Act. A 1957 All 495 (503) ** A 1950 All 556 (558) : 52 Cri LJ 1062 (FB) ** A 1956 All 258 (266) : 1956 Cri LJ 679 (DB) ** A 1952 All 86 (87).

(9) Where a Court created by a special statute has been made subject to the appellate jurisdiction of the High Court although to a lesser extent than the ordinary Criminal Courts of the Country, it is a Court subordinate to the High Court within the meaning of the Contempt of Courts Act. It is not the less such a Court merely because the power to make rules in respect of it has been conferred on the Government and not the High Court. A 1933 Cal 118 (120) : 34 Cri LJ 662 (DB).

(10) Any Tribunal, which is subordinate to the High Court under Article 227 of the Constitution would come within the scope of the Act even though it is not subordinate to the High Court as a Civil Court. A 1955 Bom 103 (105) : 1955 Cri LJ 361 (DB) ** 1970 All LJ 574. (Court of the Zila Commissioner is one such Court.) ** A 1970 Cal 477 (478) : 74 Cal WN 958. (The Additional member, Board of Revenue established under Bengal Act (2 of 1913) though not a Court under either the Civil P. C. or the Criminal P. C. is a tribunal and is under the superintendence and the judicial subordination of the High Court.) ** A 1967 Andh Pra 299 (320) : 1967 Cri LJ 1470 (DB) ** A 1960 Madh Pra 115 (117) : 1960 Cri LJ 484 (DB).

[But see ILR (1971) 1 Cal 23 (DB). (The District Judge functioning as Appellate Authority under Section 29 of the W. B. Premises Tenancy Act is not a Court but an appellate officer.)]

(11) The Court of a Magistrate passing order under Section 144, Criminal P. C., is a Court subordinate to the High Court within the meaning of Section 3 of the Contempt of Courts Act. A 1954 Pat 203 (207) : 1954 Cri LJ 533 (DB) ** A 1959 Cal 174 (176) : 1959 Cri LJ 316 (FB).

(12) A Magistrate holding an enquiry under Section 176 of the Code of Criminal Procedure is not a Court subordinate to the High Court contempt of which is punishable under Sec. 3 of the Contempt of Courts Act. A 1958 Punj 141 (143) : 1958 Cri LJ 673. (A 1940 Rang 68, held no longer good law.)

[But see A 1940 Rang 68 (70) : 41 Cri LJ 470 (DB).]

(13) The appointment of a Judge of the High Court as the sole member of an Industrial Tribunal it was held did not equate it with the High Court. The status of the tribunal as an inferior Court was not in any way altered by such appointment. A 1955 Mad 1 (16) : 1955 Cri LJ 1 (FB).

(14) An Election Tribunal constituted under Representation of the People Act is a Court subordinate to the High Court. A 1960 Madh Pra 115 (116, 117) : 1960 Cri LJ 484 (DB) ** A 1959 Madh Pra 50 (51) : 1959 Cri LJ 199 (DB).

(15) The Authority functioning under the Payment of Wages Act is a Court subordinate to the High Court within the meaning of Section 3 of the Contempt of Courts Act. A 1963 Bom 254 (261) : 1963 (2) Cri LJ 603 (DB).

(16) In view of the provisions of S. 22 of the Andhra Pradesh Buildings (Lease, Eviction and Rent) Control Act (XV of 1960), Rent Controller is a Court subordinate to the High Court within the terms of Section 3. (1968) 2 Andh WR 587 (DB)

(17) The Assistant Registrar exercising powers of Registrar under Section 48 of Bihar and Orissa Co-operative Societies Act (6 of 1935) is a Court subordinate to the High Court. A 1965 Pat 227 (236, 237) : 1965 (1) Cri LJ 748 (DB) ** A 1967 SC 1494 (1504) : 1967 Cri LJ 1380.

(18) An Arbitrator appointed by the State under Section 37 read with S. 12 of the U. P. Consolidation of Holdings Act and the Rules framed thereunder is not a Court subordinate to the High Court within the meaning of Section 3 of the Contempt of Courts Act. A 1968 All 157 (162) : 1968 Cri LJ 577.

(19) The Registrar or the Assistant Registrar appointed under U. P. Co-operative Societies Act are not a Court of law and they cannot also be said to be subordinate to the High Court. 1963 (1) Cri LJ 507 (511) (All).

7. Publication of information relating to proceedings in chambers or in camera not contempt except in certain cases.— (1) Notwithstanding anything contained in this Act, a person shall not be guilty of contempt of court for publishing a fair and accurate report of a judicial proceeding before any court sitting in chambers or in camera except in the following cases, that is to say,—

(a) where the publication is contrary to the provisions of any enactment for the time being in force;

(b) where the court, on grounds of public policy or in exercise of any power vested in it, expressly prohibits the publication of all information relating to the proceeding or of information of the description which is published;

(c) where the court sits in chamber or in camera for reasons connected with public order or the security of the State, the publication of information relating to those proceedings;

(d) where the information relates to a secret process, discovery or invention which is an issue in the proceedings.

(2) Without prejudice to the provisions contained in sub-section (1), a person shall not be guilty of contempt of court for publishing the text or a fair and accurate summary of the whole, or any part, of an order made by a court sitting in chambers or in camera, unless the court has expressly prohibited the publication thereof on grounds of public policy, or for reasons connected with public order or the security of the State, or on the ground that it contains information relating to a secret process, discovery or invention, or in exercise of any power vested in it.

OBJECTS AND REASONS

Clause 7.— This clause provides that except in the cases specifically mentioned therein a person shall not be guilty of contempt of court for publishing a fair and accurate report of judicial proceedings before any court sitting in chambers or in camera." —S. O. R.

8. Other defences not affected.— Nothing contained in this Act shall be construed as implying that any other defence which would have been a valid defence in any proceedings for contempt of court has ceased to be available merely by reason of the provisions of this Act.

OBJECTS AND REASONS

Clauses 8 and 9.— By way of abundant caution these clauses provide that the proposed legislation shall not be construed as in any way affecting any defence which may be otherwise open to an alleged contemner or the scope of contempt as otherwise understood.—S. O. R.

Section 7

(1) English case — Publication of reports on private wardship proceedings is prohibited by law. However, the publisher would not be guilty of contempt of Court in absence of the proof that the information relating to private wardship proceedings was published by him recklessly. (1977) 1 All ER 114.

(2) English case — In a committal proceeding the Justices in interest of national security made a rule that identity of the witness should not be disclosed, but no formal order or direction to that effect was made — A newspaper after the proceedings were over published the name of the witness. The newspaper was held guilty of contempt. (1978) 3 All ER 731.

Section 8

Cases under Old Act of 1952

(1-2) Rule that party in contempt cannot be heard is inapplicable when order for the breach of which contempt is alleged is challenged on ground of want of jurisdiction. A 1931 Bom 402 (402) (DB) °° ILR (1968) 1 Ker 384 (541) (FB) °° (1966) 68 Bom LR 453.

(3) A person in contempt cannot be heard unless he has purged himself of it, is not an absolute proposition of law, but only a qualified one. A party, though continuing to be in contempt is to be heard in defence of his rights. (1974) 78 Cal WN 504.

(4-6) Violation of the order of injunction cannot be excused on the ground that though the Court acted within its jurisdiction, the order that is passed was erroneous. (1968) 1 Andh WR 382 (DB).

(7) Innocence of the contemner in doing the act which amounts to contempt is no defence to the charge of contempt. It would be relevant only for determining the punishment. A

9. Act not to imply enlargement of scope of contempt.— Nothing contained in this Act shall be construed as implying that any disobedience, breach, publication or other act is punishable as contempt of court which would not be so punishable apart from this Act.

10. Power of High Court to punish contempts of subordinate courts.— Every High Court shall have and exercise the same jurisdiction, powers and authority, in accordance with the same procedure and practice, in respect of contempts of courts subordinate to it as it has and exercises in respect of contempts of itself:

Provided that no High Court shall take cognizance of a contempt alleged to have been committed in respect of a Court subordinate to it where such contempt is an offence punishable under the Indian Penal Code.

[1952—S. 3.]

Section 8 (contd.)
1945 Nag 33 (47) (DB) ** A 1962 SC 1172 (1179) : 1962 (2) Cri LJ 262 ** 1965 Ker LT 871 (DB) ** 1964 All WR (HC) 504.

(8) It is no defence, to a charge of contempt that the offensive article never reached the eyes of the Court, or that the Court was not prevented from performing its duties fairly and properly or that they were published without intent to injure the parties or interfere with the administration of justice. (1961) 2 Cri LJ 104 (106) : 1960 Ker LT 792 (DB) ** 1965 Ker LT 871 (DB).

(9) In a proceeding for contempt, the truth of the imputations is no defence at all. **A 1971 SC 221 (230) : 1971 Cri LJ 268** ** 1971 WLN 495 (Raj) ** A 1966 Andh Pra 167 (173) : 1966 Cri LJ 642 (DB) ** 1968 MPLJ 725 (DB) ** A 1965 Ker 49 (49, 50) : 1965 (1) Cri LJ 176 (DB) ** A 1961 J & K 76 (80) : (1961) (2) Cri LJ 766 (DB).

(10) Pleas of justification or privilege are strictly speaking not available to contemner except perhaps as matters tending to aggravate or mitigate offence of contempt. A 1966 All 588 (589) : 1966 Cri LJ 1361 ** A 1963 Bom 254 (262) : 1963 (2) Cri LJ 603 (DB).

(11) The excuse that a person may be found fault with by the higher authorities or that he should consult the higher authorities before complying with the orders of Court can be of no avail when he is asked to show cause why he should not be committed for contempt. (1966) 1 Andh LT 158 (DB) ** A 1967 Andh Pra 19 (21) : 1967 Cri LJ 19 (DB).

(12) In case of prohibitive orders, the fact that they were not served on the officers concerned is not a defence to their liability for contempt of Court, if they came to know of that order from a source whose authenticity they cannot doubt. (1967) 1 Andh WR 129 (DB).

(13-14) Person charged for committing contempt by acting in contravention of prohibitory order issued by High Court, cannot take plea that he was not party to that proceeding or that the order was not received by the concerned person. (1968) 2 Andh WR 208 (DB).

(15-17) The sooner the misconception is removed from the mind of those taking defence of freedom of press that they are not accountable to the law for what they edit, write and print, the better it will be for society. 1966 Cri LJ 214 (217) : 1965 MPLJ 844 (DB)

SECTION 10 — SYNOPSIS

1. Power of High Court to punish contempts.
2. Proceedings against State or Union.
3. Scope of enquiry.
4. Evidence and mode of proof.
5. Exercise of power is discretionary.
6. Contempt proceedings and Criminal P. C.
7. Bar of jurisdiction under the Proviso.
8. Ex parte order.
9. Parallel proceedings.
10. Other remedy.

1. Power of High Court to punish contempts.

(1) Section 2 of 1926 Act, Section 3 of 1952 Act and Section 10 of 1971 Act do not confer any new jurisdiction on the High Court but only recognise the initial inherent jurisdiction as a Court of Record, now sanctioned by Article 215 of the Constitution. 1975 All LJ 64 : 1974 Cri LJ 962 (968, 970).

(2) Criticism against judgment of trial Court — High Court entitled to consider judgment of Appellate Court. **A 1978 SC 921 : 1978 Cri LJ 917.**

(3) Although the High Court has got power and jurisdiction to punish for contempt, such power and jurisdiction will be used by them with great care and caution, and very sparingly, unless its exercise is absolutely necessary for the proper administration of law and justice. (1974) 1 Andh Pra LJ 243 : (1974) 1 An LT 170.

Case law under Old Act of 1952

(4) The power of a High Court to institute proceedings for contempt and punish where necessary is a special jurisdiction which is inherent in all Courts of Record. **A 1954 SC 186 (187) : 1954 Cri LJ 460** ** A 1957 All 37 (41, 42) (DB) ** A 1955 All 638 (640) (DB) ** A 1955 Orissa 36 (40) (DB) ** ILR (1946) 2 Cal 499 (506) ** A 1945 Oudh 266 (267) (DB).**

(5) Power of High Court to punish for contempt is to safeguard dignity of Courts and to create an atmosphere in which Judges can dispense justice with equal hand and fearlessly perform functions which they are called upon to discharge. **A 1969 Delhi 319 (320) (DB).**

(6) Institution and dropping of proceedings — Not dependent on desire of individual who had made report of contempt — Duty of High Court is to see that no person indulges in scandalizing any Court. 1972 All Cri R 57.

(7-10) No notion of the liberty of the press can stand in the way of the inherent power of Court to punish any publication which amounts to contempt. Article 19 (2) of the Constitution makes it clear that reasonable restrictions could be imposed on the fundamental right to freedom of speech and expression.

Section 10 — Note 1 (contd.)
inter alia, in relation to contempt of Court. A 1958 Punj 273 (279, 280) : 1958 Cri LJ 952 °° A 1969 Cal 1 (3) : 1969 Cri LJ 40 (58) °° 1958 Cri LJ 1225 (Punj) °° A 1953 Orissa 249 (252) °° A 1969 Cal 1 (3) : 1969 Cri LJ 40 (SB) °° A 1968 Punj 217 (230) : 1968 Cri LJ 775 (FB) °° A 1960 Pat 430 (440) : 1960 Cri LJ 1254 (FB) °° A 1959 Bom 182 (189) : 1959 Cri LJ 567 (DB).

(11-12) A High Court is a Court of Record and as such has an inherent power and authority to protect its subordinate Courts from interference with the course of justice administered by them, in any way which may be necessary. A 1939 Oudh 131 (139) : 40 Cri LJ 421 (FB) °° A 1952 Ajmer 33 (33) °° A 1952 Kutch 74 (76).

[But see A 1933 Pat 204 (205, 206) (DB).]

(13) High Court cannot deal with matters alleged to be of contempt of the Supreme Court. A 1967 Andh Pra 299 (305) : 1967 Cri LJ 1470 (DB).

(14-15) The Contempt of Courts Act only gives a statutory recognition to the already existing inherent powers of the High Courts to punish contempts of subordinate Courts also. A 1957 Hyd 17 (17) (DB) °° A 1939 Oudh 131 (139) : 40 Cri LJ 421 (FB) °° A 1955 Andhra 156 (159) : 1955 Cri LJ 1028 (DB).

(16) Article 215 of the Constitution does not limit the powers which the High Court possessed before to punish contempts of subordinate Courts either as a superior Court of Record or under the Contempt of Courts Act of 1926 which has been replaced by the present Act of 1952. A 1953 All 342 (345) : 1953 Cri LJ 733 °° A 1950 All 556 (558) : 52 Cri LJ 1062 (FB) °° A 1960 Pat 430 (442, 444, 445, 446) : 1960 Cri LJ 1254 (FB) °° A 1964 Cal 572 (582, 583) : 1964 (2) Cri LJ 660 (DB) °° A 1959 Bom 182 (187) : 1959 Cri LJ 567 (DB).

(17) The inherent power of the High Court to punish contempts of subordinate Courts and Tribunals has not been touched by Article 227 of the Constitution, just as such power was left untouched by Section 15 of the High Courts Act of 1861 which Article 227 replaced. A 1955 Mad 1 (18) : 1955 Cri LJ 1 (FB).

(18) Contempt of Court is contempt of the authority of the sovereign State exercised through its Courts duly constituted for the administration of justice and the power which the High Court exercises to punish contempt of itself and the Courts and Tribunals subordinate to it is the power of the sovereign State. A 1955 Mad 1 (20) : 1955 Cri LJ 1 (FB).

(19) It is open to the Parliament of India which exercises the sovereign authority of the State in the legislative field to provide specifically for the exercise of the power of the sovereign State to punish contempts of any specified classes of Courts or Tribunals. A 1955 Mad 1 (20) : 1955 Cri LJ 1 (FB)

(20) Where a subordinate Tribunal can protect itself or when any statutory provision is made for its protection from contempts, the High Court cannot invoke its inherent powers to punish contempt of that Tribunal. A 1955 Mad 1 (20) : 1955 Cri LJ 1 (FB).

(21-23) That the Court or Tribunal in relation to the proceedings in which the contempt was committed has ceased to exist does not deprive the High Court of its power to punish the contempt. A 1955 Mad 1 (21, 22) : 1955 Cri LJ 1 (FB).

(24) The High Court of Jammu and Kashmir has a statutory power given to it by the Constitution of the State itself to punish contempts of itself as well as any Court subordinate to it. A 1955 J & K 30 (31) : 1955 Cri LJ 1595 (FB).

2. Proceedings against State or Union.

Case law under the Old Act of 1952

(1) Contempt proceeding by its nature is a proceeding in personam. A 1956 Manipur 44 (48) : 1956 Cri LJ 1411.

(2) No doubt the State Government not being a natural person cannot be ordered to be detained in civil prison, on the analogy of Corporations for which special provision is made in O. 39, R. 5, but beyond that, both when a decree for a permanent injunction is executed and when an order of temporary injunction is enforced the liability of the State Government to be proceeded against appears to be clear. A 1961 SC 221 (228) °° A 1969 Pat 72 (76) (DB).

3. Scope of enquiry.

Case law under the Old Act of 1952

(1) Proceedings for contempt are of summary nature and so a hotly contested question of fact cannot be decided. A 1944 Lah 196 (201) : 46 Cri LJ 174 (SB) °° A 1951 Pat 443 (444) : 52 Cri LJ 558 (DB) °° A 1967 Mad 162 (164) : 1967 Cri LJ 551 (DB) °° A 1961 Punj 18 (20) : 1961 (1) Cri LJ 146.

(2-3) The Court in contempt proceedings based on the ground of disobedience to judicial orders will not enquire into the merits of the case to ascertain whether the order is erroneous. A 1958 Punj 180 (183) : 1958 Cri LJ 685 °° (1968) 1 Andh WR 382.

(4-6) Though contempt jurisdiction is considered to be summary jurisdiction. Courts are not barred from holding a detailed enquiry, when necessary. 1967 All Cri R 488.

4. Evidence and mode of proof.

Case law under Old Act of 1952

(1) Application under — Contempt on ground of breach of allegations alleged — Proof of allegations — Recording of evidence necessary — Equally efficacious remedy provided under Order 39, Rule 2 (3) — Held Court before whom matter is pending is competent to deal and therefore petition for contempt was not entertained by the High Court. 1974 Pun LJ (Cri) 71.

[See however (1975) 2 Cri LT 13 : ILR (1975) 1 Delhi 250 (266). (Petition admitted — Permission granted to file affidavits and counter-affidavits and evidence taken — Moreover interference to injunction order by public official — Petition entertained instead of directing the petitioner to take steps under O. 39, R. 2 (3), C. P. C.)]

(2) The standard of proof required to establish a charge of 'criminal contempt' is the same as in any other criminal proceeding. It is all the more necessary to insist upon strict proof of such charge when the act or omission complained of is committed by a person under colour of his office as a judicial officer. A 1976 SC 859 : 1976 Cri LJ 641. (A 1971 Ker 248, Reversed.)

(3-4) In order to amount to contempt of Court and to be punishable as such, mere breach of

Section 10 — Note 4 (contd.)
an undertaking given to, or disobedience of the order passed by, the Court is not enough. It must further be proved that the breach or disobedience was wilful or contumacious and the act of the contemner, therefore, signified disrespect to the Court. (1971) 73 Bom LR 616.

(5) In the case of breach of an order of the Court if it is done by a private person, apparently to gain some unlawful advantage, the presumption would be that infringement or disobedience was wilful, but in the case of an official, if he commits a certain disobedience, there would be a presumption in his favour that he had in the ordinary circumstances, done it bona fide and unintentionally. The presumption is not irrebuttable. A 1960 All 231 (234) : 1960 Cri LJ 442 (DB).

(6) Action for contempt of Court for disobedience of a stay order can be taken only when the party proceeded against for contempt is shown to have known the order in time. The fact that the order was pronounced when his counsel was present in Court is not sufficient. When, however, the party is present at the time the order is made, personal service thereof on him is not necessary. (1970) 72 Pun LR 114.

(7) It is not sufficient to find that the Magistrate has acted without proper care and caution in order to punish him for contempt. It has further to be shown, he has been motivated by extraneous considerations. (1971) 73 Pun LR 852.

(8) Contemner cannot be allowed to produce witnesses and documents to prove matters which are not strictly relevant to the enquiry relating to contempt. (1970) 72 Pun LR 822.

(9) In order to justify action for contempt of Court for breach of prohibitive order it is not necessary that the order should have been officially served on the party against whom it is granted, if it is proved that he had knowledge of the exact order aliunde and he knew that it was intended to be enforced. Official communication is not a condition precedent, provided there is no valid reason to doubt the authenticity of the order conveyed to him. **A 1979 SC 1767 (1770) : 1970 Cri LJ 1520.**

(10) Charge of contempt of Court for disobeying its order — Those who assert that alleged contemners had knowledge of order must prove this fact beyond reasonable doubt — In case of doubt benefit ought to go to person charged. **A 1970 SC 1767 : 1970 Cri LJ 1520.**

(11) Breach of injunction — Contempt proceedings — Proviso to Section 50, Evidence Act, is not applicable. A 1970 Raj 83.

(12) The drastic step of striking out defence and denial of hearing to a party in contempt is an extreme penalty which is enforced only in those cases where an act of a party in contempt impedes the course of justice. A 1974 All 39 (41, 42).

(13-14) In proceedings for contempt against newspaper editors for comments on pending proceedings, the prosecution need not affirmatively establish that the offender had knowledge of pendency of proceedings. A 1955 Orissa 169 (171) : 1955 Cri LJ 1514 (DB) ** A 1966 Cal 411 (420) : 1966 Cri LJ 883.

(15) Contempt proceedings even if they are judicial proceedings within the meaning of Section 1 of the Evidence Act have always been treated as falling outside the scope of that section and hence it is not necessary to prove a contempt in the manner provided for proving any fact by that Act. In those proceedings the Court is competent to adopt its own procedure for deriving satisfaction on the question that a contempt has been committed. A 1955 All 638 (640) : 1955 Cri LJ 1451 (DB) ** A 1960 Pat 430 (436, 437) (FB).

(16-19) Where a contemner wishes to defend himself he is to be given every opportunity having regard to the nature of summary proceedings in the trial of contempt matters, but it is for the Court to decide whether the documents produced had the tendency or were calculated to interfere with the course of justice by embarrassing the trial Judge in the trial of the cause and any witness outside the Court need not be examined to give opinion on the matter. **A 1968 Punj 217 (236) : 1968 Cri LJ 775 (FB).**

(20) For conviction for contempt of Court arising from scandalising the Court, it is not necessary that 'clear and present danger' to the orderly and impartial administration of justice has to be made out. **ILR (1968) 1 Ker 384 (519-20) (FB).**

(21-24) If a contumacious speech is denied by the contemner, Courts can always take evidence and on proof of the speech deal with the contemner according to law. A 1966 Cal 411 (423) : 1966 Cri LJ 883.

(25-27) An alleged contemner not being exactly an accused person can file an affidavit or make a statement on oath. A 1951 Pat 443 (444) : 52 Cri LJ 558 (DB) ** A 1943 Lah 329 (346) : 45 Cri LJ 445 (FB).

(28-29) A person against whom a charge of contempt of Court has been levelled is neither an accused within the meaning of Section 5 of the Oaths Act nor a person accused of an offence within the meaning of Art. 20 (3) of the Constitution of India. Hence the cross-examination of him upon an affidavit filed by him voluntarily is not barred. **A 1954 All 523 (537) : 1954 Cri LJ 1141 (FB).**

(30) Where there is any reasonable doubt in a case of contempt of Court the person charged with the contempt is entitled to the benefit of that doubt. **A 1944 Lah 196 (202) : 46 Cri LJ 174 (SB)** ** A 1957 All 37 (45) (DB) ** A 1955 All 638 (647) : 1955 Cri LJ 1451 (DB) ** A 1968 SC 1348 (1351) : 1968 Cri LJ 1514 ** A 1968 Punj 217 (232) : 1968 Cri LJ 775 (FB) ** A 1969 Delhi 201 (212) : 1969 Cri LJ 884 (FB) ** 1968 Cri LJ 671 (673) ** A 1966 All 588 (589) ** (1964) 68 Cal WN 330 (DB) ** A 1960 All 231 (236) (DB) ** A 1960 Orissa 132 (136) : 1960 Cri LJ 1120.**

(31) In the matter of a prohibitory order issued by a Court, it is not necessary that the order itself should have been served on the party against whom it has been granted in order to justify committal for breach of such an order, provided it is proved that the person complained against had notice of the order aliunde. **A 1967 All 93 (98) : 1967 Cri LJ 291.**

5. Exercise of power is discretionary. Case law under the old Act of 1952.

(1-4) The fact that in a case of contempt committed in its face the Court before it calls upon the contemner to show cause comes to a decision that a contempt has been committed does not disqualify the Court from adjudicating upon

Section 10 — Note 5 (contd.)
the matter when cause is shown by the contemner. A 1932 Lah 502 (503) : 33 Cri LJ 675 (FB).

(5) The jurisdiction to commit for contempt is an extraordinary one and should be sparingly and circumspectly used. A 1956 Andhra 84 (86) : ILR (1955) Andhra 545 : 1956 Cri LJ 475 (DB) °° A 1943 Lah 329 (337) : 45 Cri LJ 445 (FB) °° A 1956 Mad 621 (626) (DB) °° A 1954 All 308 (309) : 1954 Cri LJ 645 (DB) °° A 1965 SC 745 (791) °° A 1969 Delhi 6 (6) °° A 1969 Delhi 304 (308) °° A 1969 Orissa 117 (128) : 1969 Cri LJ 763 (DB) °° (1968) 2 Andh WR 208 (DB) °° 1968 Cri LJ 248 (250) (DB) (Cal) °° A 1968 Ker 301 (307). (Reversed in A 1970 SC 1694 on another point.) °° 1968 Cri LJ 1424 (Ker) : 1968 Ker LT 157 (DB) °° A 1967 Andh Pra 219 (225, 226) : 1967 Cri LJ 984 (DB) °° 1963 (1) Cri LJ 820 (823) (DB) (MP).

(6) Power to proceed against persons for contempt is a shield given to Courts for protecting their authority and making the same effective. It is a protective power necessary for the proper functioning of Court and due administration of justice. 1969 Ker LT 513 (517) (DB).

(7) Proceedings by way of contempt being summary, and the Court being both accuser and judge of accusation, such proceedings have to be initiated in exceptional cases where there is a serious interference with proceedings of Court. The jurisdiction for committing for contempt being practically arbitrary and unlimited, must be most jealously and carefully watched and exercised with greatest reluctance and greatest anxiety on the part of judges. A 1969 Delhi 291 (293, 294) (DB).

(8) In action by way of contempt, Court is both the accuser and judge of the accusation. It behoves the Court to act with due circumspection — Court must always be jealous in vindicating its dignity and impartiality while at the same time, it must exercise its power with restraint and care — Litigant may have a grievance in a matter decided by Courts, but that cannot justify use of intemperate or improper language by aggrieved party in reference to Courts. A 1969 Delhi 169 (169, 170) (FB).

(9) A Court will not exercise its extraordinary power of committal upon light occasions and where the ends of justice do not require its use. A 1956 Sau 102 (104) : 1956 Cri LJ 1355 (DB) °° A 1951 Punj 49 (52) : 52 Cri LJ 950 (DB) °° A 1950 All 285 (286) : 51 Cri LJ 595 °° A 1941 Pat 185 (192) (DB) °° A 1969 Delhi 137 (141) : 1969 Cri LJ 599 (DB) °° 1968 Cri LJ 107 (All) °° 1961 (2) Cri LJ 104 (109) (DB) (Ker) °° A 1960 All 231 (234) : 1960 Cri LJ 442 (DB) °° A 1958 Cal 474 (482) : 1958 Cri LJ 1162 °° ILR (1955) Mys 524 (DB).

(10-11) In order to justify the exercise of the jurisdiction in contempt the interference with the due course of justice must be a substantial interference. A 1953 SC 185 (187) : 1953 Cri LJ 911 °° A 1950 All 556 (562) : 52 Cri LJ 1062 (FB) °° 1968 Cri LJ 107 (108, 109) (All) °° A 1968 Ker 301 (307) : 1968 Cri LJ 1424 (DB) °° A 1967 Ker 177 (180) (DB) °° (1966) 2 Mys LJ 288 (DB) °° A 1965 All 606 (608) : 1965 (2) Cri LJ 707 °° A 1963 Madh Pra 61 (70, 71) : 1963 (1) Cri LJ 187 °° 1963 (2) Cri LJ 219 (222) (DB) (MP) °° 1961 (2) Cri LJ 104 (109) (DB) (Ker) °° A 1958 Cal 474 (482) : 1958 Cri LJ 1162 (DB).

(12) Interference with course of justice — Likelihood and not actual interference is essential. A 1969 Delhi 201 (210) (FB).

(13) Criticism of police investigation — Giving opinion in newspaper as to who is real culprit — Amounts to contempt. 1969 Ker LJ 453 (463) : 1969 Ker LT 513 (DB).

(14) Courts should be reluctant to take notice of technical contempts. A 1954 All 308 (309) : 1954 Cri LJ 645 (DB) °° A 1950 All 556 (562) : 52 Cri LJ 1062 (FB) °° A 1967 Andh Pra 299 (309) : 1967 Cri LJ 1470 (DB) °° 1961 (2) Cri LJ 104 (109) (DB) (Ker).

(15) The power to commit for contempt should be used only when contempt is deliberate. A 1939 Mad 257 (260) : 40 Cri LJ 533 (SB) °° A 1953 All 266 (270) : 1953 Cri LJ 630 (DB) °° A 1969 Delhi 137 (140) : 1969 Cri LJ 599 (DB) °° 1968 Cri LJ 107 (108, 109) (All) °° 1966 All WR (HC) 759 °° 1963 (2) Cri LJ 219 (223) : 1963 MPLJ 1121 (DB) °° A 1959 Pat 262 (266) : 1959 Cri LJ 754 (DB).

(16) Interference with due course of justice in pending proceedings — Case in question referred to in public speech made by P — P explicitly declaring that that case was sub judice and he would refrain from any discussion about it — In view of cautionary trends of speech, jurisdiction relating to contempt of Court held could not be invoked. A 1969 Mad 378 (380) (DB).

(17) Benefit of doubt — Publication of letter in a pending case marked by Court only for identification — Letter neither proved, nor admitted in evidence nor read out in Court — Held that in view of principle that action for contempt should be taken with caution and deliberation, it was proper to ignore publication of full text of letter in newspaper in peculiar facts of case and benefit of doubt given to accused. A 1969 Delhi 201 (212) (FB).

(18) The High Court will not exercise its jurisdiction in contempt upon a mere question of propriety. A 1957 All 37 (46) : 1957 Cri LJ 18 (DB) °° A 1953 SC 185 (187) : 1953 Cri LJ 911 °° A 1945 PC 134 (136) °° A 1949 Lah 151 (154) : 50 Cri LJ 598 (FB) °° A 1955 Cal 368 (368) : 1955 Cri LJ 943 (DB) °° 1968 Cri LJ 248 (251) (DB) (Cal) °° A 1967 Ker 177 (180) : 1967 Cri LJ 1147 (DB).

(19) The matter of dealing with the contempt is totally within the jurisdiction of the High Court and is not the right of any party in any sense. Further, this jurisdiction must be very sparingly used only where the interests of justice imperatively require its use, and even then only to the limit strictly called for by such interests : any impression that the exercise of such jurisdiction or the power to punish for contempt, has been made in a somewhat hasty or dominating mode without carefully considering the consequence involved to parties may be even more unfavourable to the administration of justice, than permitting such acts of contempt to go unnoticed. (1969) Mad LW 25 (28) (DB) (Cri).

(20) The jurisdiction to commit for contempt should not be used to vindicate any personal interest of the Judge but only the general administration of law which is the public concern. A 1956 Andhra 84 (86) : 1956 Cri LJ 475 (DB) °° A 1950 All 285 (286) : 51 Cri LJ 595 °° ILR (1968) 1 Ker 384 (403) : 1968 Ker LJ 197

Section 10 — Note 5 (contd.)
(FB) ** 1968 Cri LJ 248 (251) : 71 Cal WN 771 (DB) ** 1968 MPLJ 725 (DB) ** A 1967 Andh Pra 299 (308) : 1967 Cri LJ 1470 (DB) ** A 1961 J & K 76 (81) : 1961 (2) Cri LJ 766 (DB) ** A 1959 Orissa 89 (93) : 1959 Cri LJ 626 (DB).

(21) Proceedings by way of contempt of Court should not be used as a 'legal thumb-screw' by a party against his opponent for enforcement of his claim. A 1970 Mad 14 (16, 17) (DB).

(22) Ordinarily, in the case of civil contempt, the Courts are reluctant to interfere unless the disobedience to the Court's order issued for the benefit of the other party, is wilful. A 1968 Punj 180 (183) : 1958 Cri LJ 685 ** A 1969 Delhi 6 (6).

(23) An application for contempt made by a party when it is not made for a genuine purpose of vindicating cause of jeopardised justice but is made for the ulterior purpose of parading a fancied grievance in order to secure the punishment of the other party must be dismissed. A 1957 All 37 (47) : 1957 Cri LJ 18 ** 1968 Cri LJ 107 (108, 109) (All) ** A 1967 Andh Pra 219 (227) : 1967 Cri LJ 984 (DB) ** A 1967 Ker 177 (181) : 1967 Cri LJ 1147 (DB).

(24) Power of High Court to punish contempts can be invoked only when facts ex facie support such proceeding and not for enforcement of decretal rights between parties. A 1966 Mad 21 (22) : 1966 Cri LJ 35 : (1965) 2 Mad LJ 162 (DB).

(25) The Court must take into consideration the fact that there is another remedy available while exercising its discretion to commit or not to commit a person for contempt of Court. A 1945 PC 147 (150) : 47 Cri LJ 61 ** A 1958 Cal 474 (482) : 1958 Cri LJ 1162 ** 1968 Cri LJ 430 (431) (Punj).

(26) A party guilty of disobedience of an interim injunction order can be punished under Order 39, Rule 2-A (Allahabad) of the Civil Procedure Code and also under the Contempt of Courts Act. It is however not necessary to award separate punishment. 1964 All WR 127 (128).

(27-28) Where the circumstances require it, Courts should not hesitate to exercise the powers conferred by the Act. A 1954 Pat 203 (208) : 1954 Cri LJ 533 (DB) ** A 1937 Bom 305 (307) : 38 Cri LJ 942 ** (1966) 68 Bom LR 453.

(29-31) Where the person directed by a subordinate Court to do a particular thing in a certain time disobeys the order the High Court in proceeding in contempt against that person to enforce the order does not exercise its discretion wrongly. A 1945 PC 147 (150) : 47 Cri LJ 61. (A 1942 Bom 154, Affirmed.)

(32-36) The Court's power to punish contempts carries with it the power to pardon contempts in suitable cases. A 1951 Cal 507 (509) ** 1968 Cri LJ 248 (252) (DB).

(37-38) A party who disobeys the order of the Court is in contempt. If the disobedience of the order is such that, so long as it continues, it impedes the course of justice in the cause, by making it difficult for the Court to ascertain the truth or to enforce the orders it may make, then the Court may in its discretion refuse to hear him until the impediment is removed or good reason shown why it should not be removed. 1962 Ker LT 354.

(39) Contempt of Court by one person — Another person taking entire responsibility for offence and expressing unqualified regrets — Is no ground for absolving former. A 1969 Delhi 201 (205) (FB).

(40) Complaint for defamation against printer and publisher of newspaper — Accused publishing in their newspaper Court proceedings in such manner as to hamper fair trial of complaint by poisoning public mind against complainant — Accused held were guilty of contempt of Court — Ignorance of law or inability of legal advisers to properly guide their clients though not a mitigating circumstance, Court in the circumstances of case gave the contemners a severe warning. A 1969 Delhi 201 (213) (FB).

(41) Where interim injunction of Court is violated and there are more suitable remedies available to the aggrieved party, High Court may refuse to exercise its jurisdiction under Contempt of Courts Act it being discretionary. 1971 All WR (HC) 290.

(42) The object is to maintain public confidence in fairness and impartiality of Courts. Vindication of prestige is not the object. The discretionary power is not available as a cloak for judicial authorities to cover up their inefficiency and corruption or to stifle criticism made in good faith against such officers. 1970 All WR (HC) 280 : 1970 All LJ 370 : 1970 All Cri R 156 : 1971 Cri LJ 580 : A 1971 All 170 (172, 173) (DB).

(43) Committal for contempt is a weapon to be used sparingly and always with reference to the interests of the administration of justice. 1970 MLJ (Cri) 139.

(44) Power of High Court to punish contempts of subordinate Courts — Commitment for contempt is discretionary — Power to be exercised to maintain the course of justice pure and unaffected. ILR (1971) Cut 237 (SC).

(45) Where the contempt is serious and there is an apprehension that the Subordinate Court whose order has been disobeyed may not be able to award adequate sentence, or, may otherwise find itself in difficulties in dealing with the case. High Court may take action under the Act notwithstanding the specific provisions of Order 39, Rule 2, sub-rule (3), Civil P. C. But such cases must be exceptional and clear. As there was no special reason. High Court declined to exercise its powers. A 1971 All 231 (233, 234) : 1971 Cri LJ 764.

(46) Where the allegation requires recording of detailed evidence on disputed question of facts and the allegation also constitute offences under Penal Code, High Court held will not exercise its discretionary powers in dealing with contempt. A 1974 Cal 3 (6) : 77 Cal WN 642.

(47) Where the Court whose contempt is alleged to have been committed finds, on an application made by the petitioner to that Court under Section 151, Civil P. C., that there was no contempt of that Court, it would be in very extreme and rare cases that the High Court would even entertain an application for contempt. A 1960 All 231 (236) : 1960 Cri LJ 442.

6. Contempt proceedings and Criminal P. C. Cases under the old Act of 1952

(1) The Code of Criminal Procedure does not apply to the trial of cases under the Contempt

Section 10 — Note 6 (contd.)
of Courts Act. A 1954 SC 186 (190) : 1954 Cri LJ 460 °° A 1956 All 258 (262) : 1956 Cri LJ 679 (DB) °° A 1955 All 638 (640) : 1955 Cri LJ 1451 (DB) °° A 1963 SC 692 (697) : 1963 (1) Cri LJ 633. (The provisions of Sections 87 and 88, Cr. P. C. cannot be made available in order to secure presence of contemner before Court. (1962) 2 Cri LJ 118 (All), Reversed.) °° A 1968 Punj 217 (230) (FB).

(2-4) A warrant for contempt has no resemblance to a warrant under Cr. P. C. (1958). 60 Bom LR 279.

(5-9) The Supreme Court has no power either under Section 527, Criminal P. C. or otherwise to transfer a proceeding for contempt of Court pending before one High Court to another. A 1954 SC 186 (190) : 1954 Cri LJ 460.

(10) Section 556, Criminal P. C., does not apply to the summary proceedings taken for punishing contempts and therefore a Judge who has been personally attacked is under no bar to initiate proceedings for the contempt and sit in judgment in the case. A 1942 Lah 105 (107, 108) : 43 Cri LJ 599 (FB).

7. Bar of jurisdiction under the proviso.

(1) Where the acts merely amount to offences of other description under the Penal Code High Court's jurisdiction not barred. 1974 Cri LJ 899 (902) : ILR (1974) 1 Delhi 466 (FB).

(2) Proviso to Section 10 excludes jurisdiction of High Court only in cases where the acts alleged to constitute contempt of a subordinate Court are punishable as contempt under specific provisions of I. P. C. but not where those acts merely amount to offences of other description for which punishment has been provided for in the I. P. C. under Sections 186, 189 and 228, I. P. C. what is made punishable is not contempt of Court. Hence initiation of contempt proceedings for acts which fall under those sections of I. P. C. is not barred under the proviso. 1974 Chandi LR (Cri) 174 (DB).

(3) Action of contemner amounting to offence under Section 228, I. P. C. involving contempt of subordinate courts — High Court has no jurisdiction to take cognizance of the said action and proceed under the Contempt of Courts Act. 1977 Punj LJ (Cri) 97 : (1977) 4 Cri LT 256 (DB).

Case law under sub-section (2) of Section 3 of the old Act of 1952.

(4) The jurisdiction of High Court under the Act is barred where the contempt complained of is also punishable under the Penal Code as an offence of contempt. A 1952 Trav-Co. 113 (114) : 1952 Cri LJ 658 (FB) °° A 1950 All 556 (559) : 52 Cri LJ 1062 (FB) °° A 1959 SC 102 (106, 107) : 1959 Cri LJ 251 °° A 1968 Andh Pra 207 (213) : 1968 Cri LJ 888 (DB) °° 1968 Cri LJ 1259 (1260) (Punj) °° 1967 All Cri R 488 °° A 1967 Mad 162 (164) : 1967 Cri LJ 551 (DB) °° A 1966 Bom 19 (29) : 1966 Cri LJ 9 (DB) °° (1966) 2 Mad LJ 219 (DB) °° A 1964 Bom 147 (154, 155) : 1964 (1) Cri LJ 652 (DB) °° (1961) 65 Cal WN 722 (DB) °° A 1961 Pat 1 (5) : 1961 (1) Cri LJ 134 (DB).

(5) Where an offence is punishable under the Penal Code not as a contempt but as a different offence the jurisdiction of the High Court to take proceedings in respect of that offence under this Act is not barred. A 1952 SC 149 (151) : 1952 Cri LJ 832. (A 1943 Nag 334, Overruled.) °° A 1956 All 258 (261, 262) : 1956 Cri LJ 679 (DB) °° A 1954 Nag 99 (102) : 1954 Cri LJ 555 (DB) °° A 1951 Cal 489 (489, 490) : 52 Cri LJ 1030 (DB) °° A 1968 Punj 217 (237) : 1968 Cri LJ 775 (FB) °° A 1961 Punj 113 (119) : 1961 (1) Cri LJ 426.

(6) The words "where such a contempt is an offence punishable under the I. P. Code" do not extend to offences punishable under the Penal Code otherwise than as contempt. A 1952 Orissa 215 (218) : ILR (1959) Cut 387 : 1952 Cri LJ 1106.

(7) Mere existence of an element of insult in the alleged act of contempt of Court is not conclusive as to the applicability of Sec. 228, Penal Code so as to oust the jurisdiction of the High Court under Section 3 (2). The true test is whether the act complained of is an offence under Section 228, Penal Code or is something more than that. If it is something more, the jurisdiction of High Court is not ousted by Section 3 (2) of the Act. A 1959 SC 102 (106, 107) : 1959 Cri LJ 251. (Madh BLR 1955 Cri 111, Reversed.) °° 1968 Cri LJ 1259 (1260) : 1967 Cur LJ 490 (Punj).

(8) Where the object of contemner clearly was to scandalize the magistrates and thus deflect them from a strict and non-hesitant performance of their duties, Section 3 (2) did not bar the jurisdiction of the High Court to punish contemner for contempt of subordinate court and thus to deflect them from a strict and non-hesitant performance of their duties and hence Section 3 (2) was no bar to jurisdiction of High Court to punish contemner for contempt of subordinate Court. A 1969 Delhi 214 (219) (SB).

(9) Section does not bar the High Court from taking cognisance of a contempt even if it is also otherwise a criminal offence under some provision of law but its jurisdiction is barred only in respect of an alleged contempt of a Court subordinate to it where such contempt is an offence punishable under Penal Code. 1971 All WR (HC) 290.

8. Ex parte order.

(1-2) Accused held guilty of committing contempt — Order passed ex parte — Absence due to omission of Court to mention case correctly in Cause List and also partly due to negligence of counsel and his clerk in referring Cause List — Alleged contempt found to be of doubtful nature and capable of proper explanation — Application to rehear contempt case disallowed — Held, alleged contempt not being patent Court should have allowed rehearing of the case. 1970 SCD 430 : 1970 SC Cri R 473 °° 1971 Mad LJ (Cri) 125 : 1971 Cri LJ (N) 15.

9. Parallel proceedings.

(1) An authority holding an inquiry in good faith in exercise of the powers vested in it by a statute is not guilty of contempt of Court, merely because a parallel inquiry is imminent or pending before a Court. To constitute the offence of contempt of Court, there must be involved some act done or writing published calculated to bring a Court or a Judge of the Court into contempt or to lower his authority or something calculated to obstruct or interfere with the due course of justice or the lawful process of the Court.

Where reference to arbitrator is made by a party in terms of the arbitration clause long

11. Power of High Court to try offences committed or offenders found outside jurisdiction.— A High Court shall have jurisdiction to inquire into or try a contempt of itself or of any court subordinate to it, whether the contempt is alleged to have been committed within or outside the local limits of its jurisdiction, and whether the person alleged to be guilty of contempt is within or outside such limits.

[1952—S. 5.]

12. Punishment for contempt of court.— (1) Save as otherwise expressly provided in this Act or in any other law, a contempt of court may be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to two thousand rupees, or with both:

Provided that the accused may be discharged or the punishment awarded may be remitted on apology being made to the satisfaction of the court.

Explanation.— An apology shall not be rejected merely on the ground that it is qualified or conditional if the accused makes it bona fide.

(2) Notwithstanding anything contained in any law for the time being in force, no court shall impose a sentence in excess of that specified in sub-section (1) for any contempt either in respect of itself or of a court subordinate to it.

(3) Notwithstanding anything contained in this section, where a person is found guilty of a civil contempt, the court, if it considers that a fine will not meet the ends of justice and that a sentence of imprisonment is necessary, shall, instead of sentencing him to simple imprisonment, direct that he be

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Section 10 — Note 9 (contd.)

before the institution of suit in Civil Court by another party to the dispute and even after the notice of institution of civil suit the proceedings before the arbitrator are continued that does not constitute contempt of Court. A 1970 SC 720 (722, 723) : 1970 Cri LJ 756.

(2) Orders of the Commissioner of Endowments Orissa terminating services of 'A' — Writ petition against the order by 'A' — Stay of impugned orders by High Court on 3-3-1970 — Commissioner of Endowments initiating domestic enquiry proceedings immediately thereafter on 18-3-70 against and ultimately dismissing him — Contempt proceedings by High Court against the Commissioner — Defence that the action of domestic enquiry and dismissal of 'A' was in pursuance of his powers under Ss. 28 and 70 of the Endowments Act which could not be affected by the stay of his orders passed under another provision of the Act and the action was bona fide and did not amount to contempt — On the technical plea of bona fide exercise of powers under the Endowments the Commissioner was discharged. (1972) 2 Cut WR 1865.

10. Other remedy.

(1) A distinct remedy may be available to a person who has been defamed or against whom a complaint has been made but if the same action does constitute contempt of Court the person responsible for such action is liable to be punished under the provisions of the Contempt of Courts Act. 1973 Cri LJ 1211 (1217): 1973 All LJ 180.

(2) Consent decree — Breach of undertaking by a party — Remedy of execution available to the other party — Still action for contempt can be taken. (1973) 77 Bom LR 107.

(3) Violation of injunction granted by Civil Court — Efficacious remedy available to the applicant under O. 39, R. 2 (3) of Civil P. C. (1908) — Civil suit in which injunction was granted pending → High Court refused to entertain the application. 1974 Pun LJ (Cr) 71.

(4) Where a plaintiff by his conduct of filing several suits of various character, he is not restricted by law to a single form of remedy and he can pursue all remedies appropriate to his grievance and his conduct does not involve any punishable contempt of the Civil Court. (1970) MLJ (Cri) 139.

Section 11

Cases under old Act

(1) The High Court has jurisdiction in view of the provisions of Section 5 of the Act of 1952 to enquire into and try a contempt of itself or of its subordinate Court whether the contempt has been committed within or outside the local limits of its jurisdiction and whether the contemner is within or outside such limits. A 1954 Assam 201 (205) : 1954 Cri LJ 1609 (FB) •• A 1961 Cal 422 (429).

(2) The High Court has jurisdiction over a matter of contempt committed within its territorial jurisdiction and the place where the contemner resides does not affect that jurisdiction. A 1934 Mad 423 (424) : 35 Cri LJ 962 (DB) •• 1962 (2) Cri LJ 118 (121) (DB) (All).

SECTION 12 — SYNOPSIS

1. Scope of the section.
2. Principles governing award of punishment.
3. Order for payment of costs by contemner.
4. Apology.
   - (A) General.
   - (B) Conditional apology.
   - (C) Effect of acceptance of apology.
   - (D) Illustrative cases
     - (i) Apology accepted as unqualified and sincere.
     - (ii) Apology not accepted.

1. Scope of the section.

(1) Power to punish for contempt is not uncontrolled or unlimited — Technical contempt — Court will not initiate proceedings for contempt without due caution and reserve. A 1970

detained in a civil prison for such period not exceeding six months as it may think fit.

(4) Where the person found guilty of contempt of court in respect of any undertaking given to a court is a company, every person who, at the time the contempt was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the contempt and the punishment may be enforced, with the leave of the court, by the detention in civil prison of each such person :

Provided that nothing contained in this sub-section shall render any such person liable to such punishment if he proves that the contempt was committed without his knowledge or that he exercised all due diligence to prevent its commission.

(5) Notwithstanding anything contained in sub-section (4), where the contempt of court referred to therein has been committed by a company and it is proved that the contempt has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company such director, manager, secretary or other officer shall also be deemed to be guilty of the contempt and the punishment may be enforced, with the leave of the court, by the detention in civil prison of such director, manager, secretary or other officer.

Explanation.— For the purpose of sub-sections (4) and (5),—

(a) "company" means any body corporate and includes a firm or other association of individuals; and

(b) "director", in relation to a firm, means a partner in the firm.

[1952—S. 4]

Section 12 — Note 1 (contd.)

SC 1821 (1829) : 1970 Cri LJ 1525 : (1970) 2 SCJ 67.

the Constitution. ILR (1975) 2 Delhi 868 (893, 894) (DB).

(2) Interference with Receiver appointed by Subordinate Court — Subordinate Court has no power to punish a person for contempt — Court concerned has to make a report of the matter to the High Court and on receipt of the report the High Court deals with the contempt. 1972 Cri LJ 1335 : 76 Cal WN 479.

(3) An order cannot be passed in contempt proceedings against a person who is not a party to it. He cannot be prejudicially affected or bound by such order. (1979) 1 Serv LR 190 (192) (Punj).

(4) The proceedings in contempt of court both civil and criminal are of a quasi-criminal if not of entirely criminal nature. Contempt is thus essentially an offence for which a provision for punishment is provided under the Act and the procedure for inflicting the same is laid out thereby. The section does not spell out any inherent power to direct the change of the possession of land or any ancillary order therefor. 1978 Cri LJ 612 (614) (Punj).

(5-6) When facts and circumstances of the case show that the allegations against the management were too vague to be taken notice of; and when the denial of the disputed questions of fact required extensive evidence and the allegations also constituted offences under the Penal Code; power to punish cannot be exercised. **A 1972 SC 2466 (2468) : 1973 Cri LJ 19 : (1973) 1 SCJ 536.**

(7) Penal provisions of the Contempt of Courts Act (1971) are not hit by Art. 19 (1) of

2. Principles governing award of punishment.

(1) A sentence of fine alone should be imposed in normal circumstances. The statute, however, confers special power on the Court to pass a sentence of imprisonment if it thinks that ends of justice so require. Thus before a Court passes the extreme sentence of imprisonment, it must give special reasons after a proper application of its mind that a sentence of imprisonment alone is called for in a particular situation. Thus, the sentence of imprisonment is an exception while sentence of fine is the rule. **A 1979 SC 1536 : 1979 Cri LJ 960.**

(2) In the matter of punishment facts in one case could not be taken as precedent for the facts of another case. Taking compassionate view of the matter, imposition of fine of rupees one hundred and detention till rising of the Court would meet the ends of justice. 1973 Cri LJ 137 (140) : 1972 BLJR 199.

(3) Where the contemner made scurrilous attacks on judges, even after he had been once punished for contempt in a criminal case maximum punishment permissible under the Act may be imposed. ILR (1971) 2 Delhi 113.

(4) Petitioner-deponent making scandalous and reckless allegations without any basis against Judges of Supreme Court in affidavit filed before Supreme Court — Not availed himself of opportunities given to him to explain his position or detract from them or to offer apologies — **Held** that contempt committed by petitioner was grave and his attitude contumacious — Sentenced to 6 months' S. I. **(1971) UJ (SC) 515.**

Section 12 — Note 2 (contd.)

(5) There is no scope for leniency when one from the rank and file of the very system of judicial administration comes out to defy the settled process of administration of law and knocks it from within. ILR (1971) Cut 986.

(6) Where the dominant intention of the alleged contemner was not to flout the orders of the Court as such but to press for the proper procedure to be followed in enforcing such orders it was held that taking action against the contemner would be "to take action in an unclear case of contempt". 1973 Cri LJ 790 (793, 794) (Cal).

(7) Contempt committed persistently and no repentance shown by contemner throughout contempt proceeding — Calls for deterrent punishment — Youth and immaturity of contemner, held, as extenuating circumstances. 1971 WLN 495 (Raj).

(8) Appeal by tenant before High Court against order of eviction — On tenant giving undertaking to vacate premises appeal dismissed — Deliberate breach of undertaking — Tenant is guilty of contempt — Maximum punishment awarded. A 1980 Delhi 39.

(9) Party restrained from alienating property — Selling property to clear off taccavi loan and some fine, without permission of Court — Conduct of party amounts to contempt — Contemner sentenced to undergo one month's S. I. and to pay a fine of Rs. 1000/-. 1977 Pun LJ (Cri) 201 (204).

(10) Contemner making most flagrant and offensive allegations against a Magistrate and defending the same instead of showing any remorse commits gross contempt. Contemner sentenced to six months' simple imprisonment. A 1973 All 369 (370 to 372) : 1973 Cri LJ 1271 : 1973 All LJ 213.

(11) Punishment for contempt of Court — Unconditional apology — Held, the conduct of contemners was so reprehensible as to warrant condemnation by imposition of sentence. **A 1980 SC 946 (951) : 1980 Cri LJ 684.**

(12) Expressions which merely indicate coloured flare of language and which may have origin in injured state of mind and as such unhealthy expression of personal sense of frustration though tantamount to contempt would not by itself be the ground to take any serious view of the matter. Unqualified bona fide apology was accepted. 1977 Cri LJ 1490 (1491) : 1976 Mah LJ 711 (DB).

(13) Gross contempt of High Court Judge by a judicial officer — Contemner at an end of his judicial career gripped by a sort of mania against the High Court which clouded his reason — Sentence of imprisonment imposed by High Court — Substituted by Supreme Court by sentence of fine of Rs. 1,000/-. **A 1974 SC 710 (725, 736) : 1974 Cri LJ 631.**

(14) Though the contemner was guilty of gross contempt the Court refrained from awarding sentence of imprisonment on the ground that he was still a student of law and of immature mind and in an unguarded moment he had exceeded the limits of fair criticism. 1974 Cri LJ 428 (430) (All).

(15) An attempt to malign Judges of the Court on false allegations is indeed not at all behoving of any member of the society; and much less so of one practising law at the bar of the very Court. Where an advocate of the Court by making contemptuous and false allegations in a petition under S. 561-A, Cr. P. C. acted in a most irresponsible and indecent way, the only appropriate sentence would be a substantive term of imprisonment. But in view of the unconditional apology offered, the stand of the contemner that he has joined the Bar only recently after a long term of service as a Magistrate and his repentant appearance in Court, the Court took a lenient view and holding him guilty of contempt admonished him in open Court and let him off with a warning of dire consequences that may be visited with in case of repetition of such conduct. (1972) 38 Cut LT 940.

(16) The drastic step of striking out the defence, and denial of hearing to a party in contempt is an extreme penalty which is enforced only in those cases where an act of a party in contempt impedes the course of justice or that justice in the cause cannot be done without compliance of the Court's order, but the party in contempt is entitled to challenge the validity of the order and the jurisdiction of the Court passing the order itself. The party in contempt may not be entitled to take advantage of its own action in the same cause without purging the contempt but such a party is entitled to defend itself. A 1974 All 39 (41, 42, 43).

(17) Contempt matters being in the nature of quasi-criminal proceedings, the benefit of doubt definitely accrues to the contemner. Where the High Court in second appeal only allowed the J. D. time to deliver possession but there was no direction to that effect and the J. D. instead of delivering possession filed a suit for declaration of his right negatived under the decree as he bona fide believed that he had such right under the law it was held that the J. D. was not guilty of disobedience of High Court direction and was entitled to benefit of doubt. (1975) 2 Mad LJ 218.

(18) Keeping in mind the surrounding circumstances in which the impugned resolution was passed by the Avadh Bar Association and keeping in mind that it refers to a single act of the Chief Justice, it was held that the resolution did not have the potentiality of causing such a degree of harm as may call for the said contemners (members actively associated with the Resolution) being punished. (Although no punishment was imposed, the High Court expressed their strong disapproval of their contumacious conduct). A 1975 All 52 (66) (DB).

(19) Punishment — Contempt by Reader working under District Magistrate by evading service of order of High Court — Imposition of fine would meet ends of justice. 1974 Cri LJ 529 (541) (All).

(20) Where the District Magistrate evades service of interim order of High Court and deliberately allows the process of service of requisition order under the U. P. Act passed by him his action is to nullify the High Court order. He is guilty of employing subterfuge to avoid compliance of order of High Court without any justification. Mere imposition of fine does not meet the ends of justice and the public interest and dignity of the High Court and respect for law requires that he should be detained in civil prison. 1974 Cri LJ 529 (542) (All).

(21) Power to punish contemner to be exercised with forbearance and circumspection —

Section 12 — Note 2 (contd.)

Conduct of contemner not only persistent and adamant but also unrelenting and inexorable — Contemner ordered to be detained in civil prison for four months. ILR (1979) 1 Delhi 280 (DB).

(22) Punishment for civil contempt — Wilful breach of undertaking given to Court by a Director of defendant Company on its behalf — Director ordered to be detained in civil prison for a period of six months. ILR (1978) 1 Delhi 233 : 1977 Cri LJ (NOC) 266.

(23) The fact that other newspapers and magazines had published something similar to that published by the contemner cannot mitigate the offence of contempt. 1971 Cri LJ 1586 (1590, 1591) (All).

(24) Criminal contempt — Letters written by complainant whose complaint was dismissed on police report to Judicial Magistrate — Language used having effect of scandalising and lowering his authority and also substantially interfering with and obstructing course of justice — Contemner given deterrent punishment (two months' simple imprisonment and fine of Rs. 1,000/-.). 1976 Cri LJ 1958 : ILR (1976) Kant 1296 (DB).

(25) Disobedience of injunction by constructing structure — Compromise decree in suit — Defendant demolishing construction — Defendant held not liable to punishment for contempt as he had purged himself of the contempt — No orders were required to be passed on the petitions. 1978 UCR (Bom) 754 (755) (DB).

(26) An allegation of dishonesty, bribery or partiality is the most serious stigma on the conduct of judicial officers and when it is made generally, it tarnishes the image of the entire judiciary. Apology was tendered after the contempt proceedings were started. **Held** that the contemner deserved deterrent punishment of imprisonment for maximum term of six months but in view of apology the ends of justice will be met if, the contemner is punished with a fine of Rs. 100 (one hundred) only in addition to acceptance of apology. 1980 WLN 276 (286, 287) (Raj).

(27) For recording a finding of guilt in contempt proceedings a clear case must be made out that an order passed by the Court in its terms was disobeyed and disregarded by the person on whom that order was served and for whom that order was meant. 1977 All LJ 268 : 1977 Cri LJ (NOC) 171.

(28) The contempt proceedings are of a quasi-criminal nature and therefore whenever there is a reasonable doubt, the person charged is entitled to the benefit of doubt. Before a person can be punished for contempt of Court for disobeying the orders of the Court, it has to be seen that the lapse has been an outcome of something more than mere negligence and in defiance of the authority of the Court. ILR 1973 Cut 1435 (1455) (Orissa).

Cases under Old Act of 1952.

(29) Contempt proceeding against a person who has failed to comply with the Court's order serves a dual purpose : (1) Vindication of the public interest by punishment of contemptuous conduct and (2) coercion to compel the contemner to do what the law requires of him. To employ a subterfuge to avoid compliance of a Court's order about which there could be no reasonable doubt may in certain circumstances aggravate the contempt. **A 1970 SC 1767 (1770) : 1970 Cri LJ 1520.**

(30) Punishment for contempt of Court is inflicted not with a view to protect the individual Judges from repetition of the attack on the Court as a whole or maintain the individual or collective dignity of the Judges but to ensure the confidence of the public in the administration of free, fearless and impartial justice and to evert the tremendous public mischief which will inevitably be caused if such confidence is allowed so to be undermined or impaired. A 1967 Raj 203 (206) : 1967 Cri LJ 1057 (DB) •• A 1967 Andh Pra 299 (308) : 1967 Cri LJ 1470 (DB) •• A 1958 Orissa 168 (182) : 1958 Cri LJ 1055 (DB).

(31) The High Court's powers for punishment of contempt have been preserved by the Constitution and they are also inherent in a Court of Record. **A 1964 SC 1625 (1630) : 1964 (2) Cri LJ 590.**

(32) Although the Court's power to punish contempt is unlimited and absolute it has to be exercised with great forbearance and circumspection in view of the fact that the ordinary protection available to a person accused of any criminal act or offence is not open to a person accused of criminal contempt. A 1956 Hyd 33 (34) : 1956 Cri LJ 400 (DB) •• **A 1969 SC 189 (193) : 1969 Cri LJ 401** •• A 1966 Cal 411 (417) : 1966 Cri LJ 883.

[See also A 1968 Ker 301 (307) : 1968 Cri LJ 1424 (DB).]

(33) High Court's power to punish contempts should be used sparingly. A 1969 Delhi 304 (308).

(34) It is only in very grave cases of contempt that the Court would exercise its power under the Act to mete out punishment. A 1952 Orissa 318 (333) : 1952 Cri LJ 1605 •• A 1966 Cal 411 (417) : 1966 Cri LJ 883 •• 1967 All Cr R 488.

(34A) The Court would ordinarily exercise its extraordinary powers to punish contempts only in cases where the act or conduct is intentional and deliberate. A 1956 Hyd 33 (34) : 1956 Cri LJ 400 (DB) •• **A 1969 SC 189 (193) : 1969 Cri LJ 401** •• **1968 Ker LJ 197 (FB).**

(35) A stricter view has to be taken where the contemner tries to interfere with the course of judicial proceeding and not a word of regret or apology is expressed at any stage. A 1966 All 305 (315) : 1966 Cri LJ 632.

(36-37) Contempt is aggravated where the accused persistently justifies his action. A 1945 Nag 33 (49, 50) (DB) •• A 1968 Andh Pra 207 (213) : 1968 Cri LJ 888 (DB) •• (1965) 2 Andh LT 170 (DB).

(38) Maximum sentence of six months was awarded to the habitual contemner who was convicted of contempt of Court on previous occasions for similar acts but sentences awarded found to have no deterrent effect. (1965) 2 Andh LT 170 (DB) •• A 1966 Bom 19 (29) : 1966 Cri LJ 9 (DB) •• (1961) 65 Cal WN 722 (DB).

(39) The summary jurisdiction exercised by the superior Courts in punishing contempt of their authority exists for the purpose of preventing interference with the course of justice and for maintaining the authority of law. This is an extraordinary power which must be sparingly exercised, but where the **public interest** de-

Section 12 — Note 2 (contd.)
mands it, the Court will not shrink from exercising it and imposing punishment even by way of imprisonment in cases where a mere fine may not be adequate. A 1954 SC 743 (747).

(40) A contempt committed by making scandalous allegations against subordinate judges should be dealt with by inflicting deterrent punishment to contemner. A 1958 Pat 276 (278) : 1958 Cri LJ 670 ** 1968 Ker LT 299 (FB) ** A 1968 Andh Pra 207 (213) : 1968 Cri LJ 888 (DB) ** A 1966 Andh Pra 167 (173) : 1966 Cri LJ 642 (DB) ** A 1961 Pat 360 (361) : 1961 (2) Cri LJ 362 (DB).

(41-42) Reckless attacks on the impartiality of presiding officer of Court would not only imperil dignity of Court, but would also endanger proper administration of justice and impair confidence of public in administration of justice. The offence is not such as to be lightly wiped out by a mere expression of regret. 1967 Ker LT 118 (119) (DB).

(43-48) Good faith or innocence of the contemner although it cannot absolve him of his culpability is an extenuating circumstance. A 1952 Orissa 318 (339) : 1952 Cri LJ 1605 ** A 1945 Nag 33 (47) (DB) ** 1966 All LJ 953.

(49) Motive or intention of the accused may be properly taken into account in awarding punishment for contempt. 1942 Oudh WN 6 (20) (DB) ** A 1952 Kutch 74 (77) : 1952 Cri LJ 1482 ** A 1959 Cal 174 (175) : 1959 Cri LJ 316 (FB) ** A 1968 Ker 301 (308) : 1968 Cri LJ 1424 (DB).

[But see A 1954 Pat 289 (296) : 1954 Cri LJ 942 (DB).]

(50) Pleas of justification or privilege are not strictly speaking available to contemner except perhaps as matters tending to aggravate or mitigate offence of contempt. A 1966 All 588 (589) : 1966 Cri LJ 1361 : 1966 All LJ 547.

(51) The motive is not a relevant consideration at all in deciding the question whether contempt of Court has been committed or not. Truth or falsity of allegations and lack of intention or knowledge are equally irrelevant matters. But lack of intention or knowledge has bearing on the question whether offender should be convicted after he is found to have committed contempt of Court. It is not necessary that every finding of guilty should be followed by conviction. Every conviction need not be followed by sentence also. 1969 Ker LT 513 (DB).

(52) Excitable temper of the accused is a justification for mitigation of the maximum sentence for contempt of Court. A 1938 All 358 (362) : 39 Cri LJ 677 (DB) ** A 1961 Pat 1 (11) : 1961 (1) Cri LJ 134 (DB).

(53-54) Ignorance of law or inability of the legal advisers to properly advise their clients is not a mitigating circumstance. A 1969 Delhi 201 (213) : 1969 Cri LJ 884 (FB).

(55) If the circumstances of a case warrant it, the Court can take a lenient view of the contempt proved against the accused and let him off with a fine only. A 1953 Cal 53 (54) : 1953 Cri LJ 214 ** A 1966 Andh Pra 167 (173) : 1966 Cri LJ 642 (DB) ** (1968) 2 Andh WR 208 (DB).

(57-58) Where it is uncertain whether the impugned criticism is fair or not, the contemner is entitled to the benefit of this uncertainty. A 1966 All 588 (589) : 1966 Cri LJ 1361 : 1966 All LJ 547.

(59) Where facts disclose that only a technical contempt is committed and it is inexpedient in public interest to take any action in the matter, Court would not punish contemner. 1969 Ker LT 513 (DB).

(60-62) High Court being unable to decide as to the quantum of prejudice likely to be caused by the speech, let off the contemner with expression of disapproval of his conduct. A 1966 Cal 411 (428) : 1966 Cri LJ 888.

(63) The fact that the accused who interfered with the course of justice were raw and illiterate villagers was taken into consideration in their favour and they were let off with a mere fine. A 1956 Pat 321 (325) : 1956 Cri LJ 1087 ** 1962 Jab LJ 1147 (DB).

(64-65) The fact that the contemner is a college student and editor only in name of the paper in which offending article was published was taken into consideration in his favour and he was let off only with fine. 1966 Cri LJ 214 (217) : 1965 MPLJ 844 (DB).

(66) Alleged contempt of Court consisted of objectionable language in revision petition — Petition drafted and signed by lawyer — Mere fact that it bears signatures of petitioner also, does not constitute actionable contempt by petitioner. A 1969 Delhi 304 (307).

(67) In cases of contempts of a very trifling nature mere warning to the accused that a repetition of the offence would be viewed with severity may be sufficient. A 1953 Orissa 249 (253, 254) : 1953 Cri LJ 1491 ** A 1957 Hyd 17 (17) (DB) ** A 1954 Orissa 57 (64) : 1954 Cri LJ 311 ** A 1950 East Punj 366 (367) ** 1968 Ker LJ 197 (FB) ** A 1969 Pat 140 (147) : 1969 Cri LJ 631.

(68) Additional District Magistrate not carrying out order of High Court directing accused to surrender to bail — A. D. M. inexperienced in Court procedure and relying on bench clerk — Held guilty of contempt of Court but in the circumstances apology tendered by him was accepted by High Court. A 1969 Cal 602 (604) (DB).

(69) In cases of contempt committed by Senior Advocate, the condemnation for contempt by a High Court is itself a heavy punishment against such advocate. A 1955 SC 19 (25) : 1955 Cri LJ 133.

(70) If contempt of Court is committed by a person, then merely because someone else takes entire responsibility, it is no ground in law to absolve the former. A 1969 Delhi 201 (205) : 1969 Cri LJ 884 (FB).

(71) Simple imprisoment for 3 months for contempt of Court in wilful and deliberate disobedience of the direction of the Court to produce the person detained in Court, is not excessive. A 1964 SC 1625 (1629) : (1964) 2 Cri LJ 590.

Section 12 — Note 2 (contd.)

(72) Court's power to punish contempt always carries with it the power to pardon contempt if need be. A 1951 Cal 507 (509).

3. Order for payment of costs by contemner.

Cases under Old Act of 1952

(1-2) The High Court has got inherent power to award costs in a proceeding for contempt A 1969 Pat 70 (71) : 1969 Cri LJ 398 (DB).

(3) Where the applicant was compelled to move the High Court for proceeding in contempt not merely to vindicate his own right to protection given to accused but also to bring the violation to Court's notice, the contemner was directed to pay the actual costs viz., counsel's fees, incurred by the applicant. 1971 Cri LJ 1586 (1591) (All).

(4) Person not interested in case approaching Magistrate in his chambers after Court hours and asking him to accept bail on behalf of accused — On Magistrate's refusal, person threatening by show of his wealth, to teach him a lesson — Amounts to contempt of Court — Contemner, considering his age was administered warning and was ordered to pay costs. A 1969 Delhi 214 (218) (SB).

(5) The Court while discharging the Rule for contempt on the ground that the opposite party had been guilty of only a technical contempt, ordered him to pay costs of the application. A 1951 Punj 49 (52) : 52 Cri LJ 950 (DB).

(6) Though the Court rejects the application for contempt accepting the apology of the accused it can award costs of the application against him. A 1954 Him Pra 31 (31) ** A 1914 Cal 550 (554) : 15 Cri LJ 65.

(7) Person obstructing receiver in discharge of his duty may be made to pay costs of a hearing. A 1914 Cal 550 (554) : 15 Cri LJ 65.

(8) Costs directed to be paid by a person punished under the Contempt of Courts Act can be recovered on the same lines as on which decrees are executed. A 1935 All 1013 (1014) : 36 Cri LJ 1365 (DB).

(9) Frivolous applications for contempt amount to an abuse of process of Court and the Court will award exemplary costs against a person who makes such an application. A 1955 Andhra 156 (159) : ILR (1955) Andhra 57 : 1955 Cri LJ 1028 (DB).

(10) Where the Court passes an order for costs in the contempt proceedings it can enforce it as a part of its inherent jurisdiction. A 1956 All 79 (80).

4. Apology.

(A) General.
(B) Conditional apology.
(C) Effect of acceptance of apology.
(D) Illustrative cases
  (i) Apology accepted as unqualified and sincere.
  (ii) Apology not accepted.

4. Apology — (A). General.

(1) Apology is an act of contrition. Unless apology is offered at the earliest opportunity and in good grace apology is shorn of penitence and, hence, is liable to be rejected. If apology is offered at a time when the contemner finds that the Court is going to impose punishment it ceases to be an apology and it becomes an act of a cringing coward. A 1972 SC 1197 (1198) : 1972 Cri LJ 754 ** 1976 Cri LJ 440 (DB) (Orissa).

(2) Where the Court is convinced about the sincerity of the apology asked by the contemners through their counsel at the time of hearing, the conviction merely on the ground that apology was not tendered at earlier stage and was not in writing is not sustainable. A 1972 SC 180 (182) : 1972 Cri LJ 39. (A 1969 Orissa 117, Reversed.)

(3) In a case of contempt the Supreme Court in appeal will not acquit the contemner, unless he makes out a case for complete exoneration, by accepting an unconditional apology tendered by him for the first time in appeal. (1970) 2 SCWR 220.

(4) No one should be left with the impression that tendering an unconditional apology at the time when contempt proceedings are heard by High Court, would be sufficient, unless there are compelling circumstances to accept the same.

When there is a regular invasion on the rights and dignity of Court, it is the duty of the High Court to uphold the dignity of Courts and to alert those who deal with Courts that the High Court will relentlessly though not vindictively try to uphold the dignity, no matter who commits contempt. It is the duty of the High Court to protect the dignity of the subordinate Court since it looks to the High Court for protection.

In their dealings with Courts, the parties should be honest and should never delude the Court into any action, making dishonest statement. 1975 Ker LT 144.

(5) Even though under the Explanation to Section 12 there can be both justification and an apology, an apology so tendered must be bona fide. The Explanation has changed the law only to that extent. An apology tendered must not convey the impression that when the contemner sees that the Court is going to hold him guilty, he then offers an apology as in the present case. An apology to be accepted, must be offered right at the start of the proceedings. The apology must be one coming from a sincere heart, and not as a matter of mere formality. A belated apology loses all its value. 1975 Cri LJ 1766 (1769) (Madh Pra). (Reversed on facts in A 1976 SC 1967.) ** 1974 Cri LJ 529 (540) (All).

(6) Apology — Can be oral and can be accepted at any stage — May even be "qualified or conditional" but must be "bona fide" — Apology tendered not out of penitence but to ward off the Court — Not accepted. A 1979 Delhi 202 : ILR (1979) 2 Delhi 156.

(7) Where the contemner was a Judicial Officer of standing and was acquainted with the law of contempt insofar as he had personally conducted certain previous contempt cases against him made scandalising allegations against the Judges of the High Court in a petition with which he had come prepared on the day of decision in the contempt proceedings for which instant contempt proceedings have been started with a view to intimidate the Judges in the earlier proceedings, his apology tendered in a memorandum at the last stage in the subsequent proceedings could not be accepted as bona fide. 1974 Cri LJ 70 (75) (SB) (Orissa).

(8) The spirit of S. 6 allows a contemner to bring on record the mitigating circumstances when an enquiry against him is being held by the High Court. In order to punish a contemner for levelling false accusations against the Presiding Officer of a Court, the Court has to

Section 12 — Note 4 (contd.)

consider the circumstances in which he uttered these words, the state of his mind and the mitigating grounds, if any, while making a decision. On consideration of the mitigating circumstances, the apologies tendered were accepted. **ILR (1978) 2 Punj 63 : 1979 Cri LJ (NOC) 165 : A 1979 (NOC) 96 (FB).**

(9) Contemner tendering unconditional apology for having addressed a letter to the Judges under some emotional strain — Apology accepted. A 1972 Pat 16 (16).

(10) Apology — Contemner, young advocate with about 8 years' experience at Bar — Incriminating act committed by contemner under bona fide misapprehension — Contemner expressing regret and tendering unqualified apology — In the interests of justice, having regard to contemner's standing, knowledge and experience and his apology, held, he should not be mulcted in fine — Apology accepted. (1969) 1 Mad LJ 649.

(11) Unqualified apology tendered by advocate on behalf of his client for contemptuous language used by him in a notice under Section 80, Civil P. C. accepted by the Supreme Court in appeal. (1969) 3 SCC 709 (1).

(12) A bona fide complaint to higher authorities against a corrupt judicial officer cannot be placed on the same footing as any other reckless act imputing dishonesty against an honest officer of the judiciary. In the instant case all the contemners, except a few tendered unqualified apologies.

Held on facts and circumstances of the case that it could not be said that the contemners who consist of members of the Bar and the public behaved with contumacy. The members of the bar acted in a cool and responsible manner. In the circumstances of the case their apologies should be accepted. (1973) 39 Cut LT 843.

(B) Conditional apology.

(13) An apology from a contemner must be sincere and offered at the earliest occasion. Under the old law a conditional apology was not regarded as an apology at all. Under the new Act of 1971, the Explanation to S. 12 (1) provides that an apology shall not be rejected merely on the ground that it is qualified or conditional if the accused makes it bona fide. But whether a conditional or bona fide apology is or is not an apology depends on the circumstances of each case. 1976 Tax LR 928 : (1975) 101 ITR 180 (DB) (Punj).

(14) The elementary basis of acceptance of apology is that there is to be a finding of committal of contempt. Where the alleged contemner states that "if the court is of the view that the letters written by him constitute for any reason contempt of court, he tenders apology" it is a conditional apology. In the absence of any finding by the High Court that the contemner committed any contempt of court there could not be any occasion for acceptance of apology. **A 1977 SC 809.** (Cri. O. Nos. 13 and 14 of 1975, D/- 1-12-1975 (Punj) (FB), **Reversed.**) ** **A 1974 SC 642 (645) : 1974 Cri LJ 594** ** ILR (1975) Cut 1228 (DB).

(15) Apology — Exhibitor of film tendering apology in case he was found guilty of contempt — Exhibition of film contrary to Supreme Court judgment found to be in bona fide belief — Such conditional apology accepted. **A 1976 SC 994 : 1976 Cri LJ 722.**

(C) Effect of acceptance of apology.

(16) The acceptance of an apology does not per se make it obligatory on the Court to discharge the contemner. A discretion is left to the Court even after accepting an apology either to refrain from awarding any punishment to the contemner or to award him lenient punishment.

Where the allegations of bribe-taking have been recklessly made by a person against the presiding officer of the Court and attack is made on his motive while discharging his judicial duties, the contemner should not escape scot-free. 1973 Cri LJ 1211 (1218, 1220) (All).

(17) Acceptance by Court of the unqualified apology tendered by the contemner is sufficient to purge his contempt. A 1974 All 39 (43).

(D) Illustrative cases — (i) Apology accepted as unqualified and sincere.

(18) Contempt proceeding pending for a long time — Apology accepted — Contemners, asked to pay costs in view of their wilful and deliberate violation of Court's orders. 1980 Cri LJ (NOC) 142 (Cal).

(19) In this case the contemner District Magistrate who had been directed by the High Court to produce a detenu before the High Court on a certain date in connection with the hearing of a habeas corpus petition had moved in the matter promptly and got the detenu produced before the High Court on the due date. Two days prior thereto the District Magistrate had sent a wireless message to the Advocate-General requesting him to request the Court not to insist on the production of the detenu as there was possibility of disturbance of public order, in the light of the State Government order D/- 1-8-1975. A copy of it was also sent to the Registrar of the High Court. The High Court, taking the view that the sending of a copy of the wireless message to the Registrar of the High Court for information amounted to an attempt to interfere with the order of the High Court, convicted the Dist. Magistrate of Contempt of High Court and sentenced him to imprisonment till the rising of the Court and a fine of Rs. 100; the apology tendered by him was however accepted for the limited purpose of remitting the punishment under the proviso to Section 12 (1). On appeal to the Supreme Court under Section 19 (1) (b).

Held that on the facts and circumstances of the case the appellant at no stage interfered with the order of the High Court but on the other hand acted in obedience to it. In view of the tender of apology with grace and the production of the detenu on the date fixed, the order of the High Court could not be sustained. **A 1976 SC 1967 : 1976 Cri LJ 1539.** (1975 Cri LJ 1766 (MP), **Reversed.**)

(20) High Court staying demolition of encroachment — Order communicated to superior officer who delayed the communication of it to subordinate officers — Subordinate officer carrying out demolition work — Superior officer and subordinate officer both commit contempt of court — Unconditional apology accepted. 1978 BLJ 717 : 1979 Cri LJ (NOC) 85 (Pat).

(21) Punishment and apology for contempt — Though contempt resulted in non-suiting plaintiff by contemner-defendant-employer terminating service on advice of legal counsel, apology being held uncondictional and sincere was acceptable.

Section 12 — Note 4 (contd.)
A 1971 Cal 178 (179, 180) : 1971 Cri LJ 699. (Reversed on another point in A 1974 SC 642.)

(22) Declaratory judgment of High Court — Chairman of Rubber Board disobeying judgment found guilty of civil contempt — Unconditional apology accepted for past period and injunction issued to prevent repetition of contempt in future. 1976 Ker LT 879 (DB).

(23) Accused granting police protection in disobedience of High Court judgment — Accused, held, guilty of contempt — Unconditional apology — Proceedings dropped but accused ordered to pay costs to complainant. 1977 Cri LJ 971 (972) (DB) (Kant).

(24) Disobedience of order under a bona fide mistake — Apology tendered — Apology accepted. 1978 Raj Cri C 194 (195).

(25) Unconditional apology tendered by contemner was accepted and he was given simply a warning not to do such things (disobedience of court's order) in future. 1978 Sim LC 367 (368) (Him Pra).

(D) (ii). Apology not accepted.

(26) Court is not powerless to reject an apology tendered at the earliest moment. The question whether an apology should be accepted or rejected depends upon the gravity of the offence and circumstances under which it has been conveyed. The power to punish contempts is conferred on this Court by reason of Article 215 of the Constitution. This power cannot be taken away or abrogated or whittled down by any Act of Parliament. For its limitation Court must look to Art. 215 of Constitution, only and in Article 215 there is none. 1980 Cri LJ 845 (852, 853) : (1979) 2 APLJ (HC) 363 (DB).

(27) The unconditional apology was tendered only when the court took up the issue, and the contemner found himself in a tight corner with little chances of escape it was held that the apology was a mere pretension without genuine repentance and should be rejected. 1976 Cri LJ 246 (DB) (Orissa) °° 1978 Cri LJ 789 (DB) (All) °° 1976 Tax LR 303 (DB) (Punj) °° (1975) 41 Cut LT 329 °° 1974 Cri LJ 529 (541) (All) °° 1970 Assam LR 259.

(28) Apology — The mere fact of apology cannot wipe off the gravity of contempt. It is only when it follows from a full realisation of nature of offence that it can be genuine. A contemner who without realising the gravity of the wrong committed by him, tenders an apology provided the court is prima facie satisfied, cannot be accepted. 1971 Cri LJ 1586 (1590) (All).

(29) Stay order by High Court — Government servant, despite approach and request, not giving effect to the stay order — Giving lame excuses for not complying with orders — Amounts to wilful disobedience and contempt of Court — Apology not enough to purge contemner of his guilt. 1978 BBCJ 146 (159) (DB) (Pat).

(30) Contempt proceedings — Pendency of — Private settlement between parties and acceptance of apology privately cannot be permitted. 1977 Cri LJ 1490 (1491) (DB) (Bom).

(31) Publication of scandalizing material or announcement on loud-speaker — Prestige and dignity of the Court affected — Apologies not to be accepted. 1979 Cri LJ 412 (DB) (All).

(32) Where a search warrant was issued by Sub-Divisional Magistrate for rescuing officers of colliery wrongfully confined by workmen and the police officer instead of rescuing confined officers in execution of search warrant, waited for Union leader to come and persuade demonstrators to lift gherao, it was held that the police officer neglected and failed to execute search warrant and thereby interfered with due course of justice and had thus committed contempt of Court of S. D. M. It was further held that as the contemner had full knowledge about the consequences of his inaction, apology tendered by him could not be accepted. (1970) 74 Cal WN 321.

(33) Punishment for contempt of court — Apology — Contemners expressed unconditional apology to High Court — **Held,** the conduct of contemners was so reprehensible as to warrant condemnation by imposition of sentence — Supreme Court sentenced each of the contemners to pay a fine of Rs. 500/-. **A 1980 SC 946 (951) : 1980 Cri LJ 684 : 1980 Cri App R (SC) 135.**

(34) Breach of undertaking given to the Court — Party (Contemner) tendering unqualified apology — Apology not found bona fide but tendered to ward off the Court and not out of penitence — Apology not accepted. (1980) I Rent LR 584 (589) (Delhi).

Cases under old Act of 1952

(35) An apology by itself is not sufficient to purge the guilt of the contemner. **A 1955 SC 19 (23) : 1955 Cri LJ 133 °° A 1934 All 317 (318) : 35 Cri LJ 433 (DB) °° A 1969 Cal 1 (3, 4) : 1969 Cri LJ 40 (SB) °° A 1967 Raj 203 (207) : 1967 Cri LJ 1057 (DB) °° A 1964 Cal 572 (586) : 1964 (2) Cri LJ 660 (DB) °° 1959 Cri LJ 316 (FB) °°** 1962 Jab LJ 1147 (DB).

(36) An apology does not entitle the accused to a discharge as a matter of right. A 1948 Oudh 114 (116) : 49 Cri LJ 108 (DB) °° A 1967 Ker 177 (180) : 1967 Cri LJ 1147 (DB) **°° A 1959 Cal 174 (176) : 1959 Cri LJ 316 (FB) °°** A 1959 Madh Pra 50 (52) : 1959 Cri LJ 199 (DB).

(37) A Court can even when it accepts an apology, commit the offender to prison or otherwise punish him. A 1953 All 153 (158) : 1953 Cri LJ 402 °° **A 1940 Sind 239 (246) : 42 Cri LJ 1 (FB) °°** A 1961 Pat 1 (11) : 1961 (1) Cri LJ 134 (DB).

(38) In considering the steps to be taken and the punishment to be awarded to the person accused of having committed contempt of Court it is open to the Court to take into account the apology tendered by him. A 1957 Madh Pra 152 (152) : 1957 Cri LJ 1137.

(39) Punishment can be remitted by accepting the unconditional apology of the accused. **A 1934 All 317 (318) : 35 Cri LJ 433 (DB) °° A 1950 Sind 1 (2, 3) : 51 Cri LJ 810 (FB).**

(40) Unqualified apology accompanied by genuine regret in a clear case of contempt entitled a pardone to the offender. 1966 All LJ 953.

(41) The question whether an apology should be accepted in any case depends upon the facts of that case and the Court is not bound as a matter of rule to accept an apology in every case even if it is an unqualified one. A 1953 All 153 (157) : 1953 Cri LJ 402 °° A 1953 Pat 364 (365) : 1953 Cri LJ 1779 (DB) °° A 1952 All 86 (87) °° A 1961 Pat 1 (10) : 1961

Section 12 — Note 4 (contd.)
(1) Cri LJ 134 (DB) ** A 1969 Cal 1 (3) : 1969 Cri LJ 40 (SB) ** A 1967 Ker 177 (180) : 1967 Cri LJ 1147 (DB) ** A 1967 Raj 203 (207) : 1967 Cri LJ 1057 (DB) ** A 1964 Cal 572 (586) : 1964 (2) Cri LJ 660 (DB) ** 1967 Cur LJ 888 (Punj).

(42) Mere apology is not enough to purge the guilt of contempt. The Court has to consider the background in the light of the facts both antecedent to the offer of apology as also the contemner's subsequent conduct right upto the contempt proceedings. A 1959 Orissa 89 (94) : 1959 Cri LJ 626 (DB).

(43) Unqualified apology tendered at the outset by admitting mistake in a straightforward manner, for act done unwittingly, should be accepted. A 1967 All 93 (100) : 1967 Cri LJ 291.

(44) An apology in order to dilute the offence must be voluntary. A 1957 All 457 (459) : 1957 Cri LJ 801 ** A 1961 Pat 1 (11) : 1961 (1) Cri LJ 134 (DB) ** A 1960 Orissa 132 (137) : 1960 Cri LJ 1120.

(45) The apology must be an unconditional apology born out of repentance or remorse. The contemner cannot enter into any kind of stipulation with the Court in that respect. A 1966 Bom 19 (29) : 1966 Cri LJ 9 (DB) ** A 1969 Delhi 201 (211) : 1969 Cri LJ 884 (FB).

(46) Unconditional apology amounts in law to a confession of the guilt. Consequently, once unqualified apology is tendered by the contemner, the Court cannot drop the proceedings against him, but must convict him though the Court might accept unqualified apology and discharge him without punishment, when the offence is only technical. (1958) 24 Cut LT 479.

(47) An apology should not necessarily be taken as a confession of guilt and the accused may be pronounced not guilty of contempt although he has made an apology. A 1953 SC 436 (437) : 1953 Cri LJ 1837.

(48) An expression of regret if genuine should ordinarily be accepted in mitigation of the offence. A 1958 Punj 377 (384) : 1958 Cri LJ 1225 ** A 1940 Sind 239 (246) : 42 Cri LJ 1 (FB) ** A 1954 Hyd 180 (181) : 1954 Cri LJ 1300 ** (1954) 56 Pun LR 302 (304) ** A 1968 Ker 301 (308) : 1968 Cri LJ 1424 (DB) ** A 1967 Guj 124 (126) ** 1966 All LJ 953 ** 1963 (2) Cri LJ 219 (224) (DB) (Madh Pra).

(49) The apology must be unequivocal and not hedging and hypothetical. A 1964 Cal 572 (586) : 1964 (2) Cri LJ 660 (DB).

(50) Although a contempt of Court by a subordinate judicial officer must be treated as an intentional one and a more serious matter because he is one who in the nature of things is educated and should have known his duty his apology when he tenders one carries with if, for the same reason, the stamp of being a genuine apology. A 1952 All 56 (59) : 1952 Cri LJ 223 (DB).

[See also A 1959 Pat 373 (373, 374) : 1959 Cri LJ 1013 (DB).]

(51) An apology is intended to be evidence of real contriteness the manly consciousness of a wrong done, of an injury inflicted, and the earnest desire to make such reparation as lies in the wrongdoer's power. Only then it is of any avail in a Court of justice. A 1961 Pat 1 (10) : 1961 (1) Cri LJ 134 (DB) ** A 1955 SC 19 (23) : 1955 Cri LJ 133 ** A 1950 Sind 1 (2, 3) : 51 Cri LJ 810 (FB) ** A 1969 SC (189, 193) : 1969 Cri LJ 401 ** A 1969 Delhi 201 (211) : 1969 Cri LJ 884 (FB) ** A 1969 Cal 1 (3) : 1969 Cri LJ 40 ** A 1967 Ker 177 (181) : 1967 Cri LJ 1147 (DB) ** A 1963 Madh Pra 61 (71) : 1963 (1) Cri LJ 187 (DB) ** A 1961 Pat 1 (11) : 1961 (1) Cri LJ 134 (DB) ** A 1960 Orissa 132 (137) : 1960 Cri LJ 1120 ** A 1959 Orissa 89 (94) : 1959 Cri LJ 626 (DB) ** A 1959 Punj 627 (629) : 1959 Cri LJ 1466.

(52) The contemner first tendered an unconditional apology but subsequently resiled from it and wanted to lead evidence in support of his allegations. Held, as his behaviour and conduct did not show the least trace of contrition, substantive term of imprisonment should be given. A 1965 Ker 49 (51) : 1965 (1) Cri LJ 176 (DB).

(53) The apology of a person who has once been previously warned for a contempt on another occasion cannot be accepted for a complete discharge. A 1954 Kutch 2 (6) : 1954 Cri LJ 390 ** A 1957 Madh Pra 152 (153) : 1957 Cri LJ 1137.

(54) Apology to be effective must be tendered at the earliest stage. A 1957 All 457 (459) : 1957 Cri LJ 801 ** A 1956 Pat 321 (324) : 1956 Cri LJ 1087 (DB) ** A 1969 SC 189 (193) : 1969 Cri LJ 401 ** A 1969 Delhi 201 (211) : 1969 Cri LJ 884 (FB) ** 1969 Cri LJ 1571 (1573, 1574) (DB) (Delhi) ** A 1969 Cal 1 (3) : 1969 Cri LJ 40 (SB) ** A 1967 Ker 177 (181) : 1967 Cri LJ 1147 (DB) ** A 1967 Raj 203 (208) : 1967 Cri LJ 1057 (DB) ** A 1964 Cal 572 (586) : 1964 (2) Cri LJ 660 (DB) ** A 1960 Orissa 132 (137) : 1960 Cri LJ 1120 ** 1963 (2) Cri LJ 219 (224) (DB) (Madh Pra).

(55) If an apology is tendered at the appellate stage of the proceedings it should be tendered unreservedly and unconditionally before the argument begins. A 1956 Pat 321 (324) : 1956 Cri LJ 1087 (DB) ** A 1940 Nag 407 (408, 409) : 42 Cri LJ 237 ** A 1964 Cal 572 (586) : 1964 (2) Cri LJ 600 (DB).

(56) While Courts will assume an unconditional apology tendered at an early stage to be sincere they would refuse to do so in the case of belated apologies even if they are unqualified. A 1954 Kutch 2 (6) : 1954 Cri LJ 390 ** A 1969 SC 189 (193) : 1969 Cri LJ 401 ** A 1967 Raj 203 (208) : 1967 Cri LJ 1057 (DB) ** 1969 Cri LJ 1571 (1573, 1574) (Delhi) (DB). (Belated apology may not be accepted, for the delay may negative contrition which is the essence of purging of a contempt.)

(57) A belated apology tendered after the arguments have closed when all else have failed and there seems to be no hope will be considered to be only a device to escape punishment and will not be accepted by the Court even if it is an unqualified apology. A 1953 All 153 (158) : 1953 Cri LJ 402 ** A 1941 Oudh 67 (69, 70) : 42 Cri LJ 221 (DB) ** A 1970 Bom 48 (57) (DB) ** A 1969 Cal 1 (3) : 1969 Cri LJ 40 (SB) ** A 1967 All 93 (100) : 1967 Cri LJ 291 ** A 1965 Pat 360 (363, 364) : 1965 (2) Cri LJ 390 (DB) ** A 1963 Madh Pra 61 (71) : 1963 (1) Cri LJ 187 (DB) ** A 1959 Madh Pra 50 (52) : 1959 Cri LJ 199 (DB) ** A 1959 Orissa 89 (96) : 1959 Cri LJ 626 (DB).

(58) The written apology tendered by contemner towards end of arguments was "I had no intention to commit any contempt of Court

Section 12 — Note 4 (contd.)

and as advised by my counsel, I committed no such contempt. Still if the Hon'ble Court consider, that what I uttered constitutes contempt of Court, I tender my unqualified apology" — Held that this was no apology in eye of law. **A 1969 Delhi 214 (219) (SB) •• A 1969 Delhi 209 (211) (FB).**

(59) An apology must be unconditional in order to reduce the gravity of an offence of contempt. A 1957 All 457 (459) : 1957 Cri LJ 801 •• (1950) 54 Cal WN (2 DR) 107 (109, 110) (DB) •• A 1968 Bom 273 (277) : 1968 Cri LJ 903 (DB) •• A 1961 Pat 1 (11) : 1961 (1) Cri LJ 134 (DB) •• A 1961 Punj 113 (120) : 1961 (1) Cri LJ 426 •• 1963 (2) Cri LJ 219 (224) (DB) (Madh Pra).

(60) A statement by the accused after fully justifying his action, expressing his unqualified regret in the event the Court held that he had committed contempt does not amount to an unqualified apology from him. A 1956 Pat 321 (324) : 1956 Cri LJ 1087 (DB) •• A 1954 Pat 289 (297) : 1954 Cri LJ 942 (DB) •• A 1945 Nag 33 (49, 50) (DB) •• A 1965 Pat 227 (237, 238) : 1965 (1) Cri LJ 748 (DB) •• A 1961 Pat 1 (11) : 1961 (1) Cri LJ 134 (DB) •• 1967 Cur LJ 888 (Punj) •• 1963 (2) Cri LJ 219 (224) (DB) (Madh Pra).

(61) There cannot be both a justification and an apology because the two things are incompatible. **A 1955 SC 19 (24) : 1955 Cri LJ 133** •• A 1955 Raj 123 (125) : 1955 Cri LJ 1108 (DB) •• **A 1962 SC 1089 (1095) : 1962 (2) Cri LJ 236** •• **A 1969 Delhi 201 (211) : 1969 Cri LJ 884 (FB)** •• A 1969 Orissa 117 (134) : 1969 Cri LJ 763 •• A 1967 Cal 153 (159) : 1967 Cri LJ 350 (DB) •• A 1965 Mad 415 (415) : 1965 (2) Cri LJ 371 (DB) •• A 1963 Madh Pra 61 (71) : 1963 (1) Cri LJ 187 (DB) •• A 1961 Pat 1 (10) : 1961 (1) Cri LJ 134 (DB) •• A 1959 Orissa 89 (94) : 1959 Cri LJ 626 (DB) •• 1968 Cri LJ 248 (256) (Cal) •• 1966 BLJR 502.

(62) Every form of defence in a contempt case cannot be regarded as an act of contumacy. It depends on the circumstances of each case. 1963 (2) Cri LJ 219 (224) (DB).

(63) Justification of his act by contemner and at the same time tendering an apology are incompatible and incongruous and such an apology cannot but be taken as an afterthought put forward in the hope of avoiding the consequence. Such an apology cannot be entertained. A 1969 Pat 323 (327).

(64) An apology tendered at the end of the argument in justification of the contempt is nothing more than an afterthought put forward to avoid the consequences of the offence if the Court were to hold the accused guilty. A 1953 All 153 (158) : 1953 Cri LJ 402 •• **A 1954 Kutch 2 (6) : 1954 Cri LJ 390** •• **A 1969 Cal 1 (3) : 1969 Cri LJ 40 (SB).**

(65) The proper method for tendering an apology by the person complained against in an action for contempt of Court is to offer it in the first instance and thereafter make his submissions in defence of his conduct. A 1955 Raj 123 (125) : 1955 Cri LJ 1108 (DB) •• A 1967 Cal 153 (159) : 1967 Cri LJ 350 (DB).

(66) In border line cases where a question of principle about rights of counsel and their duties has to be settled Courts will consider even an alternative plea of apology because in such cases, as it is possible for the Judge to conclude that no contempt has been committed, the defence of unqualified apology, which tantamounts to the admission of guilt, would be meaningless. **A 1955 SC 19 (24) : 1955 Cri LJ 133** •• **A 1969 Orissa 117** (132) : 1969 Cri LJ 763 (DB).

(67) Unqualified apology coupled with justification for objectionable remarks against Judge — Justification vague — Contemner uneducated and frustrated in litigation — Held no serious action against contemner was called for except being admonished. A 1965 Mad 415 (416) : 1965 (2) Cri LJ 371 (DB).

(68) Where the contempt alleged against the accused is his disobedience to an order of injunction under Order 39, Rule 1 of Civil P. C. and the accused admitting his disobedience tenders an unqualified apology it cannot be said that the apology is a conditional one merely because he has not also given up his defence in the suit but on the other hand mentioned that defence in the apology. A 1954 Him Pra 31 (31).

(69) A contempt of a very grave character should be punished in spite of the unconditional apology of the contemner. A 1948 Oudh 114 (116) : 23 Luck 37 : 49 Cri LJ 108 (DB) •• A 1951 Pat 451 (2) (452) (DB) •• A 1940 Rang 70 (72) : 41 Cri LJ 445 (DB) •• A 1965 Mad 336 (337) : 1965 (2) Cri LJ 223 (DB) •• A 1961 Pat 360 (361) : 1961 (2) Cri LJ 362 (DB) •• 1961 (2) Cri LJ 109 (111) (DB) (Ker).

(70) The Court should not permit a person who is found to have deliberately sworn a false affidavit in proceedings before the Court, to get away with an apology except in very exceptional circumstances. 1967 Cur LJ 888 (Punj).

(70-A) The proviso to the section gives the High Court a power of reviewing its judgment awarding punishment to an accused under the Act where the accused offers an apology to the satisfaction of the Court. But that power however is discretionary. A 1953 Him Pra 3 (4) : 1953 Cri LJ 92.

(71) An unqualified apology although it is not sufficient to let go the accused unpunished where his contempt is grave and his conduct persistently contumacious can justify some leniency being shown to the accused in the matter of punishment. A 1958 Punj 180 (183) : 1958 Cri LJ 685 •• A 1958 Punj 273 (283) : 1958 Cri LJ 952 •• A 1954 Orissa 167 (172) : 1954 Cri LJ 988 •• A 1968 Andh Pra 370 (375) : (1967) 2 Andh WR 470 (DB) •• A 1967 Raj 203 (208) : 1967 Cri LJ 1057 (DB).

(72) An apology which is neither sincere nor satisfactory and which besides is a belated one will not be accepted by the Courts especially in cases of gross contempt as sufficient to treat the accused leniently and let him off without any punishment at all. A 1958 Andh Pra 170 (172) : 1958 Cri LJ 349 •• A 1945 Nag 33 (49, 50) (DB) •• **A 1959 Pat 183** (185) : 1959 Cri LJ 509 (DB).

(73) An unconditional apology may be accepted by the Court especially in a case where the

13. Contempts not punishable in certain cases.— Notwithstanding anything contained in any law for the time being in force, no court shall impose a sentence under this Act for a contempt of court unless it is satisfied that the contempt is of such a nature that it substantially interferes, or tends substantially to interfere with the due course of justice.

14. Procedure where contempt is in the face of the Supreme Court or a High Court.— (1) When it is alleged, or appears to the Supreme Court or the High Court upon its own view, that a person has been guilty of contempt committed in its presence or hearing the Court may cause such person to be

Section 12 — Note 4 (contd.)

contempt is so trifling that no serious notice need be taken of it. A 1952 Ajmer 33 (1) (33) : 1952 Cri LJ 1234 ** A 1940 Oudh 137 (137, 138) : 41 Cri LJ 169 (DB) ** A 1967 Andh Pra 299 (309) : 1967 Cri LJ 1470 ** A 1967 Raj 203 (207) : 1967 Cri LJ 1057 (DB).

(74) An apology may readily be accepted and no punishment inflicted where an offending article was published in the papers due to an accidental slip and not deliberately. A 1950 Cal 129 (133) : 51 Cri LJ 610 ** 1966 BLJR 502.

[See also (1951) 4 Sau LR 108 (108, 109) (DB).]

(75) In the case of an unintentional contempt the Court can act upon the apology of the contemner expressing sincere regret and let him off with a warning. (1950) 55 Mys HCR 148 (150, 151) (DB) ** A 1933 Oudh 118 (119) : 34 Cri LJ 726 (DB) ** 1966 BLJR 281.

(76) Where a counsel was held guilty of contempt for committing an act intimidating the witnesses, an unconditional apology from the counsel was accepted and no further action was taken against him. A 1957 Punj 105 (105) : 1957 Cri LJ 657.

(77) In view of the fact that the contemner (who was a solicitor) committing contempt by scandalizing the Court had offered a very frank and unqualified apology and had admitted that the letter written by him was improper and ought not to have been written, only a fine of Rs. 1000 was imposed. A 1942 Bom 331 (332) : 44 Cri LJ 93.

(78) A mere admission of error and an expression of regret do not amount to an apology of the nature required under the section. 1942 Oudh WN 6 (20) (DB).

(79) Expression of intention not to repeat offence cannot affect question whether offence committed is serious one. A 1941 Pat 185 (194) : 42 Cri LJ 225 (DB).

Section 13

(1) Unless substantial punishment is imposed the growing tendency to scandalise the judiciary from the lowest status right upto the Supreme Court cannot be arrested. (1975) 41 Cut LT 329 (DB).

(2) Under Section 13 a sentence is to be imposed where the contempt substantially interferes or tends to interfere with the due course of justice But if a technical contempt is committed the Court may not impose any punishment. The expression 'due course of justice' used in Section 13 is of much wider import than the expression 'due course of judicial proceeding' used in Section 2 (c) (ii). It would necessarily cover all the three classes of cases in Section 2 (c); otherwise an absurd result would be reached that no punishment can be imposed in respect of contempts under Section 2 (c) (i) and (ii). The expression 'course of justice' means the path in which justice moves. A 1973 Orissa 244 (283, 284) (FB). ** A 1979 Delhi 202. (Risk of interference must be real.) ** 1976 Cri LJ 746 (DB) (AP) ** 1975 All LJ 41 : 1975 Cri LJ 659 (660, 661) (DB).

(3) By reason of Section 13 of the Act the courts will not initiate contempt proceedings unless the contemner substantially interferes or tends to interfere with the due course of justice. Even prior to 1971 Act the law was no different : the courts would not initiate proceedings for contempt without the due care and caution they deserve and could not act in cases where there was mere technical contempt. Penal provisions under the Act do not violate Art. 19 (1) of the Constitution. ILR (1975) 2 Delhi 868 (894).

(4) Power of Court to punish contempt — Has to be exercised sparingly — Every infraction of Court's order does not amount to contempt. 1974 Cri LJ 828 (831, 833, 834) (Cal).

(5) Where a senior lawyer practising in rural area instead of taking recourse to procedure under Section 6, published a pamphlet alleging that the Judge had a pre-disposition to convict and accordingly took deliberate turn in the discussion of evidence, the criticism must be deemed to substantially interfere with the due course of justice, especially in the background that matter concerned with a Mofussil place where there are one or two Courts and a few lawyers and the litigating public is mostly illiterate and poorly educated. The pamphlet published by the contemner was highly mischievous and therefore no benefit under Section 13 could be granted to the contemner. A 1978 SC 921 (929) : 1978 Cri LJ 917.

(6) An advocate arguing a case of the gravity where the offence charged was serious, the trial was prolonged and the record was heavy, would undoubtedly be under a great strain. If in the course of the hearing he said something which in retrospect may appear to overstep the limits of fair advocacy, the Court would not be justified in taking proceedings in contempt against the advocate concerned. (1969) 2 SC WR 613 : 1969 UJ (SC) 686.

Section 14

(1) The High Court has jurisdiction to initiate contempt proceedings suo motu even in a civil contempt as defined in Section 2. No particular form of procedure is necessary so long as the proceedings are initiated giving an opportunity to the con-

detained in custody, and, at any time before the rising of the Court, on the same day, or as early as possible thereafter, shall—

(a) cause him to be informed in writing of the contempt with which he is charged;

(b) afford him an opportunity to make his defence to the charge;

(c) after taking such evidence as may be necessary or as may be offered by such person and after hearing him, proceed, either forthwith or after adjournment, to determine the matter of the charge; and

(d) make such order for the punishment or discharge of such person as may be just.

(2) Notwithstanding anything contained in sub-section (1), where a person charged with contempt under that sub-section applies, whether orally or in writing, to have the charge against him tried by some Judge other than the Judge or Judges in whose presence or hearing the offence is alleged to have been committed, and the Court is of opinion that it is practicable to do so and that in the interests of proper administration of justice the application should be allowed, it shall cause the matter to be placed, together with a statement of the facts of the case, before the Chief Justice for such directions as he may think fit to issue as respects the trial thereof.

(3) Notwithstanding anything contained in any other law, in any trial of a person charged with contempt under sub-section (1) which is held, in pursuance of a direction given under sub-section (2), by a Judge other than the Judge or Judges in whose presence or hearing the offence is alleged to have been committed, it shall not be necessary for the Judge or Judges in whose presence or hearing the offence is alleged to have been committed to appear as a witness and the statement placed before the Chief Justice under sub-section (2) shall be treated as evidence in the case.

(4) Pending the determination of the charge, the Court may direct that a person charged with contempt under this section shall be detained in such custody as it may specify:

Provided that he shall be released on bail, if a bond for such sum of money as the Court thinks sufficient is executed with or without sureties conditioned that the person charged shall attend at the time and place mentioned in the bond and shall continue to attend until otherwise directed by the Court:

Provided further that the Court may, if it thinks fit, instead of taking bail from such person, discharge him on his executing a bond without sureties for his attendance as aforesaid.

Section 14 (contd.)

temner to defend himself. Article 21 of the Constitution is not in any way violated thereby. A 1974 Mad 313 (316).

(2) Case from U K. — Contempt in face of court — Charge against contemner must be clear enough to afford him opportunity to explain — A counsel accusing the Judge of unjudicial conduct — Conviction on grounds of "a vicious attack on integrity of Court" — Counsel was not afforded opportunity to explain that unjudicial conduct complained of had nothing to do with Judge's integrity — Conviction for contempt held vitiated. **1978 Cri LJ 319 (PC) of (UK).**

(3) Case from U. K. — Contempt in face of Court — Representation and consultation with counsel — Cannot be claimed as of right — **Held** in instant case that request to consult senior lawyer should have been allowed. **1978 Cri LJ 319 (PC).**

Cases under old Act of 1952

(4) The power of the High Court to commit for any contempt of itself is an inherent power and it arises from the fact that it is a Court of Record A 1930 Cal 759 (760): 32 Cri LJ 352 (DB) ** **A 1942 Lah 105 (107): 43 Cri LJ 599 (FB)** ** A 1957 Hyd 17 (17) (DB) ** A 1952 Ajmer 33 (33): 1952 Cri LJ 1234 ** A 1951 Vindh Pra 14 (16) ** A 1959 Cal 106 (108, 109, 110): 1959 Cri LJ 172 (DB) ** A 1959 Bom 182 (186, 187): 1959 Cri LJ 567 (DB)

(5) The Contempt of Courts Act, whether the one of 1926 or the one of 1952 which repealed it, should not be interpreted as conferring any new jurisdiction on the High Courts, but must be taken as having assumed the existence of such jurisdiction even from before At least in so far as the power of the High Court in relation to contempt of itself has been vested in the High Courts by the Constitution itself the new Act cannot be interpreted to have taken away that jurisdiction and conferred it again on the High Courts by virtue of its own authority. **A 1954 SC 186 (190): 1954 Cri LJ 460.**

15. Cognizance of criminal contempt in other cases.— (1) In the case of a criminal contempt, other than a contempt referred to in Section 14, the Supreme Court or the High Court may take action on its own motion or on a motion made by—

(a) the Advocate-General, or

(b) any other person, with the consent in writing of the Advocate-General, [a][or]

[a][(c) in relation to the High Court for the Union territory of Delhi, such law officer as the Central Government may, by notification in the official Gazette, specify in this behalf, or any other person, with the consent in writing of such law officer.]

(2) In the case of any criminal contempt of a subordinate court the High Court may take action on a reference made to it by the subordinate court or on a motion made by the Advocate-General or, in relation to a Union Terri-

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Section 14 (contd.)

(6) The inherent power which the High Court possesses to commit for contempt of itself is ancillary to the exercise of its various jurisdictions and it may be expedient to exercise it in or in relation to any one of those jurisdictions. A 1930 Cal 759 (760): 32 Cri LJ 352 (DB).

SECTION 15 — SYNOPSIS

1. Validity of the section.
2. Consent of Advocate General.
3. Manner of initiating proceedings.
4. Commencement of proceeding on report of subordinate court.
5. Commencement of proceedings suo motu.
6. Party entitled to make application.

1. Validity of the Section.

(1) Section 15 confers power on a High Court to punish for contempt of a subordinate Court and that would amount to conferring more power rather than taking away the power conferred by Article 215. It is not ultra vires Arts. 129 and 215 of the Constitution. 1975 Cri LJ 164 (167) (DB) (All)

(2) S. 15 is not hit by Art. 14 of the Constitution on the ground of being discriminative. The Advocate-General holds a high status and is supposed to act impartially in coming to a conclusion whether or not he should move the Court under Section 15 or give his consent in writing to any other person to move it. An ordinary citizen cannot belong to that group. A restraint or check has been placed upon a citizen in a matter of criminal contempt for the sake of public good so that only tenable motions come before the Supreme Court or a High Court. There is no discrimination inter se between one citizen and another. Both suffer under the same disability. 1975 Cri LJ 164 (169) (DB) (All).

(3) The imposition of the condition about the consent of the Advocate General cannot by itself invalidate the section, nor can it be said that the power conferred therein is arbitrary. The Advocate General is expected to exercise his discretion reasonably and in accordance with the policy indicated by the Act, while considering the request for consent to move High Court to initiate action for contempt. The bare possibility that the discretionary power may be abused is no ground for invalidating the section. A 1975 Kant 224 (228).

2. Consent of Advocate General.

(1) Petition asking for initiation of proceedings for criminal contempt without the consent of the Advocate General is not maintainable not being in accordance with Section 15 (1). **A 1974 Orissa 1 (6) (FB)** ** 1975 Cri LJ 164 (165) (DB) (All) ** 1974 Pun LJ (Cri) 11 ** 1974 Pun LJ (Cri) 143.

(2) Section 15 (1) which requires that the motion should be made by the Advocate General or a person with the consent in writing of the Advocate General, is for the mere purpose of ensuring that the High Court is not flooded with frivolous motions but receives only motions of substance. The Advocate General has been entrusted with that function by virtue of his legal training and experience and the responsibility presumed in the holder of that office. The State is thereby not made a party to the proceeding. At the same time there is nothing to prevent the court from seeking the assistance of the Advocate General or any other law officer of the State in the conduct and decision of a contempt proceeding. 1975 Cri LJ 1359 (1362) (Him Pra)

(3) Under Section 15 (1), it is competent to the High Court to take action for contempt of Court not only on a motion being made by the Advocate-General but also on a motion made by any other person with the consent in writing of the Advocate-General. (1975 Cri LJ 184 impliedly no good law). **A 1977 SC 639 : 1977 Cri LJ 382.**

(4) If a private person thinks that certain occurrence, amounts to contempt of the High Court and the High Court concerned or the Supreme Court ought to take cognizance of it, this Act provides that he shall first approach the Advocate-General satisfy him that it is a fit case for making motion before the High Court and obtain his consent in writing. This is the only mode provided for a private citizen apart from the Advocate-General, who is a law officer, for moving the High Court for inducing it to take cognizance of a criminal contempt of itself. The party has to obtain consent of the Advocate-General and cannot approach the court directly. (1976) 2 UCR (Bom) 358 (DB).

tory, by such Law Officer as the Central Government may, by notification in the Official Gazette, specify in this behalf.

(3) Every motion or reference made under this section shall specify the contempt of which the person charged is alleged to be guilty.

Explanation.— In this section, the expression "Advocate-General" means—

(a) in relation to the Supreme Court, the Attorney-General or the Solicitor-General;

(b) in relation to the High Court, the Advocate-General of the State or any of the States for which the High Court has been established;

(c) in relation to the court of a Judicial Commissioner, such Law Officer as the Central Government may; by notification in the Official Gazette, specify in this behalf.

[a] Inserted by Act 45 of 1976, S. 2 (30-3-76).

Section 15 — Note 2 (contd.)

(4A) Criminal contempt — Cognizance by High Court — Procedure — Criminal contempt is a matter cognisable by a Division Bench — Application for such proceedings can be moved either by the Advocate-General or by a party with consent of the A. G. in writing. 1980 All LJ 892 (893).

(5) Grant or refusal of consent by Advocate-General under Section 15 (1) (b) is in his absolute discretion and is not justiciable. A 1978 Kant 57 (60): 1978 Cri LJ 726 (DB).

(6) Advocate-General's act of giving consent is only administrative. Hence the contemner is not entitled to notice before a consent is given. (1974) 1 An LT 170.

(7) Petition to punish Editor for contempt of High Court — Consent in writing of Advocate-General obtained by petitioner — Petition cannot be rejected because it fails to mention the said fact. (1974) 1 An LT 170.

(8) A private person cannot initiate a motion without the written consent of Advocate General — Private person not praying to the High Court to initiate proceedings — Issuance of notice by court — No indication that court was initiating contempt proceedings — No initiation by court suo motu — Contempt petition dismissed. 1977 Puni LJ (Cri) 72 (DB)

3. Manner of initiating proceedings.

(1) In view of Rule 324 and Secs. 15, 17 and 18 of the Contempt of Courts Act the proper procedure to be followed in the case of criminal contempt is that the matter should be placed before the Chief Justice and if he considers it expedient that proceedings for criminal contempt should be initiated, then he should direct that the matter be placed before an appropriate Bench, which after applying its judicial mind to the facts, may take cognisance of the case. Such proceedings can only be initiated when the Division Bench consisting of two Judges, constituted to hear and determine such a case, issues notice to the contemnor under Section 17 (1) of the Act, after applying its mind to the alleged contemptuous act. It is not necessary that the motion under Section 15 can be made only by a Full Court. When a show cause notice against the contemnor was issued under the order of the Chief Justice, but the matter was not placed before a Division Bench for consideration nor a bench applied its mind and decided to initiate proceedings and no cognizance was ever taken, no further action could be justified. The notice issued to the contemnor was improper and invalid. 1978 Cri LJ 1440 (Raj).

(2) Contempt proceedings being of summary nature formal charge need not be framed. All that is necessary is that for the sake of justice and fair play the contemner must know all the facts alleged against him. 1971 WLN 495 (Raj).

(3) Contempt proceedings under — Notice to opposite party must specify the contempt of which the person charged is alleged to be guilty — Notice not specifying the facts constituting the contempt — Opposite party had no opportunity to explain — The contempt proceedings are vitiated. (1977) Pun LJ (Cri) 20 (DB).

(4) Rule that party in contempt will not be heard — Scope and applicability of — Rule cannot be invoked in criminal contempt. **A 1975 HP 57 (59, 60) (FB).**

(5) Section 15 (2) deals with contempt of a subordinate Court. High Court can act only on a reference by a court subordinate to it or on a motion by the Advocate-General — No private citizen has a right to make an application calling upon the High Court to take cognizance of contempt of Court subordinate to it. (1976) 78 Bom LR 616 (621) (DB).

Cases under old Act of 1952.

(6) As the proceedings taken by the Court in matters of contempt is a judicial proceeding and if the offence is not committed in the presence of the Court, it is started by means of an application supported by an affidavit. A 1929 Cal 115 (116) (DB) ** A 1958 Punj 141 (143) : 1958 Cri LJ 673.

(6A) Application under Section 3 filed without complying with rules framed by the High Court under the Contempt of Courts Act, is void and without jurisdiction. A 1966 Mad 136 (139) : 1966 Cri LJ 421 (DB).

(7) An applicant for proceedings in contempt must in his affidavit disclose the source of his information regarding the facts which he alleges to constitute the contempt or swear to them from his own knowledge. A 1952 Nag 259 (260) ** A 1951 Nag 26 (31): 52 Cri LJ 452 (DB).

(8) The affidavit filed in support of an application to start proceedings must state the act alleged to constitute contempt in such a way as to show a prima facie case.

Section 15 — Note 3 (contd.)
A 1958 Punj 141 (143): 1958 Cri LJ 673 ** **A 1960 Pat 430 (446): 1960 Cri LJ 1254 (FB).**

(9) When the Court moves suo motu. the question of notice of motion or statement on affidavit is wholly redundant. **A 1960 Pat 430 (446): 1960 Cri LJ 1254 (FB).**

(10) In case of application to the High Court for starting of contempt proceedings, the affidavit filed in support of the application should be sworn by some responsible officer, an affidavit of a clerk is not proper. A 1941 Pat 185 (187): 42 Cri LJ 225.

(11) Petition for issue of process for contempt made by Governor-in-Council with affidavit signed by Secretary is proper and within authority until contrary is shown. A 1933 Cal 118 (120): 34 Cri LJ 662 (DB).

(12) Even where the rules and practice of a High Court require the petitions for taking action for contempt to be signed by or on behalf of the persons presenting it, the Courts can issue a rule if in spite of absence of proper signature the evidence shows prima facie that contempt has been committed. A 1933 Cal 118 (120) : 34 Cri LJ 662 (DB).

(13) The High Court can treat an application presented to a subordinate Court as one presented to itself and initiate proceedings for contempt. A 1932 Cal 254 (255): 33 Cri LJ 444 (DB)

(14) There is no warrant for the practice of making the Chief Justice and Judges parties to an appeal against the decision of a High Court in a contempt matter. The title of such proceedings should be 'In re' ..... (the alleged contemner)." **A 1961 SC 1367 (1369): 1961 (2) Cri LJ 438.**

(15) Once the proceedings get going, it quite clearly becomes a matter between contemner on the one hand, and the Court, of which the contempt is stated to have been committed, on the other. Therefore, on death of the private party initiating the proceeding, there is no need to call upon his legal representatives to pursue the proceedings. **A 1968 Punj 217 (223, 228): 1968 Cri LJ 775 (FB)** ** (1964) 68 Cal WN 330 (DB)

(16) Normally where a party is alleged to have disobeyed an order of injunction made by Court of Law, it would not be expedient to initiate summary proceedings in contempt before the High Court. 1968 Cri LJ 107 (All).

4. Commencement of proceeding on report of subordinate Court.

(1) "Reference" — To be interpreted in the sense of information of a particular matter — A statement of the subordinate Court taken by the Sessions Judge at the instance of the High Court and sent to the High Court was held to amount to a reference within the meaning of the sub-section (2). **1974 Cri LJ 899 (900, 901) (FB) (Delhi).**

(2) When the Magistrate is moved to take action by a party he might ultimately come to the conclusion that there is no contempt, and that reference need not be made to the High Court. While doing so he would be passing a judicial order and, therefore it must be a speaking order giving reasons. In the same manner if he comes to the conclusion that there is some material which prima facie requires to be referred to the High Court because again prima facie contempt of court appears to have been committed., he must write a concise reasoned Order indicating why he thinks the contempt appears to have been committed. Even the motion may have to contain sufficent material to indicate why the Advocate-General is inclined to move the High Court. 76 Bom LR 191 : 1975 Cri LJ 531 (539) (DB)

(3) Sub-sec. (1) of Section 15 covers all cases relating to cognizance of criminal contempt which are not covered by Sec. 14. Where the High Court issues a notice under sub-section (2) in the absence of any reference, it can be treated as issued under sub-section (1). **1974 Cri LJ 899 (901) (FB) (Delhi).**

Cases under old Act of 1952

(4) A subordinate Court has no jurisdiction under the Contempt of Courts Act to try an offence for contempt or punish the offender therefor. A 1956 Pat 321 (324): 1956 Cri LJ 1087 (DB).

(5) Every Judge and Magistrate should report any matter of contempt to the High Court to which he is subordinate. A 1952 Nag 34 (36) ** A 1956 Pat 321 (324): 1956 Cri LJ 1087 (DB).

(6) It is the duty of Magistrates to bring to notice of Chief Court attempt made to bring improper influence on them in connection with magisterial work. A 1939 Oudh 180 (181) (DB).

(7) Where a contempt of Court is committed by a person addressing a communication to the Court with an intention to influence it in the trial of a case, the Court should take a serious view of the matter and should immediately report the case to the High Court for speedy and quick action. A 1952 All 86 (88) (DB).

(8) The report regarding the contempt of a subordinate Court can be made to the High Court either by the Court contemned or by a superior Court. The superior Court when the report is sent through it, can, instead of forwarding it direct to the High Court, hold a preliminary enquiry and give an opportunity to the accused to show cause. A 1956 All 258 (262): 1956 Cri LJ 679 (DB).

(9) A Judge or a Magistrate need not obtain the permission of the State Government to report to the High Court a contempt committed against him. A 1952 Nag 34 (36).

5. Commencement of Proceedings Suo Motu

(1) There is nothing in sub-s. (2) of Section 15 which would prevent the High Court to take cognisance suo motu in respect of contempt of a subordinate Court. Sub-section (1) is comprehensive in its terms and sub-sec. (2) makes provision for a reference by the subordinate Court in respect of cases which do not otherwise come to the notice of the High Court. 1976 Cri LJ 440 (Orissa).

[But see 1974 Chand LR (Cri) 162.]

(2) It is for the Court in exercise of its discretion to decide whether or not to

16. Contempt by judge, magistrate or other person acting judicially.— (1) Subject to the provisions of any law for the time being in force, a judge, magistrate or other person acting judicially shall also be liable for contempt of his own court or of any other court in the same manner as any other individual is liable and the provisions of this Act shall, so far as may be, apply accordingly.

(2) Nothing in this section shall apply to any observations or remarks made by a judge, magistrate or other person acting judicially, regarding a subordinate court in an appeal or revision pending before such judge, magistrate or other person against the order or judgment of the subordinate court.

Section 15 — Note 5 (contd.)

initiate proceedings for contempt. Even if the complainant could not maintain the petition under the Act for want of consent by the Advocate-General, it is open for the Court to initiate the action suo motu. 1979 Lab IC 74 (DB) (Kant).

(3) Section 15 (2) does not prohibit suo motu action by High Court so, if somebody else brings the criminal contempt of a subordinate Court to the notice of the High Court by filing a petition before it, Section 15 (2) cannot stand in the way of the H. C. taking suo motu action for contempt under Sec. 15 (1). 1979 Ker LT 262 (266) (DB).

(4) Section 15 (2), properly interpreted, does not restrict the power of the High Court to punish contempt of the subordinate Court on its own motion

Article 215 of the Constitution carries a constitutional sanction of such power of the High Court. Article 215 not only confers on the High Courts the power to punish its own contempt but also preserves to it or confers the power to punish the contempt of a subordinate Court. Therefore, if anything contained in Section 15 disabling the High Court from taking cognizance of its contempt on its own motion would have rendered the provision illegal, there is no reason why such a restriction on the power of the High Court to take cognizance of the contempt of a subordinate Court, if read in Section 15 (2) of the Act, should not be held to be illegal and ultra vires. The contention that Article 225 confers a power on the Parliament to enact a Law restricting the power of the High Court to take cognizance of the contempt of the subordinate Court and that Section 15 (2) of the 1971 Act should be interpreted to be imposing such a restriction on the power of the High Court cannot be accepted. 1974 Cri LJ 962 (968, 970) (All).

(5) Under S. 15 read with R. 2, Contempt of High Court of Orissa and Courts subordinate to it (Regulation of Proceedings) Rules, it is clear that High Court is quite competent to take cognizance of contempts of Courts subordinate to it suo motu, without any reference made to it by the subordinate Court for the purpose. Rule 2 is not in any way inconsistent with Section 15. 1976 Cri LJ 246 (249) (Orissa) (DB).

(6) High Court acting suo motu — Notice given by High Court must indicate, under Section 15 (3), the specific contempt which the person charged is alleged to be guilty of. ILR (1979) Bom 25 (32) (DB).

(7) Shouting by an Advocate, whether amounts to contempt — Even a forceful argument advanced by an Advocate may be construed by a sensitive presiding judge to mean shouting — If contempt notices were to be issued on Counsel, for forcefully arguing his client's case, Court would be doing nothing but contempt cases — Suo motu notice on Advocate discharged. 1975 Cri LJ 176: 1975 Chand LR (Cri) 267 (Punj) (DB)

Cases under old Act of 1952.

(8) The High Court of its own motion can issue a rule calling upon a person to show cause why he should not be committed for contempt and in this respect its powers in relation to contempt of subordinate Courts are not different. A 1941 Pat 185 (188): 42 Cri LJ 225 (DB).

(9) When the Court moves suo motu the question of notice of motion or statement on affidavit is wholly redundant. A 1960 Pat 430 (446): 1960 Cri LJ 1254 (FB) ** A 1966 Cal 411 (428): 1966 Cri LJ 883 ** A 1961 J & K 76 (80): 1961 (2) Cri LJ 766 (DB)

(10) When the Court acts suo motu and not on application, Rules framed by High Court do not strictly apply. A 1964 Cal 572 (583, 584): 1964 (2) Cri LJ 660 (DB).

(11) Although it is the party who alleges that he has been damaged by the interference of the other party with the receiver appointed by Court that should move the Court for action being taken against that party for contempt, in some cases the Court could take action also on the application of the receiver or of its own accord. A 1932 Cal 254 (255): 33 Cri LJ 444 (DB).

6. Party entitled to make application.

(1) An application to initiate proceedings for action on the ground that civil contempt has been committed must contain a copy of the order of the court alleged to have been disobeyed, the date on which it was disobeyed, the manner in which it was disobeyed and the name of the person who disobeyed it. 1975 Cri LJ 898 (All).

Section 16

(1) Contempt by Magistrate of his own Court — Reserved judgment delivered after eight months after having adjourned case for judgment on 13 dates — Prior occupation with administrative work and attending to visiting higher officers not an acceptable excuse. (1973) 39 Cut LT 458.

(2) A mala fide and intentional refusal by a Tribunal to apply a finding decision of the High Court to the facts of the case before it, on the ground that application for leave to appeal to Supreme Court against that decision is pending, amounts to contempt of the Court. ILR 1971 Cut 986.

17. Procedure after cognizance.— (1) Notice of every proceeding under Section 15 shall be served personally on the person charged, unless the Court for reasons to be recorded directs otherwise.

(2) The notice shall be accompanied,—

(a) in the case of proceedings commenced on a motion, by a copy of the motion as also copies of the affidavits, if any, on which such motion is founded; and

(b) in the case of proceedings commenced on a reference by a subordinate court, by a copy of the reference.

(3) The Court may, if it is satisfied that a person charged under Sec. 15 is likely to abscond or keep out of the way to avoid service of the notice, order the attachment of his property of such value or amount as it may deem reasonable.

(4) Every attachment under sub-section (3) shall be effected in the manner provided in the Code of Civil Procedure, 1908, for the attachment of property in execution of a decree for payment of money, and if, after such attachment, the person charged appears and shows to the satisfaction of the Court that he did not abscond or keep out of the way to avoid service of the notice, the Court shall order the release of his property from attachment upon such terms as to costs or otherwise as it may think fit.

(5) Any person charged with contempt under Section 15 may file an affidavit in support of his defence, and the Court may determine the matter of the charge either on the affidavits filed or after taking such further evidence as may be necessary, and pass such order as the justice of the case requires.

Section 16 (contd.)

(3) Where it was alleged that the Presiing Judge of the Court by calling the guards and insulting the applicant Lawyer committed the contempt of his own Court by lowering its prestige, it was held that the present case was one of misunderstanding between the lawyer and the munsif who was a new entrant in the service and no case was made out for taking any action.

Steps in contempt should be taken only when there is real and grave danger which may result in the obstruction of justice or result in scandalizing Court. Incidents of high temper giving rise to misunderstanding are not uncommon between the members of the Bar and Bench. It behoves both the Bench and the Bar to act with restraint and circumspection and bear with the incidents which arise because of short temper or misunderstanding. 1975 Cri LJ 659 (DB) (All).

(2) First contempt petition not pressed — Second contempt petition based on same allegations — Not maintainable. 1978 Pun LJ (Cri) 116 (117).

(3) Summary jurisdiction by way of contempt must be exercised with great care and caution and only when its exercise is necessary for the proper administration of law and justice. **A 1971 SC 221 (230): 1971 Cri LJ 268.**

(4) English case — A litigant is at liberety to move in person for an order of committal for contempt of court. (1978) 1 All ER 479.

(5) Where the notice of motion is issued after the Chief Justice of the High Court on consideration of the matter brought to its notice considers it necessary to initiate contempt proceedings and constitutes a Bench for hearing the case, it cannot be said that the notice is issued without the High Court taking cognizance. 1971 WLN 495 (Raj).

Section 17

(1) The High Court has power to adopt its own procedure and it is free to adopt the procedure laid down in Sections 87 and 88 of the Criminal P. C. where the contemner remains absent from Court notwithstanding the service of notice. The contention that Article 215 of the Constitution does not confer on the High Court the power to issue process for securing the presence of the contemner is not sound. If the High Court has power to punish for contempt of itself it follows that it has all powers incidental and consequential to that power which would include the power, where necessary, to issue a proclamation of arrest and attachment. (1974) 76 Bom LR 422.

(6) A notice or Rule for contempt must set out precisely and in detail the deeds or words which are said to constitute contempt and the Court would not consider a submission which does not dovetail into the terms of the Rule. 1973 Cri LJ 790 (794) (Cal).

(7) Presentation of petition under Section 2 — It is for the Court to issue notice at its cost and supply the necessary papers to the respondent and direct the office to make necessary number of copies for the use of the Court and the Advocate General and all others concerned. It is no part of the duty of the petitioner to pay 'bhatta' for notice to respondents. (1980) 1 Andh WR 402 (404) (DB).

(8) Contempt in the face of Court — Change — Contents of — Must be clear enough to afford opportunity to contem-

Section 17 (contd.)

ner to explain — Absence of specific charge — Committal for contempt vitiated. 1978 Cri LJ 319 (PC of UK).

(9) Appreciation of evidence — Contempt matter — Issue forming the core of the plea of justification raised by contemners — Evidence in support thereof pressed up to the last stage of arguments — **Held**, case could not be decided without a firm conclusion thereon — Fact that parties took conflicting stands was immaterial. **ILR (1978) 2 Punj 63 : A 1979 (NOC) 96 (Punj) (FB).**

(10) If the offence of contempt is committed by scandalising the judges or the judiciary, the law has throughout been that the accused could not seek to justify it. No justification of vilification of judges or the judiciary is permissible; the accused who has vilified cannot say that he would wish to defend himself by leading evidence to justify the allegations of such a nature made by him. ILR (1975) 2 Delhi 868 (DB).

(11) No plea of justification or truth against a charge of contempt of Court can be allowed to be established by evidence both as regards the superior and the subordinate Courts. All evidence supposedly led on the plea of justification must be scrupulously excluded from consideration. The plea of justification and the leading of the evidence thereon virtually constitute a fresh action of contempt deliberately and designedly pursued on behalf of the contemners. **ILR (1978) 2 Punj 63 : A 1979 (NOC) 96 (Punj) (FB) ** A 1973 Orissa 244 (268) (FB).**

(12) Judge acting in administrative capacity — Truth and justification not valid defence in proceedings for contempt of Court. (1974) 1 APLJ 243.

(13) The Act requires a 'wilful' disobedience of a decree which contemplates some sort of mens rea. Because the State Government, as such, can have no mens rea and the Act provides for no adequate penalty which may be imposed against the State Government, the intention of the legislature appears to be that the writ of contempt must run only against a natural person and not against the Government. The 'will' of the State Government is expressed through the decision-making by an officer. If the officer makes a decision which amounts to a wilful disobedience of the order of the Court he will of course be liable to punishment. 1975 Cri LJ 1283 (1285) (All).

(14) Contempt proceedings against public body like Rubber Board — Only executive head i.e. Chairman need be made party — Board need not be made party. 1976 Ker LT 879 (DB).

(15) Both the rules of natural justice and of justice according to law seem to be one on the point that no person or party is to be condemned unheard. There is no rule or principle which authorises a Court to consider and pronounce on the conduct of a third party without giving him least opportunity of being heard and then to hold that the findings arrived at are confined to the particular case. **ILR (1978) 2 Punj 63 : A 1979 (NOC) 96 (Punj) (FB).**

(16) When certain orders were passed in exercise of his judicial discretion by the Chief Judicial Magistrate and they were well reasoned orders against which admittedly no appeal or revision was even later taken up by the parties and therefore they had achieved finality, it is not open to the Court of law in collateral judicial proceedings to adversely comment on an earlier judicial order or proceeding which is not before it in appeal or revision. **ILR (1978) 2 (Punj) 63 : A 1979 (NOC) 96 (Punj) (FB).**

(17) Malaysian case — Where contempt of Court proceedings were initiated against a person for failure to comply with an interim order of a Court in a case, and the only evidence in the contempt case was by way of affidavits filed by both sides, held that on a mere consideration of such affidavits it was impossible to say that guilt of the person had been proved beyond reasonable doubt, and therefore, the person could not be convicted for contempt of court. (1978) 1 Malayan LJ 126.

Cases under old Act of 1952

(18) The verification of the statement or charge is necessary as a condition precedent to the issue of a rule to the offender to show cause why he should not be punished for alleged contempt. A 1958 Punj 141 (143) : 1958 Cri LJ 673.

(19) When the Court moves suo motu, the question of notice of motion or statement on affidavit is wholly redundant. **A 1960 Pat 430 (446) : 1960 Cri LJ 1254 (FB).**

(20) Where doubtful questions of fact are involved the High Court may refuse to issue notice to the person charged with contempt, before being satisfied by affidavit that there was reasonable ground for thinking that contempt had been committed. A 1945 All 67 (68) : 46 Cri LJ 458 (DB).

(21) In an application for committal for contempt, notice of motion should be personally served on the party alleged to have committed contempt. ILR (1946) 2 Cal 499 (503) ** A 1932 Bom 638 (639). (Service upon his attorneys not sufficient.) ** (1951) 88 Cal LJ 70.

[See also (1964) 68 Cal WN 148 (DB).]

(22) Proceedings for committal for contempt are in the nature of quasi-criminal proceedings and in such proceedings established practice must be strictly followed, not only in substance but also in form. (1951) 88 Cal LJ 70.

(23) Notice of the motion for contempt of Court must state the precise act complained of inasmuch as the proceeding is of a criminal nature. A 1934 Bom 452 (454) ** A 1959 Pat 262 (265, 266) : 1959 Cri LJ 754 (DB) ** (1951) 88 Cal LJ 70.

(24) The deeds or words which are said to constitute contempt must be set out precisely and in detail in the notice or Rule for contempt. A 1958 Cal 474 (480) : 1958 Cri LJ 1162.

(25) Where a contempt is committed by breach of a Court's order the precise breach or breaches of order complained of

18. Hearing of cases of criminal contempt to be by Benches.— (1) Every case of criminal contempt under Section 15 shall be heard and determined by a Bench of not less than two Judges.

(2) Sub-section (1) shall not apply to the Court of a Judicial Commissioner.

19. Appeals.— (1) An appeal shall lie as of right from any order or decision of High Court in the exercise of its jurisdiction to punish for contempt.

(a) where the order or decision is that of a single Judge, to a Bench of not less than two Judges of the Court;

Section 17 (contd.)

must be set out in the notice of motion itself. A 1932 Bom 638 (640).

(26) Under the practice prevalent in India, a notice to show cause in a contempt proceeding which is in substance sufficient to apprise the accused of the charge he has to meet with is a valid notice and it cannot be condemned on the ground of its non-compliance with any technical form. A 1957 Pat 528 (530) : 1957 Cri LJ 1156 (DB).

(27) Wherever the grounds indicated in the notice of motion clearly indicate the charge of contempt failure to give in the notice of motion minute particulars as to the contempt complained of is not a fatal objection to the application for contempt. ILR (1946) 2 Cal 499 (506).

(28) The procedure of issuing a notice to show cause in the first instance containing only extracts of news items as amounting prima facie to contempt and subsequently issuing another notice containing the entire news items amounting to contempt, is not irregular provided such procedure does not cause any prejudice. A 1952 Orissa 318 (326) : 1952 Cr LJ 1605.

(29) A contempt of High Court is an offence which can be enquired into according to the provisions of Criminal P. C. as set out in Section 5 (2). Hence a High Court in case of contempt committed within its territorial jurisdiction is competent to issue process to secure the attendance of the offender, wherever he may be residing. A 1945 All 1 (4) : 46 Cri LJ 272 (DB).

(30) In cases of contempt, a High Court acting under its inherent powers may send a special bailiff to arrest a person at a place within its general jurisdiction. ILR (1937) 1 Cal 345 (356) ** 1962 (2) Cri LJ 118 (122) (DB) (All).

(31) Where a moffusil Court has no jurisdiction a party complaining of contempt has to make an application direct to the High Court instead of to the moffusil Court for making that Court to refer the matter to the High Court. A 1932 Cal 254 (255) : 33 Cri LJ 444 (DB).

(32) The High Court can punish a person for contempt of a subordinate Court in the same manner as for a contempt of its own self. **A 1950 Pepsu 9 (11) : 51 Cri LJ 1219 (SB)** ** ILR (1970) Cut 1130. (That procedure has, however, to be fair.)

(33) In the absence of any defined procedure in India the Courts have uniformly acted upon the rules of the procedural law of England in contempt proceedings. A 1957 Pat 528 (532) : 1957 Cri LJ 1156.

(34) There is no substantial difference between the procedure in India and that prevailing in England. **A 1960 Pat 430 (442) : 1960 Cri LJ 1254 (FB).**

(35) American law regarding power of courts to punish for contempt cannot be made applicable to Indian conditions. **A 1960 Pat 430 (444) : 1960 Cri LJ 1254 (FB).**

(36) The High Court is entitled to deal with a case of contempt summarily and adopt its own procedure subject to the conditions that the procedure is fair and the contemner is made aware of the charge and also given a fair and reasonable opportunity to defend himself. **A 1954 SC 186 (190) : 1954 Cri LJ 460** ** A 1955 All 638 (640) : 1955 Cri LJ 1451 (DB) ** A 1966 All 305 (310, 311) : 1966 Cri LJ 632 ** A 1966 Cal 411 (423) : 1966 Cri LJ 883 ** A 1960 Pat 430 (446) : 1960 Cri LJ 1254 (FB).**

Section 18

(1) Trial of criminal contempt held by single Judge is without jurisdiction. 1974 Pun LJ (Cr) 203.

(2) Hearing of contempt cases by Benches — Hearing is different from initiating proceedings — Single Judge of High Court not barred from mere initiating proceedings for criminal contempt and issuing notice to contemner. **A 1980 Punj 72 (80) : 1980 Cri LJ (NOC) 63 (FB).** (Cri. Order No. 79 of 1972, D/- 5-8-1974 (Punj and Har) (FB), Overruled.)

(3) When a show cause notice against the contemner was issued under the order of the Chief Justice, but the matter was not placed before the Division Bench for consideration nor a bench applied its mind and decided to initiate proceedings and no cognizance was even taken, no further action could be justified. Notice issued to the contemner was improper and invalid. 1978 Cri LJ 1440 (1442) (DB) (Raj).

(4) Rules to regulate contempt proceedings in the High Court of Karnataka, R. 7 — Procedure prescribed in R. 7 is not ultra vires Sections 18 and 19 (1). **A 1975 Kant 224 (228, 229).**

Section 19

(1) Under Section 19 (1) an appeal shall lie to the Supreme Court as a matter of right from any order or decision of a Bench of the High Court if the order has been made in the exercise of its jurisdiction to punish for contempt. Mere initiation of a proceeding for contempt by the issuance of the notice under Section 17 on the prima facie view that the case is a fit one

(b) where the order or decision is that of a Bench, to the Supreme Court:

Provided that where the order or decision is that of the Court of the Judicial Commissioner in any Union territory, such appeal shall lie to the Supreme Court.

(2) Pending any appeal, the appellate Court may order that—

(a) the execution of the punishment or order appealed against be suspended;

(b) if the appellant is in confinement, he be released on bail; and

(c) the appeal be heard notwithstanding that the appellant has not purged his contempt.

(3) Where any person aggrieved by any order against which an appeal may be filed satisfies the High Court that he intends to prefer an appeal the High Court may also exercise all or any of the powers conferred by sub-section (2).

(4) An appeal under sub-section (1) shall be filed—

(a) in the case of an àppeal to a Bench of the High Court, within thirty days;

(b) in the case of an appeal to the Supreme Court, within sixty days,

from the date of the order appealed against.

Section 19 (contd.)

for drawing up the proceeding, does not decide any question. Hence an order merely initiating the proceeding without anything further, does not decide anything against the alleged contemner and cannot be appealed against as a matter of right under Section 19. In a given case special leave may be granted under Article 136 of the Constitution from an order initiating the proceeding. But unless and until there is some order or decision of the High Court adjudicating upon any matter raised before it by the parties, affecting their right, the mere order issuing the notice is not appealable. **A 1978 SC 1014 : 1978 Cri LJ 772 ** A 1974 SC 2255 (2260, 2261) **** 1977 Cri LJ 1530 (DB) (Him Pra) ****** (1976) 1 Cal LJ 56 (57) (DB).

(2) Interlocutory order pertaining purely to procedure of the Court is not appealable. **A 1976 SC 1206.**

(2A) Malaysian case — Trial Court finding that contemner was guilty of contempt of Court — Order clear and unambiguous — Finding of fact would not be interfered with by appellate Court. **(1977) 1 Malayan LJ 151 (158) (FC).**

(3) It is true that notice issued to a contemner should be precise and should contain all the relevant material in order to enable the contemner to meet the charge against him. But where the contemner did not raise any objection to the notice in his reply to the notice and could not show any miscarriage of justice due to alleged lack of material facts therein, he could not raise objection to notice in appeal. 1980 Cri LJ 271 (DB) (Delhi).

(4) Concerned judgment must have become final inter partes as contemplated under Explanation to Section 3 — High Court entertaining the plea under Section 5 of fair and reasonable comment of a judicial act — Supreme Court in appeal held would not refuse defence of fair comment though short ground that case not finally decided available. **A 1978 SC 921 (926) : 1978 Cri LJ 917.**

(5) Arbitration proceedings — Injunction granted by Court — Breach — Proceedings for contempt of Court — Single Judge holding contemner not guilty — Appeal to Division Bench against order is maintainable. 1980 Cri LJ (NOC) 109 (DB) (Delhi).

(6) Appellant held guilty of contempt by High Court, admonished and warned of dire consequences if repeated — Appeal of Supreme Court — Lapse of 7 years — **Held** warning should be deleted and award of costs set aside. **A 1979 (NOC) 159 (SC) : 1979 UJ (SC) 671 (1).**

(7) Where a person is committed to contempt on basis of a pamphlet published by him and the High Court convicted him taking into consideration certain passages from the pamphlet, the Supreme Court while hearing an appeal against conviction will ordinarily confine its attention to material which has received consideration of the High Court while adjudging the contemner guilty. However there would be no lack of jurisdiction to take into consideration passages in respect of which notice for contempt was issued and served upon contemner. **A 1978 SC 921 (924) : 1978 Cri LJ 917.**

(8) Procedure prescribed by R. 7 of Karnataka High Court Rules under the Act, is not ultra vires Sections 18 and 19 (1). A 1975 Kant 224.

(9) If the contempt committed is very grave, it is open to the High Court not to grant bail. **A 1973 Orissa 244 (279) (FB).**

(10) Appeal filed within the period of limitation — Certified copy of the order of the single Judge not filed with memorandum of appeal — In absence of rules requiring filing of certified copies under Section 19, it could not be said that the appeal was not properly filed. 1976 MCC 94 (97) (DB) (Delhi).

Cases under old Act of 1952

(11) A High Court does not have an inherent jurisdiction to entertain an appeal against an order of conviction for con-

20. Limitation for actions for contempt.— No court shall initiate any proceedings for contempt, either on its own motion or otherwise, after the expiry of a period of one year from the date on which the contempt is alleged to have been committed.

Section 19 (contd.)

tempt passed by a Judge of the High Court acting alone in summary proceedings. A 1947 Bom 184 (185) ** 1967 All LJ 982 (DB).

(12) An order of attachment for contempt not being one passed by a High Court in the exercise of its original Civil Jurisdiction may not be appealable under the provisions of Civil P. C. but that does not mean it is not appealable under Clause 15 of the Letters Patent also. (1883) 7 Bom 5 (12) (DB).

[But see A 1948 Cal 214 (218) : 49 Cri LJ 379.]

(13) When a High Court punishes a person for criminal contempt, it exercises criminal contempt, it exercises a criminal jurisdiction and no appeal will lie under Clause 15 of the Letters Patent as to the merits of the order, although an appeal can lie on the question of jurisdiction. A 1958 Cal 474 (476) : 1958 Cri LJ 1162 (DB).

[See also (1967) 69 Pun LR (D) 393 (DB).]

(14) Orders passed in cases of civil contempts are appealable. A 1955 Mad 121 (129) : 1955 Cri LJ 505 (DB) ** A 1958 Cal 474 (476) ** A 1969 Punj 60 (62) : 1969 Cri LJ 320 (DB).

Leave to appeal to Supreme Court.

(15) No leave to appeal to the Supreme Court can be granted under Article 133 of the Constitution where the contempt adjudged against the petitioner is a criminal contempt and not a civil one. A 1953 Orissa 266 (271).

(16) An order refusing to punish a person for contempt being one passed in proceedings which are of a criminal nature, Section 109 of the Civil P. C. cannot be invoked to grant leave to appeal to the Privy Council against that order. A 1941 All 211 (212) (DB).

(17) Every Court of record is the sole and exclusive judge of what amounts to a contempt of court and leave to appeal to Privy Council ought not to be granted unless there was something improper in the order committing the appellant. A 1935 Cal 419 (451, 452) (FB).

(18) The High Court has power to grant leave to appeal to the Supreme Court but not to challenge its findings on merits but cnly on the limited ground of jurisdiction. A 1953 Orissa 266 (273) (DB) ** A 1956 Manipur 44 (47) : 1956 Cri LJ 1411.

(19) Where on conviction for contempt of High Court, a petition for grant of certificate under Article 134 (1) (c) is made, the High Court would not be justified in applying a standard of scrutiny different from that by which it judges applications for certificates of fitness in other cases. A 1953 Madh Bha 206 (208) (DB).

(20) Where the remedy in respect of contempt proceedings can be given by way of civil execution only, the proceedings for the purposes of leave to appeal to Supreme Court are civil and leave could be granted only under Article 133 (1) (c). A 1952 Pat 23 (25).

(21) The Privy Council will not interfere with the orders of the High Court in contempt cases unless there is a serious disregard of the principles of natural justice by the High Court. A 1945 PC 147 (150).

(22) Single Judge of High Court whose judgment or order is under appeal cannot be made a respondent to that appeal. A 1969 Punj 60 (62) : 1969 Cri LJ 320 (DB).

(23) Where a person was not let off on the acceptance of his apology but was convicted of the offence of having committed contempt of Court, he has the right to file an appeal. A 1969 Punj 60 (62) : 1969 Cri LJ 320 (DB).

Section 20

(1) The exercise of the jurisdiction to punish for contempt commences with the initiation of the proceeding for contempt whether suo motu or on a motion or a reference. That is why the terminus a quo for the period of limitation in Section 20 is the date when a proceeding for contempt is initiated by the Court. A 1974 SC 2255 (2260) : 1975 Cri LJ 1.

(2) Period of limitation does not start from the date when the contempt is stated to have taken place, but from the date when proceedings for contempt are initiated in the Court. 1977 Pun LJ (Cri) 201 (203).

(3) Limitation commences, when Court becomes aware of contempt and not from date when contempt was committed. (1974) 76 Pun LR 23.

[Reversed on another point in 1974 Pun LJ (Cri) 203.]

(3A) Section 20 operates an absolute bar to initiation of contempt proceeding after expiry of one year's limitation — Starting point of limitation is the date on which contempt is alleged to have been committed and not date of knowledge of complainant. A 1978 Kant 57 : 1978 Cri LJ 726 (728) (DB).

(4) Where the proceedings for contempt were initiated against non-petitioners beyond a period of one year from the date on which the contempt was alleged to be committed, the proceedings for contempt were time barred and no action against the contemners, could be taken under the Act. 1978 Raj LW 186.

(5) Where the contemner was appointed a co-receiver in respect of certain buses with an obligation to produce them whenever required and he failed to produce them after asking for extension of time on certain occasions he would be deemed to have committed contempt when he failed to produce them after last extension. Consequently, the limitation of one year for notice for contempt would be deemed to have commenced when he finally failed to produce the buses after asking for last extension of time. 1980 Cri LJ 271 (DB) (Delhi).

21. Act not to apply to Nyaya Panchayats or other village courts.— Nothing contained in this Act shall apply in relation to contempt of Nyaya Panchayats or other village courts, by whatever name known, for the administration of justice, established under any law.

22. Act to be in addition to, and not in derogation of, other laws relating to contempt.— The provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law relating to contempt of courts.

Section 20 (contd.)

(6) Contempt consisting in scandalous allegations against subordinate Court was first committed by entry dated 9-7-1971 in General Diary of police station and secondly by publication of that entry in extenso in newspaper on 15-4-1972. **Held**, proceedings for contempt could not be initiated after expiry of one year of the entry and its publication. 1973 All Cri R 409.

(7) Contempt by filing false affidavit by the party — The offence of contempt of Court is committed on the date when the affidavit is filed in the registry of High Court by the party — Limitation starts from that date and not from the date on which High Court acts on it. 1974 Chandi LR (Cri) 169.

(8) Section 20 applies not only to cases where the Court takes action suo motu but also where contempt application is made after obtaining the permission of the Advocate-General and hence on a contempt application no notice can be issued to the alleged contemner after the expiry of one year from the date on which the contempt is alleged to have been committed. A 1975 All 48 (52) (DB).

(9) Petitioner bringing acts of contempt to the notice of High Court within one month — High Court not initiating proceedings within limitation of one year — Plea that petitioner ought not be allowed to suffer for the mistake of court is not available. A 1975 All 366 (367).

(10) Though limitation under Section 20 will apply in the case of show cause notice under the Act, neither under Order 39 of the civil P. C. or under Art. 215 of the Constitution has any limitation been prescribed. The powers to punish under the Code and the Constitution are in addition to and not in derogation of the provisions of the Act. ILR (1978) 1 Delhi 233 : 1977 Cri LJ (NOC) 266.

(11) Wilful breach of an undertaking given to a Court amounts to civil contempt — But no contempt proceedings can be initiated against a person after a lapse of one year. 42 Cut LT 687 : 1977 Cri LJ (NOC) 23 (Orissa)

(12) No provision stops running of the time of limitation of one year. A 1975 All 366 (367).

(13) The date on which the matter is placed before the Division Bench and on which date the rule is granted is the date when contempt proceedings can be said to be initiated in the Court. A reference by a subordinate Court or the administrative order of the Administrative Judge of the High Court cannot be said to be the beginning of contempt proceedings. (1976) 78 Bom LR 116 (121) (DB).

(14) Retrospective operation — Contempt committed on 30-10-1971 — New Act coming into force subsequently on 24-12-1971 — Contempt petition filed on 20-12-1973 — Ample time (till 29-10-1972) to initiate proceedings available under Section 20 of new Act — Proceedings held barred. A 1975 Raj 61 (63).

(15) Power of High Court to punish for contempt of itself arises under Art. 215 of the Constitution and is a special one. Period of limitation prescribed under Section 70 of Penal Code does not apply to recovery of fine imposed by High Court for its contempt. **A 1972 SC 858 (859, 860) : 1972 Cri LJ 643.**

(16) Reference by Chief Justice to Government Advocate for opinion — Does not amount to initiating contempt proceedings. 1978 Raj LW 186.

(17) Dismissal of application for initiation of contempt proceedings as time-barred — Second application for the same relief is not maintainable as like the first one this is also made beyond time limit prescribed under Section 20 of the Act. Second application is also barred by the principle of res judicata. 1980 All LJ 919.

Section 22

(1) Contemner remaining absent not withstanding service of notice — Court has power to issue proclamation for appearance and attachment of properties. (1974) 76 Bom LR 422

(2) In matters of contempt of Court, the Courts should apply the rules regarding evidence which are applicable in criminal cases though the contempt may be of civil nature. The stigma attached to the person found guilty of contempt and the punishment imposed on him are serious matters and therefore the Courts must be wary and must punish only those who are conclusively found to be guilty of flouting the orders of the Court. 1978 Cri LJ 466 (DB) (Mad).

(3) In the Contempt of Courts Act there is no specific provision authorising the High Court to grant an injunction restraining the respondent from initiating any proceeding against the petitioner without first obtaining the leave from the court. However, such a jurisdiction is inherent in the High Court in exceptional cases and the same has been preserved by S. 22. The court cannot be a mere spectator of its process being abused only to punish the person so abusing after the abuse but incompetent to prevent its repetition. The right to prevent such acts is inherent in court. 1978 Cri LJ 560 (DB) (Cal).

23. Power of Supreme Court and High Courts to make rules.— The Supreme Court or, as the case may be, any High Court, may make rules not inconsistent with the provisions of this Act, providing for any matter relating to its procedure.

Note.—For rules made by some of the High Courts, see—

(1) Contempt of Courts (Allahabad H. C.) Rules, 1977—U. P. Gaz., 12-2-77, Pt. II p. 8.

(2) Contempt of Courts (Bombay H. C.) Rules, 1975—Mah. Govt. Gaz., 1979, Pt. IV-C, p. 540.

(3) Contempt of Courts (Calcutta H. C.) Rules, 1975—Cal. Gaz., 18-9-75, Pt. I, p. 1813.

(4) Contempt of Courts (Gauhati H. C.) Rules, 1977—Assam Gaz., 3-8-77, Pt. II B, p. 2401.

(5) Contempt of Courts (Madras H. C.) Rules, 1975—T. N. Govt. Gaz., 3-9-75, Pt. III, S. 2, p. 114.

(6) Contempt of Courts (Punjab and Haryana H. C.) Rules, 1974—Punj. Govt. Gaz., 6-12-74, Pt. III (LS), p. 719.

24. Repeal.— The Contempt of Courts Act, 1952, is hereby repealed.

[THE] CONTINGENCY FUND OF INDIA ACT (49 OF 1950)

[The text of the Act printed here is as on 31-3-80.]

STATEMENT OF OBJECTS AND REASONS

"Pursuant to Articles 267 (1) and 283 (1) of the Constitution, this Bill seeks to provide for the establishment of the Contingency Fund of India, and for the custody of, the payment of moneys into and the withdrawal of moneys from, such fund. It is proposed to place a sum of fifteen crores of rupees in the Fund, which will be administered by the Finance Ministry on behalf of the President. The advances will be resumed to the Fund as soon as the necessary supplementary funds have been authorised by Parliament through Supplementary Appropriation Acts or at the end of the Financial Year."

—Gaz. of India 12-8-1950, Pt. II S. 2 p. 310.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

—Amended by Acts 20 of 1970; 10 of 1972; 81 of 1976 and 4 of 1980.

[THE] CONTINGENCY FUND OF INDIA ACT (49 OF 1950)

[14th August, 1950.]

An Act to provide for the establishment and maintenance of Contingency Fund

Be it enacted by Parliament as follows:

NOTE:— The Act has been extended to the Union Territories—of Goa, Daman and Diu, by Regn. 12 of 1962 (30-1-1963); of Dadra and Nagar Haveli by Regn. 6 of 1963 (1-7-1965); of Pondicherry by Regulation 7 of 1963 [1-10-1963].

Section 23

(1) Rule 6 (1) of the Contempt of Court (Punjab and Haryana) Rules (1974) is not attracted to a suo motu action by a single Judge and hence he can take cognizance of and initiate proceedings for criminal contempt on his own motion even on the existing provisions of Rule 6 (1). **A 1980 Punj 72 (85) (FB).**

[Cr. O. No. 79 of 1972 D/- 5-8-1974 (Punj & Har) (FB) **Overruled.**]

Cases under old Act of 1952

(2) The jurisdiction of the High Court to punish by summary procedure even contempts of Court by scandalising it still exists. **A 1935 Cal 419 (423, 424) (FB).**

(3) Attachment and commitment as a form of procedure in the case of criminal contempt and civil contempt is the same, namely whether it be followed as a summary process for the former kind of contempt or as the form of execution of an order or judgment in a civil contempt. **A 1957 Pat 528 (533): 1957 Cri LJ 1156 (DB).**

(4) The State as a party to a suit is in no better position than any other individual and is bound by the orders of the Court. The difference in its character as contradistinguished from that of an individual will only affect the form of disciplinary action; that is there can only be an attachment of its property and no detention inasmuch as it is not a person. **A 1954 Pat 513 (522): 1954 Cri LJ 1593.**

(5) Rules under Order 19 of Original Side Rules Madras will apply only where the 1956 rules under the Contempt of Courts Act do not provide otherwise. An application under Section 3 of Contempt of Courts Act (1952) filed before a single Judge of the High Court must comply with the procedure laid down by Rules 1 (b) and 1 (c) of the 1956 Rules. A 1966 Mad 136 (140): 1966 Cri LJ 421 (DB)

1. Short title.— This Act may be called THE CONTINGENCY FUND OF INDIA ACT, 1950.

2. Establishment of the Contingency Fund of India.— There shall be established a Contingency Fund in the nature of an imprest entitled the Contingency Fund of India, into which shall be paid from and out of the Consolidated Fund of India a sum of [a][fifty crores of rupees.]

[b][Provided that during the period beginning on 22nd day of October, 1979 and ending on the 31st day of March, 1980, this section shall have effect subject to the modification that for the words "fifty crores of rupees", the words "one hundred and fifty crores of rupees" shall be substituted.]

[a] Substituted by Act 81 of 1976, S. 2 (26-8-76).

[b] Inserted by Act 4 of 1980, S. 2 (22-10-1979).

3. Custody of the Contingency Fund and withdrawals therefrom.— The Contingency Fund of India shall be held on behalf of the President by a Secretary to the Government of India in the Ministry of Finance, and no advances shall be made out of such fund except for the purposes of meeting unforeseen expenditure pending authorization of such expenditure by Parliament under appropriations made by law.

4. Power to make rules.— For the purpose of carrying out the objects of this Act, the Central Government may make rules regulating all matters connected with or ancillary to the custody of, the payment of moneys into and the withdrawal of moneys from, the Contingency Fund of India.

Note.— For Contingency Fund of India Rules, see S. R. O. 1358 published in Gaz of Ind., 9-8-1952, Pt. II S. 3, page 1207.

[THE] CONTINUANCE OF LEGAL PROCEEDINGS ACT (38 OF 1948)

[The text of the Act printed here is as on 29-8-80.]

STATEMENT OF OBJECTS AND REASONS

"Section 15 (2) of the Indian Independence Act, 1947, provides inter alia that any legal proceedings by or against the Secretary of State in respect of any right or liability of the undivided India or any part thereof which were pending in Indian Courts immediately before the 15th August, 1947, shall be continued by or against such person as may be designated by order of the Governor-General under Section 9 of that Act or otherwise by law of the Dominion concerned. Article 12 (3) of the Indian Independence (Rights, Property and Liabilities) Order, 1947, makes the requisite provision for the continuance of such legal proceedings, but only in respect of any liability of the undivided India or part thereof. This Article does not cover proceedings in respect of any right of the undivided India. The Bihar Government brought to the notice of the Government of India the existence of a long pending suit which was instituted in 1933 before the passing of the Government of India Act, 1935, in the name of the Secretary of State in Council to establish the right of Government to underground minerals in an estate, and since there was the possibility of a few more cases of a similar character pending by or against the Secretary of State in some of the Courts, an Ordinance entitled the Continuance of Legal Proceedings Ordinance, 1948 (12 of 1948), was promulgated. The object of the present Bill is to convert that Ordinance into an Act of the Legislature."

—Gazette of India 1948, Part V, page 464.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

—Adapted by A. L. O., 1950; 3 A. L. O., 1956

[THE] CONTINUANCE OF LEGAL PROCEEDINGS ACT (38 OF 1948)

[3rd September, 1948.]

An Act to provide for the continuance of certain legal proceedings by or against the Secretary of State

WHEREAS it is expedient to provide for the continuance of certain legal proceedings by or against the Secretary of State in respect of any right of India or any part of India which were pending immediately before the 15th day of August, 1947.

It is hereby enacted as follows :—

1. Short title and extent.— (1) This Act may be called THE CONTINUANCE OF LEGAL PROCEEDINGS ACT, 1948.

(2) It extends to [a][the whole of India except [b][the territories which, immediately before the 1st November, 1956, were comprised in Part B States].]

[a] Substituted for "all the Provinces of India," by A. L. O., 1950.
[b] Substituted for "Part B States", by 3 A. L. O., 1956.

Note.— Part B States no longer exist: Of these States, Jammu and Kashmir, Mysore, Rajasthan and Travancore-Cochin, now known as Kerala, have become full-fledged States: Hyderabad has merged with Andhra, together forming the State of Andhra Pradesh· Madhya Bharat with the State of M. P.: Pepsu with pre-reorganisation Punjab and Saurashtra now forms part of Gujarat.

2. Interpretation.— In this Act, "the appointed day" means the 15th day of August, 1947.

3. Continuance of legal proceedings.— Any legal proceedings which, immediately before the appointed day, —

(a) were pending by or against the Secretary of State in any Court within the territories which as from the appointed day became the territories of India by virtue of sub-section (1) of Section 2 of the Indian Independence Act, 1947, and

(b) were in respect of any right of India or any part of India, shall—

(i) if the right in question was that of the Governor-General in Council be continued by or against the Dominion of India;

(ii) if the right in question was that of the former Province of Bengal or the Punjab, be continued by or against the Province of West Bengal or East Punjab, as the case may be; and

(iii) if the right in question was that of any Governor's Province other than Bengal, the Punjab, the North-West Frontier Province of Sind, be continued by or against that Province.

4. Exclusion of time in computing period of limitation.— In computing the period of limitation prescribed for any appeal or application to a Court in respect of any such proceedings as aforesaid, the period from the appointed day up to the 28th day of May, 1948 shall be excluded.

5. Repeal.— (1) The Continuance of Legal Proceedings Ordinance, 1948, is hereby repealed.

(2) Anything done or any action taken in exercise of any powers conferred by or under the said Ordinance shall be deemed to have been done or taken in exercise of powers conferred by or under this Act as if this Act had commenced on the 28th day of May, 1948.

Section 1

(1) The Act is a statute enacted by a legislature lawfully authorised to legislate for the Dominion. It is a law of the new Dominion of India within the meaning of Section 15 (2) of the Indian Independence Act of 1947. A 1950 Pat. 168 (172) (DB).

Section 4

(1) Section 4 of this Act has no application to a suit which falls under the provisions of Section 15 (1) of the Indian Independence Act, 1947. In such a case the right of the designated person to appear and continue the suit as a statutory right under Section 15 (2) which he could exercise after formally approaching the Court and obtaining its permission. Even if an application for the purpose is held to be necessary, Article 181 and not 171 of the Limitation Act would govern the case. A 1950 Pat 168 (172) (DB).

[THE INDIAN] CONTRACT ACT, 1872 (ACT IX OF 1872)

[The text of the Act printed here is as on 31-10-80.]

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—Adapted by A. O. 1937; A. C. A. O. 1948; A. L. O. (1950).

—Repealed in part and amended by Acts 6 of 1899; 24 of 1917.

—Repealed in part by Acts 1 of 1877; 10 of 1914; 3 of 1930; 9 of 1932.

—Extended by Acts 59 of 1949; 30 of 1950; 26 of 1968; Regs. 6 of 1963; 11 of 1963 and 8 of 1965.

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[THE INDIAN] CONTRACT ACT, 1872 (ACT IX OF 1872)[a]

[25th April, 1872.]

Preamble.

WHEREAS it is expedient to define and amend certain parts of the law relating to contracts; It is hereby enacted as follows :—

[a] For the Statement of Objects and Reasons for the Bill, which was based on a Report of Her Majesty's Commissioners appointed to prepare a body of substantive law for India, dated July 6, 1866, see Gazette of India, 1867, Extraordinary, page 34; for the Report of the Select Committee, see ibid, Extraordinary, dated 28th March, 1872; for discussion in Council, see ibid, 1867, Supplement, p. 1064; ibid, 1871, p. 313 and ibid, 1872, p. 527.

The Chapters and Sections of the Transfer of Property Act, 1882 (4 of 1882), which relate to contracts are, in places in which that Act is in force, to be taken as part of this Act—see T. P. Act 4 of 1882, S. 4.

PREAMBLE — SYNOPSIS

1. Applicability and scope of the Act.
2. Interpretation of the Act.
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1. Applicability and scope of the Act.— (1) The Contract Act is both an amending and a consolidating Act and it is not exhaustive of the law of contract to be applied by the Courts in India. A 1942 Bom 302 (303) ** A 1917 Bom 268 (270).

(2) The Contract Act, so far as it goes, is exhaustive and imperative. **(1903) 30 Cal 539 (548) (PC).**

(3) Although the Indian Contract Act purports to deal only with certain parts of the law relating to contracts yet where it treats with a subject in a way at variance with the English law, it should be considered as exhaustive and binding on Courts in India. A 1916 Nag 104 (110) (DB).

(4) Wherever the provisions of the Contract Act do not apply in terms to a case the principles of English law become applicable as rules of justice, equity and good conscience. A 1952 Cal 93 (98) ** A 1942 Bom 302 (304) ** A 1939 Bom 23 (25) (DB) **** A 1966 SC 543 (549).** (Act is not exhaustive — It does not refer to Banker's lien in respect of cash deposits.) ** A 1960 Punj 632 (635) : ILR (1960) 2 Punj 823 (DB) ** A 1959 Madh Pra 234 (237).

(5) English principles of equity can be applied only if they are not opposed to the provisions of the Contract Act. A 1937 Oudh 82 (86) (DB).

(6) The Contract Act, including Section 73, applies in terms to all contracts including those in respect of lands. The Indian Courts cannot, therefore, even where the result might appear hard, apply to such contracts foreign rules of law or equity, modifying the express terms of the Statute. **A 1927 Sind 120 (122).**

(7) Justice, equity and good conscience mean the rules of English law so far as they are applicable to Indian circumstances. A 1939 Sind 125 (126) (DB) ** (1935) 62 Cal 612 (617) (DB).

(8) The general provisions of the Contract Act do not supersede the provisions of a special later enactment such as Bombay Hereditary Offices Act. A 1928 Bom 201 (203) (DB).

(9) Constitution or Railways Act providing for particular form of contract — Provisions of Contract Act not superseded. **A 1976 SC 879 (883).**

(10) The Contract Act (9 of 1872), is not retrospective. **(1874) 12 Beng LR 451 (458, 472) (SB)** ** 1946 Jaipur LR 442 (445) (DB).

(11) The law of contempt of Court is essential for keeping the administration of justice pure and undefiled. Society is also interested in the fulfilment of a man's expectations under a contract. Each should have viable area so that justice may hold high her head and contract is not cribbed and cramped. Bona fide or honest exercise of a right under a contract should be the yardstick for allocating their respective area to contempt and the contract. **A 1974 SC 642 (644) : 1974 Cri LJ 594.**

2. Interpretation of the Act.— (1) The Court must interpret an Act where it applies and the natural meaning of the words should be followed uninfluenced by the previous state of the law. A 1932 Bom 168 (172, 173) (DB).

(2) Indian law of contract is similar to the English law of contract. But where the Indian law clearly lays down principles that may not be identical with the English law, the Court has to be cautious in accepting citations of English law or rulings applying that law. The duty of the Court is to apply the Indian statute literally and unambiguously. A 1952 Vindh Pra 51 (57).

(3) The definition of "good faith" in General Clauses Act would not apply to Contract Act. The definition of 'good faith' as understood generally in civil law would apply viz., that nothing is said to be done in 'good faith' which is done without due care and attention. A 1969 Bom 127 (130) (DB).

3. Illustrations to sections.— (1) The illustration to a section cannot control the plain meaning of the section itself especially when its effect would curtail a right purported to be conferred by the section. A 1917 Bom 268 (270).

(2) The illustrations are only intended to assist in construing the language of the Act. It is a mistake to be guided by the illustrations, rather than considering the wording of the sections. (1874) 22 Suth WR 367 (368) (DB).

PRELIMINARY

1. Short title.— This Act may be called THE INDIAN CONTRACT ACT, 1872.

Extent: Commencement.— It extends to the [a]whole of India [b][except the State of Jammu and Kashmir]; and it shall come into force on the first day of September, 1872.

[c][* * *] Nothing herein contained shall affect the provisions of any Statute, Act or Regulation not hereby expressly repealed, nor any usage or custom of trade, nor any incident of any contract, not inconsistent with the provisions of this Act.

[a] This Act has been declared to be in force in—the Santhal Parganas [See the Santhal Parganas Settlement Regulation (3 of 1872), S. 3]; Panth Piploda [See the Panth Piploda Laws Regulation, 1929 (1 of 1929), S. 2.]

Section 1

(1) The law of contract is the law of the place where the contract was made. Where the law of one province of British India is distinct from the law of the other province, the two provinces must be regarded for the purposes of this rule, as foreign countries inter se. A 1970 All 108 (113). (Act has no extra territorial operation.)

(2) The proper law of contract which would govern the validity, interpretation and effect of a contract of affreightment is the law by which the parties intend their contract to be governed. The expressed intention in the contract would determine the proper law of the contract. A 1951 Trav-Co 1 (3) (DB) ** **A 1961 SC 1285 (1294).**

(3) The Contract Act applies to suits between Hindus in the Calcutta Small Causes Court. **(1875) 14 Beng LR 76 (85) (DB).**

(4) The liability of common carriers in India is not affected by the Indian Contract Act, 1872. The written law relating to that liability is untouched by the Act; the unwritten law is not within its scope. **(1891) 18 Cal 620 (628) (PC).**

(5) In India the duties and liabilities of the common carrier are governed by the principles of English common law on the subject except where they have been departed by Indian Statutes. The Indian Contract Act does not cover the common carriers responsibility. A 1951 Trav-Co 1 (4) (DB) ** A 1951 Sau 83 (85).

(6) Incidence of any insurance contract in India is on the same footing as in England. Agreement is not enforceable if basis of agreement is broken. A 1959 Pat 102 (106) (DB).

(7) If the contract is illegal, foreign award made in pursuance of an arbitration clause which formed an integral part of such contract, will not be enforceable. A 1964 Mad 532 (536) (DB).

(8) The rights and liabilities arising out of a joint ownership created by Hindu law between the members of an undivided family cannot be determined exclusively by Indian Contract Act but must be considered with the general rules of Hindu law. (1880-1881) 5 Bom 38 (39) (DB).

(9) The general provisions of the Contract Act as to the rights and liabilities of undisclosed principles were not intended to alter well-established rules as to negotiable instrument. **(1907) 30 Mad 88 (92) (FB).**

(10) The rule of damduppat applies only during contractual relations of debtor and creditor. It does not apply where the contractual relation has come to an end by reason of a decree. A 1966 Nag 239 (240) (DB).

(11) Trade usage can be pleaded in conflict with the provisions of the Contract Act. Its incidents and details ought to be indicated with clearness and precision. A 1931 All 583 (583, 584) (DB) ** A 1959 Andh Pra 545 (546, 547).

(12) It is for the parties to decide on what terms contracts should be entered into and if they choose to enter into contracts with full knowledge of the commercial usage governing them, they are bound by them even if the usage does involve some conflicts between the agent's duty and interest. A 1932 Lah 633 (635) (DB).

(13) Where an agent by the trade usage sells goods, the question whether he is authorised to do so is not governed by the provisions of the Contract Act inasmuch as Section 1, Contract Act, provides that nothing therein contained shall affect any usage or custom of trade. A 1933 Lah 183 (184).

(14) By the mercantile usage prevailing in the Delhi iron market, among big merchants, no interest can be charged on the unpaid price for transactions before 1917. A 1933 Lah 127 (127).

(15) The existence of the usage of "Pakki Adat" (a local usage) must be strictly proved. A 1935 Sind 38 (40) (DB).

(16) Usage or Custom of trade not affected if not inconsistent with Act — Forward purchase — Poonam delivery — Actual delivery by Badi 1 to Badi 5 of succeeding month — Not inconsistent with Act. ILR (1970) 20 Raj 427 (DB).

(17) The Barrister's profession cannot be called a trade and therefore the exception contained in this section has no application. **A 1933 All 417 (420) (FB).**

(18) Words "not inconsistent with provisions of the Act" are not to be connected with words "usage or custom of trade." Both grammatical construction of sentence and reason of the thing require that application of these words should be confined to subject which immediately precedes them. **(1891) 18 Cal 620 (626) (PC).**

It has been declared by notification under S. 3 (a) of the Scheduled Districts Act, 1874 (14 of 1874) to be in force in the Tarai of the Province of Agra—see Gaz. of Ind., 1876, Pt. I, page 505; and in the Districts of Hazaribagh, Lohardaga and Manbhum, and Pargana Dhalbhum and the Kolhan in the District of Singbhum—See Gaz. of Ind., 1881, Pt. I, page 504. (The District of Lohardaga included at this time the present District of Palamau which was separated in 1894. The District of Lohardaga is now called the Ranchi District—See Calcutta Gazette, 1899, Pt. I, page 44). (All these districts form parts of Bihar State now.)

It has been extended to Berar by the Berar Laws Act, 1941 (4 of 1941).

This Act has been extended to the new Provinces and Merged States, by the Merged States (Laws) Act, 1949 (59 of 1949), S. 3 (1-1-1950) and to the Union Territories of Manipur and Tripura by the Union Territories (Laws) Act, 1950 (30 of 1950), S. 3 (16-4-1950). Vindhya Pradesh to which the Act was extended by this Act, now forms part of State of M. P. — See Act 37 of 1956, Section 9 (1) (e) (1-11-1956); Manipur and Tripura are States now—See Act 81 of 1971, Ss. 3, 4 (21-1-1972).

It has also been extended to the States Merged in the States of Bombay and Punjab; see Bombay Act 4 of 1950 and Punjab Act 5 of 1950 respectively. States of Bombay and Punjab have now been reorganised into two States each, namely, Maharashtra and Gujarat and Punjab and Haryana respectively—See Acts 11 of 1960 and 31 of 1966.

The Act has been amended in C. P. by C. P. Act 1 of 1915 and in C. P. and Berar by C. P. and Berar Act 15 of 1938. This latter Act, in its application to Berar i.e., Vidarbha region of Maharashtra State, has now been repealed by Maharashtra Act 26 of 1963.

It has been extended to the Union Territories of—

Dadra and Nagar Haveli by Regulation 6 of 1963 (w.e.f. 1-7-1965).

Goa, Daman and Diu by Regulation 11 of 1963 (w.e.f. 1-12-1965).

Laccadive, Minicoy and Amindivi Islands by Regulation 8 of 1965. Now known as Lakshadweep Islands—See Act 34 of 1973, S. 5 (1-11-1973).

Pondicherry by Act 26 of 1968 (18-12-1968).

[b] Substituted for "except Part B States" by the Part B States (Laws) Act, 1951 (3 of 1951), S. 3 and Schedule (1-4-1951).

[c] Words "the enactments mentioned in the schedule hereto are repealed to the extent specified in the third column thereof but" were repealed by the Repealing and Amending Act, 1914 (10 of 1914).

2. Interpretation-clause.— In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context:—

(a) When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal;

Section 1 (contd.)

(19) The rule that a person building on the land of another is 'prima facie' entitled to remove the buildings erected upon the land demised or to receive compensation, when applied to a contract of tenancy, is not inconsistent with anything in the Contract Act and therefore, is unaffected by it. (1880) 5 Cal 688 (692).

(20) Where the matter is provided by a statute the Contract Act does not apply. It is meant to cover contracts between parties and not statutory enactments. 1965 Pun LR (Supp) 170 (172).

SECTION 2 (a) — SYNOPSIS

1. Offer.
2. Invitation to offer.
3. Bids at auction sales.

1. Offer.— (1) A proposal is merely an offer to be bound by a promise. A 1939 Rang 86 (87, 88).

(2) The word 'proposal' used in the section is synonymous in English use with offer. A 1965 Andh Pra 191 (193) (DB).

(3) On 2nd September, 1957, the defendant wrote to the plaintiff as follows: 'I hereby agree to assign the said lease area of 184 acres in your favour subject to your paying me one lakh and eighty thousand rupees at your option to be decided by you within three months from this date.' This offer was revoked by the defendants by a letter dated 31st October, 1957, which reached the plaintiff on 6th November, 1957. On 1st November, 1957, the plaintiffs filed a suit to enforce the contract.

Held, the document dated 2nd September, 1957, though worded as an agreement was in point of law only an offer. A 1969 SC 1157 (1159).

(4) 'Proposal', under Section 2 (a) cannot be treated as an equivalent or synonym of

Section 2 (a) — Note 1 (contd.)

'offer' in the expression 'offer for sale or hire' appearing in Section 51 (b)(i), Copyright Act 1957. A 1969 Bom 302 (306, 307, 308).

(5) A proposal is a declaration by the proposer of his intention to be bound by an obligation if the offeree fulfils or undertakes to fulfil certain conditions. **A 1951 All 93 (98) (FB).**

(6) An offer which does not contain any particulars as to the thing offered, does not constitute a proposal properly so-called. A 1947 All 337 (338) (DB).

(7) Where person states that he is prepared to purchase the property for a 'reasonable sum' the proposal cannot be construed as an offer to purchase for any definite amount. A 1968 Ker 197 (198) (DB).

(8) The terms of an offer must be certain and the offer should be such as in law is capable of being accepted and gives rise to a legal relationship. The vagueness of an offer would not carry any contractual relationship. A 1966 Mys 118 (122) (DB).

(9) Where an instrument is so worded as to be binding only on the promisor, it is in point of law only an offer and until both parties are bound, neither party is bound. A 1922 Mad 16 (16) (DB).

(10) Tender constitutes offer. A 1966 Cal 259 (263) ** A 1978 (NOC) 211 (Cal).

(11) Where the agreement is executory on both sides with an option to one of the parties to do as he likes, there is nothing more than a standing offer. A 1922 Mad 16 (17) (DB).

(12) A 'term of the proposal' signifies a condition without the fulfilment of which the proposer is not willing to undertake the obligation. Whether a particular condition proposed amounts to a term of the proposal depends upon the intention of the proposer. **A 1951 All 93 (98) (FB).**

(13) A promise to reconvey the property within a specified period at the option of the promisor is at least an offer or option which becomes a promise enforceable at law when the offeree exercises his option and accepts the offer. A 1965 All 83 (85) (DB).

(14) When the offer of any payment is subject to any condition, the payment has to be accepted with the condition imposed and it is not permissible in law to accept the payment and ignore the condition. It is always open to a person to elect to accept or not to accept with that condition. A 1962 Pat 372 (377) (DB).

(15) A letter requesting a loan and promising to repay with interest by a certain date is not a promissory note but a mere proposal. (1923) 71 Ind Cas 968 (969) (Pesh) **(1889) 13 Bom 669 (670) (DB).

[But see (1893) 16 Mad 283 (283) (DB).]

(16) Where a party sent a transfer deed for sale of certain shares to a Railway administration accompanied by letter which requested the Railway to pay him any amount which it thought just and reasonable and contained a further assurance that the Railway was not bound to make the purchase it was held that there was only an offer to the Railway to purchase the shares and not out-right sale. (1958) 28 Com Cas 29 (33, 34) (Punj).

(17) Where a person went to the office of a public servant and told him that he would pay him a certain amount if a certain order was obtained for him the very same day it was held that his conduct amounted to an offer of a bribe even though he did not actually produce the money at the time. A 1955 Bom 61 (62) (DB).

(18) A letter by the Railway company signifying its readiness to pay a certain sum to the consignor in satisfaction of his claim was held not to contain a promise to pay the amount but to contain only an offer to settle the claim at that amount. A 1920 All 157 (158).

(19) Where a party in order to deposit money in a bank obtains the necessary forms from the bank, fills them up and sends the necessary money to the bank he makes the real offer and the acceptance of that which is to be by the bank takes place when it issues the deposit receipt. **A 1942 PC 6 (7).**

(20) A person by telegraphing a commission agent to buy certain number of silver bars and keep them with him offers the business of buying the bars as commission agent and keeping them pending instructions as to delivery. A 1939 Bom 101 (102, 103) (DB).

(21) A circular by a bank to its debtors which does not signify to them its intention to raise the rate of interest with a view to obtaining their consent to the increase but only intimates to them its unilateral decision to enhance the rate as from the date of the notice cannot be said to be proposal as defined in Section 2 (a). A 1958 Cal 644 (646).

(22) A term in a partition deed that in the event of anyone of the brothers wishing to sell his share of the house he should sell it to the other brothers at the market value is not an offer itself but merely an undertaking to make an offer of sale upon the arising of certain contingency. A 1951 Mad 396 (396).

(23) Where the Honorary Secretary of a bank had an informal talk with a person to enquire whether he would purchase a land belonging to the bank on certain conditions but not as representing the bank and later made a report to the bank that the person had assured to purchase the land it was held that what took place between the two was only an enquiry on the one hand and an assurance on the other. It could not amount either to an offer or a contract. A 1949 Nag 286 (288).

(24) Informal discussions by interested persons and Court of Wards, culminating in Court of Wards passing a resolution that if possible compromise should be effected in terms arrived at the discussion does not amount to an offer or an acceptance of an offer. The stage of making an offer and getting the acceptance would follow passing of the resolution. A 1941 Oudh 529 (539).

(25) Where tenders are called for different commodities together, the fact that quotations in respect of only one commo-

Section 2 (a) — Note 1 (contd.)

dity has been accepted would not amount to fresh offer in respect of other commodities making it obligatory to call for fresh tenders in respect thereof. A 1962 Manipur 47 (51, 52).

(26) Where one person by a letter asks the consent of another to a certain transaction without stating the consideration, it does not become an offer. 1913 Pun LR No. 277, p. 929 (930) (DB).

(27) In a suit where plaintiffs based their claim on a contract alleged to arise out of an offer made by the manager of defendants who said in a suit that if the plaintiffs took into account a certain havala he would have to pay a certain amount to the plaintiffs, it was held that the statement only amounts to an expresssion of the consequences in law and not an offer. **(1936) 162 Ind Cas 327 (328, 329) (PC).**

(28) If the party to whom the offer is communicated by a party in Bombay resides or carries on business outside the jurisdiction of the Bombay High Court, the offer cannot be said to have been made within Bombay and therefore no part of cause of action in respect of that transaction can be said to have arisen within the jurisdiction of the Bombay High Court. A 1951 Bom 249 (252).

(29) Condition that tenderer should deposit money at any of the branches of Reserve Bank — Tenderer depositing money at Branch C a place within jurisdiction of Court — Tender accompanied by deposit receipt lodged at B, a place outside Court's jurisdiction as required by terms of contract — Acceptance of tender at B and execution of formal document of contract at B — Court at C held had no jurisdiction to try suit on the contract. A 1966 Cal 259 (263).

(30) Telegram by defendant from Gorakhpur to plaintiff communicating the rates of Tora — Plaintiff at Forbesganj writing to defendant to purchase certain quantity of tora — The defendant accordingly purchasing and communicating the fact of purchase — The contract was completed at Gorakhpur on the date when the Telegram of purchase was dispatched, plaintiff's letter to the defendant to purchase tora was an offer and the communication of purchase by defendant was an acceptance of the offer — A suit on the contract would not lie in a Court which has jurisdiction over Forbesganj. A 1970 Pat 91 (93) (DB).

(31) Offer and acceptance — Tender form including clause for arbitration with choice to tenderer either to refuse or to accept arbitration — Tenderer submitting tender for supply but rejecting arbitration — Tender is an 'offer' only for supply — Government sending letter of acceptance and again introducing arbitration clause — It amounts to counter offer of arbitration clause. ILR (1975) 2 Delhi 420 (424).

2. Invitation to offer.— (1) A catalogue of the goods of a Company for sale is not a series of offers but only an invitation for offers. A person ordering a certain article is the offeror and the Company is the acceptor. (1909) 12 Oudh Cas 17 (20).

(2) When a merchant or commission agent sends his quotations or terms of business it is not an offer but merely an intimation on his part of his readiness to transact business on those terms. The addition of the words "let us have your transaction once" will not convert it into an offer. A 1938 Nag 186 (188) ** ILR (1954) 4 Raj 252 (256) ** 56 Bom 324 (DB) ** A 1922 Lah 100 (101) ** A 1920 Mad 177 (179) (DB).

(3) Telegraphing lowest price on request is not tantamount to an offer but a mere invitation for an offer. A 1914 Low Bur 236 (237) (DB).

(4) A tender notice means only an invitation extended to the contractors for making offers. It does not amount to an offer or proposal. A 1962 Manipur 47 (50). ** (1974) 1 WLN (UC) 37 (Raj).

(5) Where a person in reply to an offer to buy his property at a certain figure states the he would not sell the property for anything less than a certain amount he thereby merely invites offers and does not make any offer to sell at the price mentiond by him as the minimum. **A 1951 SC 184 (185, 186)**

(6) A bank by sending on request by a party, certain forms to be filled in by him if he proposed to deposit money with it only sends a quotation and not an offer to the party. **A 1942 PC 6 (7).**

(7) Where an advertisement in a newspaper by Railway Company invited tenders for certain contract and was not addressed to any particular person it was held that the advertisement did not constitute a proposal. A 1939 Oudh 249 (252) (DB).

(8) Notice inviting tenders is merely general invitation to make offer. 1966 All LJ 1118.

(9) Letter communicating willingness to sell at a price in reply to an enquiry whether the property is for sale, amounts to an offer and is not merely an invitation to an offer. A 1936 Cal 87 (89) (DB) ** (1964) 77 Mad LW 458 (2).

(10) In cases of invitations for orders a contract would come into being only when the invitee places an order and the invitor accepts the same. **A 1954 SC 236 (238).**

3. Bids at auction sales.— (1) A bidder at an auction merely makes an offer to buy which he can withdraw until it is accepted. A 1922 Mad 486 (491) (DB) ** (1913) 19 Ind Cas 904 (905) (Cal) ** A 1965 Andh Pra 191 (193) (DB) ** 1965 MPLJ 108 (DB) ** A 1962 Mys 185 (187) (DB) ** A 1973 Madh Pra 24 (25) (DB).

(2) The highest bid at an auction sale held subject to the condition that the sale will not be confirmed until receipt of orders from the Collector amounts only to an offer which could when accepted by the Collector become a concluded contract. The endorsement of the officer conducting the sale at the end of the bidding list stating that the sale has been concluded in favour of the highest bidder cannot override that condition and bring about a concluded contract in the absence of the Collector's order. A 1923 Mad 582 (582, 583) (DB).

(b) When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise;

Section 2 (a) — Note 3 (contd.)

(3) Forest auction sale — Highest bid accepted subject to confirmation by competent authority — No confirmation by authority — The bid not having been culminated into a binding contract between the parties, the bidder cannot challenge the settlement made by the Government in favour of a third party. A 1975 Orissa 33 (34) (DB) ((1970) 1 Andh WR 342 Diss.)

Section 2 (b)

(1) The word 'promise' in the Act is used in a narrow sense to mean an accepted proposal. A 1939 Rang 86 (87, 88).

(2) Definition of 'promise' shows that there must not only be a proposal but there must also be an acceptance of the proposal by other side. Conditional offer rejected by other party does not amount to a promise within Sec. 25 (3). A 1964 Orissa 111 (113) (DB).

(3) 'Promise' defined under clause (b) is not the same thing as an agreement which is defined under clause (e). A 1948 Sind 91 (93) (DB).

(4) When the parties negotiate a contract orally in the presence of each other or over telephone and one of them makes an oral offer, in making the oral acceptance the acceptor must ensure that his acceptance is audible, heard and understood by the offeror. The acceptance must be by such words which have effect of communicating it. A 1959 Madh Pra 234 (237).

(5) After a proposal has been accepted and there is promise the promisor cannot resile from the promise. A 1925 All 271 (271, 272) (DB) ** A 1962 Pat 372 (377) (DB).

(6) Tender is an offer which is accepted when tender is accepted. Offer after acceptance becomes promise. 1966 All LJ 1118.

(7) A binding promise can be inferred from the circumstances of a case. A 1934 All 271 (272). ** A 1959 Orissa 301 (304) ** A 1959 Madh Pra 234 (237).

(8) An offer which is not accepted cannot bind the offeror especially when the contract was intended to be reduced into writing. **A 1955 SC 468 (476).**

(9) An offer unless accepted by the offeree cannot bind him with any obligation. Thus the mere making of an offer at the first opportunity to buy a property in the event of its sale by the offeror cannot compel the offeree unless he accepts the offer to buy the property when it is sold. A 1925 Mad 120 (121).

(10) An offer made during negotiations is no more than an offer and unless it is accepted, it cannot ripen into a completed contract binding on the offeree. **(1970) 2 Lab LJ 576 (581) (SC).**

(11) Seeking clarification of offer — Neither amounts to the acceptance of the offer nor to the making of a counter offer. A 1977 All 494 (496) (DB).

(12) Acceptance of offer must be absolute and unconditional. **A 1962 SC 378 (385).**

(13) Tender constitutes an offer which after acceptance and being embodied in a formal document becomes a contract. A 1966 Cal 259 (263).

(14) Tender — Material terms settled by the time of acceptance of tender — Contract becomes concluded even if tenderer required to execute an agreement after acceptance of his tender. **A 1974 Mad 39 (42).**

(15) An offer is accepted when acceptance is made in manner prescribed or indicated by the offeror. Where a bid is reserved for acceptance of the person who puts the property for sale by auction it is implicit that acceptance must, in the absence of any agreement to the contrary be communicated to the offeror. 1957 Nag LJ 637 : 60 Bom LR 189.

(16) Bids for right to collect Tehbazari dues were offers — Bid knocked down as the highest and confirmed by a resolution of Municipality was acceptance. A 1980 All 143 (144).

(17) A conditional offer lapses when the condition is not accepted by the offeree. **A 1957 SC 95 (102).**

(18) Refusal to accept proposal to purchase — Not communicated for long time — Party not bound to purchase. 1971 WLN 31 (DB) (Raj).

(19) Acceptance of offer by telegram is valid. A 1963 Punj 372 (375).

(19-A) Where an offer is made subject to condition and that offer is accepted, the person accepting the offer must be presumed to have accepted it with the condition so attached and he cannot be heard to say that though he accepted the offer he was not bound by the condition. A 1960 Pat 139 (143, 144).

(20) Offeree expressing non-acceptance of condition as modified by the offeror, by itself is no rejection of original offer. A 1977 All 494 (497) (DB).

(21) Where a person receiving an offer through a letter remains silent he connot be taken to have accepted it by his silence. A 1941 Rang 270 (272).

(22) A entering into certain forward transactions with B with agreement that contract forms if not returned unsigned with letter will be deemed to have been accepted — A retaining contract forms — **Held** A's conduct in not returning contract forms amounted to acceptance of proposal — **Held** further contract forms being in writing and prescribing compulsory arbitration amounted to arbitration agreement. A 1968 All 292 (295).

(23) The quotation of rates offered by a contractor, in response to tender notice, does not amount to an acceptance of offer. It is by the acceptance of any of the offers or proposals by the person calling for tenders that it becomes a promise or an agreement. A 1962 Manipur 47 (50).

(24) Where a vendor of certain properties subject to pre-emption offered to sell them to his co-sharers by a notice and the co-

(c) The person making the proposal is called the "promisor", and the person accepting the proposal is called the "promisee";

Section 2 (b) (contd.)

sharers remained silent without expressing willingness to buy, it was held that the co-shares' conduct amounted to a refusal to buy. A 1919 All 340 (342) (DB).

(25) There cannot be an acceptance of an offer which has not come to the knowledge of the offeree. (1913) 11 All LJ 489 (492) ** (1959) 63 Cal WN 158 (DB).

(26) Business offer — Not usual to accept it by a plaint — Acceptance cannot be by serving copy of plaint in a suit for specific performance through Court. **A 1969 SC 1157 (1159).**

(27) Reward offered for the search of a missing boy for whose search a servant was already sent cannot be claimed by the servant though he found the boy out; the servant did not undertake the search with knowledge of the offer and finding out by him does not amount to acceptance by conduct. (1913) 11 All LJ 489 (493).

(28) Notification issued by Government introducing system of minimum consumption of electricity and rate charged thereon. Respondents although protesting against the introduction of new system continuing to take electrical energy. Respondents by their conduct accepted the terms notified in the notification. A 1968 Pat 171 (DB).

(29) The mere writing on bills of medical practitioners that interest at 1 per cent. per mensem will be charged cannot amount to a contract. A 1941 Oudh 254 (256, 257): 16 Luck 701 (DB).

(30) No single party can impose any term of contract upon the other, unless it is agreed to by the other party. Merely because the letter on the top of which 'subject to Madras jurisdiction' was printed, it could not become part of contract unless it was agreed to by addressee. A 1968 Andh Pra 330 (332): (1967) 1 Andh WR 445.

(31) An offer unless it is communicated to the other party is not capable of acceptance. Hence, where a party merely makes a mental resolve to make an offer but does not communicate it he cannot be said to have made any offer. A 1949 Nag 286 (288)

(32) Where a letter addressed to a member of a Company offered him new shares and in the event of his renouncing, to his nominee and on the member's renouncing the nominee accepted the shares, it was held that a contract with the nominee was concluded even though the offer was made in the letter to the member. A 1938 Cal 423 (428)

(33) Before a party can be said to accept something other than the performance of the contract he must have the option to refuse to accept such satisfaction and to insist on performance as stipulated. ILR (1937) 1 Cal 757 (763).

(34) Where there was an offer by a letter which was accepted by a minute of the Company which did not incorporate all the terms contained in the letter, it was held that the only binding contract was that contained in the minute. **A 1914 PC 48 (48).**

(34-A) Where intention of offeror was to sell all the properties at a uniform rate of price offeree cannot accept a portion of it and claim specific performance of that portion of contract. 1913 Punj LR No. 277, page 929 (932, 933) (DB).

(35) Where he plaintiff accepts the offer of the defendant to sell but seeks to add a further term, which the defendant refused to consider at the same time repeating the offer previously made, and the plaintiff accepts the offer, the transaction of contract is complete and binding on the defendant. A 1938 Cal 343 (346) ** (1963) 65 Punj LR 681 ** A 1961 Ker 21 (22) (DB).

(36) If the making of the contract be part of the cause of action, it follows that the act of concurrence of either party which is essential to the contract, is itself a part of the cause of action, for without such act of concurrence the contract cannot come into existence. A 1931 Cal 659 (662) (DB).

(37) On 2nd September 1957, defendants wrote to plaintiff as follows: 'I hereby agree to assign the said lease area of 184 acres in your favour subject to your paying me one lakh and eighty thousand rupees at your option to be decided by you within three months from this date." This offer was revoked by defendant by letter dated 31st, October 1957, which reached plaintiff's on 6th November 1957. On 1st November 1957, plaintiff filed suit to enforce his contract **Held:** the promise to keep offer open for 3 months was not supported by any consideration and defendant was at liberty to revoke the offer at any time before its acceptance by plaintiff. Such revocation was made by letter dated 31-10-1957 which reached plaintiff by 6-11-1957 before which date plaintiff did not accept the offer either orally or by any letter sent to defendant. **A 1969 SC 1157 (1159).**

(38) Where the offeree wrote to the offeror that defects in the tender submitted may be rectified so that it may be fit for consideration, it was only an opportunity given to the offeror and not a counter offer. A 1977 All 494 (497) (DB).

Section 2 (c)

(1) Under Section 2 (c) a 'promisor' or a promisee is a 'person' and considering the object of the Act the word 'person' must be given such an extended sense that it will include governments also. A 1956 All 383 (384) (DB).

(2) No man can in his own right be under any obligation to himself. Therefore where hat-chita is executed by a person in favour of himself and some others, such person cannot in law become a promisee and the portion of the debt due to himself will stand discharged by the doctrine of merger. A 1941 Cal 595 (597) (DB).

(3) The heirs of a promisee merely because they may be entitled to claim what their ancestor could have claimed do not become the promisees themselves. Similarly an assignee of a promisee does not become the promisee himself simply because he could claim what his transferor himself could have claimed. A 1939 Mad 818 (821) (DB).

(4) The promisee must include the representative of a deceased promisee as a person

(d) When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise;

Section 2 (c) (contd.)

to whom the offer of performance can be made. (1908) 4 Mad LT 335 (336).

(5) There can be no agreement to form a partnership by the same person acting in different capacity. He cannot be both the promisor and the promisee. A 1957 Mad 8 (12).

(6) At a meeting between the mortgagees and the family of A and B who were the co-mortgagors it was agreed that A and B should execute a sale deed in favour of the mortgagees in respect of certain properties including the mortgaged properties. It was also agreed that the mortgagees would reconvey the properties to B's wife provided she paid the expenses of reconveyance. The mortgagors subsequently sent a letter to the mortgagees stating these terms to which the mortgagees replied accepting the arrangement and stating that they would reconvey the mortgaged items at the cost of mortgagors. It was held that the promisee under the arrangement was the wife of B and that was in no way affected by the statement in the letter of acceptance that the property would be reconveyed at the cost of mortgagors on their demand. **A 1953 SC 443 (446).**

SECTION 2 (d) — SYNOPSIS

1. "At the desire of the promisor."
2. Consideration need not be to the benefit of the promisor.
3. Consideration may proceed from third party.
4. Compromise as consideration.
5. Consideration to one co-promisor is consideration to all.
6. Essentials of consideration.
7. Evidence as to consideration.
8. Forbearance.
9. Future promise as consideration.
10. Consideration for a promise to pay subscription.
11. Past consideration.
12. Suit by strangers to contract.

1. "At the desire of the promisor."— (1) The words "at the desire of the promisor" in Section 2 do not necessarily contemplate a promisor who, at the time, possesses contractual liability. (1906) 16 Mad LJ 422 (423) (DB).

(2) Promise to pay at some indefinite time is no promise made "at the desire of promisor." The words 'at the desire of the promisor' imply a promise which has a real effect conducing to the contract. A 1926 Bom 54 (54, 55) (DB).

(3) Where the plaintiff company under an agreement with the joint grantees of a mining concession undertook to manage and develop the right comprised in the licence for remuneration and also agreed to finance the concern and recover the amount from the sale proceeds of the ores shipped or disposed of, it was held that any advance that the plaintiff company made was not done at the request of the concession holders but was made in consideration of the agreement. (1912) 17 Ind Cas 256 (257) (DB) (Mad).

(4) Coal was consigned to company by colliery on orders and sanction of Deputy Coal Commissioner (Distribution) under Colliery Control Order, 1945. An order intimating the same and sanction of a priority supply of wagons for transport of the Coal was intimated to Eastern Railway — Coal was loaded by the colliery — Colliery was acting as an agent of the company for the purpose of arranging for transport of coal in which the property had under orders of Coal Commissioner passed to the company — Company was liable for demurrage. **A 1969 SC 193 (197).**

(5) Where a depositor drew a cheque upon a bank for an amount bigger than there was money to his credit and the bank had to pay the amount of the cheque because of their own mistake and not because there was any request from the depositor to honour his cheque, it was held that there was no consideration for the promise to pay the amount paid out by mistake by the bank obtained from the depositor subsequently and by misrepresentation of facts also. A 1958 Andh Pra 605 (607).

(6) Where the defendant promised to bring a thakur to plaintiff's house on a certain day but there was no evidence that he had asked the plaintiff to invite guests and feed them in consideration of his promise to bring the thakur, it was held that his promise being not one supported by consideration he was not liable for damages for the breacn of the promise. A 1929 Cal 369 (370).

(7) By an agreement in writing the defendants promised to pay the plaintiff a commission on articles sold in a market Huma Ganj, in consideration of plaintiff having expended money in construction of the Ganj. Plaintiff constructed Ganj at the request of the Collector. In a suit filed by plaintiff to establish the agreement, it was held that the construction of Ganj was not "at the desire" of defendants so as to constitute a consideration as defined in Section 2 (d) and the agreement was therefore void for want of consideration. (1881) 3 All 221 (228) (DB).

(8) Where A executed a patta in favour of B on receipt of selami and execution of a kabuliat by B agreeing to pay rent to A and B in the course of the same day executed an ekrarnama undertaking to convey and release his interest on repayment of the amount paid as selami within six years, it was held that as the act of granting lease by A was done at the desire of the promisor B under the ekrarnama the promise of B to convey was supported by consideration. A 1957 Cal 92 (94) (DB).

(9) Where a person advanced money to the son on an undertaking given by the father and obtained promissory notes for the amount advanced it was held that these pronotes were without consideraion inasmuch as the advances were not made at the desire of the son who was the promisor under these pronotes. **A 1948 PC 150 (155).**

Section 2 (d) — Note 1 (contd.)

(10) Where one N performed the loilena ceremony of J's daughter and although it was not clear as to who asked her to perform it there was little doubt that she insisted on getting a village for performing it and J who refused to give her a village however agreed to pay a guzara, it was held that she performed the ceremony at the desire of J and that his promise to pay guzara was in consideration of that. 1950 All LJ 168 (172) (DB).

2. Consideration need not be to the benefit of the promisor.— (1) It is not necessary that promisor should benefit by consideration. A 1926 Nag 149 (151) ** A 1934 All 271 (272) ** 1967 Raj LW 383.

(2) Consideration need not be to the benefit of the promisor — The fact that the money borrowed under a pronote was not used by its executant but by another for whose use it had been borrowed by the executant does not mean that so far as the executant is concerned the pronote is not supported by consideration. **1969 Mer LR 34 (SC).**

(3) If the promisee does some act by which a third person is benefited which he would not have done but for the promise the consideration is sufficient. A 1918 Cal 816 (816): 45 Cal 774 (DB) ** A 1934 All 271 (272).

(4) Agreement to pay money to third person is valid consideration for contract. (1809) 1 Ind Cas 572 (572, 573) (DB) (Cal).

(5) An agreement to pay a debt due from a third person is supported by good consideration and can be enforced against the promisor. A 1937 Lah 484 (484).

(6) Promise to perform existing contract with third person can be good and valid consideration for another contract. A 1970 Madh Pra 40 (47, 49).

(7) The release by the creditor of the original debtor on the undertaking given by another to pay the debt furnishes good consideration for the contract which the new debtor enters into with the creditor. A 1934 Lah 789 (790).

(8) Where a municipality accepting the offer of the government to bear half costs introduced the scheme of compulsory and free education it was held that there was an agreement with the government supported by consideration which consisted in the advantage gained by a section of the Government's subjects. A 1934 Bom 277 (281, 282).

(9) The rule regarding lack of mutuality is not without exceptions or apparent exceptions; one such exception is of a contract where one party has an option by the exercise of which the other party, becomes bound to perform his part.' A 1967 Mad 375 (379) (DB).

(10) An agreement to reconvey was supported by the element of mutuality. A 1964 Mad 219 (220, 221) (DB).

3. Consideration may proceed from third party.— (1) The consideration for a promise need not necessarily move from the promisee but may move from a third party. A 1939 Pat 477 (485) (DB) ** A 1940 Rang 91 (93) ** A 1936 Bom 344 (351) (DB) ** A 1930 All 434 (436) (DB) ** A 1923 Mad 434 (435) ** (1883) 6 Mad 351 (354) (DB) ** (1965) 2 Mad LJ 329.

(2) The general rule is that although consideration for an agreement may proceed from third party, stranger to the agreement cannot sue upon it. A 1943 Sind 190 (192) (DB) ** A 1957 Bom 276 (279) ** A 1957 Punj 169 (170) ** A 1953 Cal 366 (367) ** 56 Cal WN (4DR) 91 (97) ** ILR (1945) Nag 581 (DB) ** A 1945 Nag 60 (63) ** ILR (1941) 2 Cal 576 (DB) ** A 1938 Rang 35 (38) ** A 1935 Lah 354 (357) (DB) * *A 1932 Mad 457 (457) (DB).

[See also A 1956 Mad 316 (319) (DB) ** A 1957 Trav-Co 189 (192) ** A 1947 All 110 (114) (DB).]

[But see A 1931 Pat 114 (125) (DB) (Person having beneficial interest under contract can sue in equity to enforce although he himself is stranger to contract.) ** A 1939 Pat 194 (196) (DB) ** A 1936 Cal 67 (68) (DB) ** 164 Ind Cas 477 (481) (DB) (Cal) ** A 1934 Cal 682 (696) (DB) ** A 1932 Lah 566 (570) (DB).]

(3) In marine insurance broker's undertaking to pay premium is consideration though it moves from a third person. A 1926 Bom 82 (85).

(4) A family arrangement may be upheld even if the consideration moves from a third party. A 1954 Orissa 80 (84) (DB).

(5) A single consideration may support more than one promise and may move from the promisee or any other person. A 1957 Cal 92 (95) (DB).

(6) A consideration moving from third party who is a minor is no consideration. A 1949 Bom 215 (217).

4. Compromise as consideration.— (1) The compromise of doubtful rights is a sufficient basis of and forms a sufficient consideration for the agreement. A 1935 Cal 263 (266) (DB) ** **A 1918 PC 287 (291) ** A 1925 Pat 68 (94) (FB)** ** A 1957 Assam 10 (13) (DB) ** A 1937 Lah 708 (709) ** A 1934 Oudh 442 (2) (444) ** A 1960 All 446 (448).

(2) Family arrangement as such can be arrived at orally. Its terms may be recorded in writing as a memorandum of what had been agreed upon. **A 1966 SC 292 (295).**

(3) Parties can arrange to avoid necessity for legal proceedings and such arrangement is supported by sufficient consideration. (1809) 4 Ind Cas 513 (516). (DB) (Cal) ** A A 1934 Lah 163 (163).

(4) No doubt a family arrangement which is for the benefit of the family generally can be enforced in a Court of law. But before the Court would do so, it must be shown that there was an occasion for effecting a family arrangement and that it was acted upon. **A 1965 SC 825 (828).**

(5) Courts give effect to a family settlement upon the broad and general ground that its object is to settle existing or future disputes regarding property amongst members of a family. The word 'family' in the context is not to be understood in a narrow sense of being a group of persons who are recognised in law as having a right of succession or having a claim to a share in the property in dispute. **A 1966 SC 323 (329).**

(6) The consideration for the family arrangement may be preservation of the family property, preservation of the peace and honour of the family or the avoidance of litigation. A 1954 Orissa 80 (84) (DB) **

Section 2 (d) — Note 4 (contd.)
A 1959 All 473 (481) (DB) ** A 1959 Assam 109 (110) (DB) ** A 1959 Punj 434 (439) (DB) ** ILR (1959) 9 Raj 253.

(7) Family settlement entered into, to avoid the possibility of a future dispute, is supported by consideration. **A 1919 Oudh 105 (109) (FB)** ** A 1964 Andh Pra 326 (329) (DB) ** A 1959 All 473 (481, 482) (DB). (Family settlement does not involve any sort of transfer.)

(8) If bona fide disputes, present or possible which may not involve legal claims are settled by a bona fide family arrangement which is fair and equitable the family arrangement is final and binding on the parties to the settlement. **A 1976 SC 807 (813).**

(9) For the validity of a family arrangement where there are no family disputes to be settled it is also essential that there must be mutuality in the agreement arrived at between the parties; that is to say, some consideration, howsoever small, must pass from the side of the person upon whom a right in property is sought to be conferred and mere love or affection between the members of the family is not enough. A 1965 Pat 87 (91, 92) (DB).

(10) A family arrangement to be good need not necessarily be a compromise of doubtful rights. A 1959 All 473 (481) (DB).

(11) Settlement of a doubtful claim for maintenance is not void for want of consideration. A 1931 Nag 197 (198).

(12) 'Valuable consideration' does not mean sufficient consideration. Transfer for consideration, whatever its extent, will be for valuable consideration in the eye of law. 1966 BLJR 739.

(13) Composition followed by partial acceptance is consideration. A 1929 Sind 153 (154) (DB).

(14) In a suit based on an agreement recording a compromise arrived at between the parties for the settlement of outstanding disputes in relation to the estate of deceased person, the question whether any consideration moved from the plaintiff to support the agreement depends upon whether he had a bona fide claim to the property which was the subject of the agreement of compromise. **A 1948 PC 7 (7).**

(15) Compromise is agreement to put an end to dispute and to terminate or avoid litigation, and real consideration is not sacrifice of right but abandonment of claim. **A 1916 Cal 843 (857) (FB)** ** A 1933 Pat 306 (396) (DB) ** (1909) 1 Ind Cas 573 (579) (DB) (Cal).

(16) If there was a compromise of the dispute between the parties in order to render the compromise valid it is not necessary in law for either party to relinquish his rights because the very fact that parties enter into a compromise for the purpose of peace and avoiding litigation is consideration for the compromise. (1909) 4 Ind Cas 133 (2) (134) (DB) (Bom) ** A 1959 Assam 109 (111) (DB).

(17) A compromise of litigation by way of family settlement is in no sense an alienation. **A 1966 SC 323 (329).**

(18) Where three brothers and their mother were parties to a family arrangement orally and an agreement incorporates the statements of the three brothers only the fact that mother's statement was not recorded in the agreement does not invalidate the arrangement. **A 1966 SC 292 (294).**

(19) Evidence may be led in to show that the real consideration for a deed of agreement is the settlement of doubtful rights. A 1935 Cal 368 (384) (DB).

(20) A settlement of accounts is a good consideration for a fresh agreement to pay the ascertained amount. 1949 Jaipur LR 161 (165) (DB).

(21) Where a promissory note was executed for a consideration of the debt due on accounts the fact that the amount was not credited in the accounts does not make it void of consideration. A 1950 Kutch 24 (26, 27).

5. Consideration to one co-promisor is consideration to all.— (1) Consideration paid to one of several joint promisors is sufficient consideration to support a promise to pay made by others. A 1914 Mad 41 (41) (DB) ** A 1929 Lah 466 (467) ** A 1928 Bom 316 (318) (DB) ** A 1926 Nag 149 (152) ** A 1922 Mad 23 (24) (DB) ** (1962) 2 Andh WR 276 (278) (DB).

6. Essentials of consideration.— (1) Consideration is what moves from the promisee whether it be an advantage to the promisor or detriment suffered by the promisee. A 1936 Mad 978 (980) (DB).

(2) To constitute consideration, there must be an act, abstinence or promise on the part of promisee or some other person at the desire of promisor. (1875-77) 1 All 309 (311) (DB).

(3) Consideration is what a party gets in return for what it gives to the other party under a contract. (1974) 76 Bom LR 156 (162).

(4) The defendant (promisor) entered into an agreement to sell the suit land to the plaintiff, (promisee) "when the latter would pay a certain sum to the former." The expression when the plaintiff (promisee) would pay a certain sum to the defendant (promisor) does not mean a firm and unequivocal obligation on the part of the plaintiff to pay the amount "at the desire of the promisor." Thus, the agreement does not constitute consideration and is therefore void. (1973) 14 Guj LR 498.

(5) Reciprocity of obligations is not of the essence of consideration. An Act done or forbearance made in return for a unilateral promise is a sufficient consideration to support the promise. A 1957 Cal 92 (94) (DB) ** A 1943 Oudh 89 (90).

(6) A consideration to be valid must be "good or valuable" in the sense in which these words appear in English Law though these words do not appear in the Contract Act which speaks only of unlawful and lawful considerations. A 1915 Mad 528 (529) (DB).

(7) Consideration means something which is of some value in the eye of law. It must be real and not illusory, adequate or not, adequacy being a matter purely for contracting parties to decide and to agree upon. Alienation requiring alienee to discharge debts and maintain wife of alienor, is for value. A 1961 Mad 405 (407).

(8) A consideration must be valuable and not superficial: it must be material and

Section 2 (d) — Note 6 (contd.)
not sentimental or imaginary. It must be a material detriment to the promisee or a benefit to the promisor. 1977 Rajdhani LR 26 (27).

(9) A valuable consideration may consist either in some right, interest or profit accruing to one party or some loss or responsibility suffered or undertaken by other. A 1918 Bom 183 (184) (DB).

(10) The expression "valuable" is implied. Consideration shall be "something which not only parties regard but the law can regard as having some value; consideration may be negative or positive. Where the mortgagees under a trust were obliged to pay certain sum to charity and in discharge of such obligation they transferred the mortgage interest to charity, the transfer was held to be for valuable consideration. **A 1966 SC 193 (197).**

(11) The consideration required to support a promise may consist of any damage or any suspension or forbearance of his right or any possibility of a loss occasioned to the plaintiff by the promise of another, though no actual benefit accrues to the promisee. A 1918 Mad 311 (312) (DB).

(12) A meritorious and a gratuitous consideration such as natural love and affection or obedience and submission by way of respect cannot be a good consideration or valuable consideration. A 1955 Pat 458 (462) (DB) ** **A 1979 SC 843** ** 1977 All WC 531 (533).

(13) The legal term 'consideration' does not mean payment of money only. Where a person executes a handnote in favour of a Bank on the basis of which he receives a substantial benefit of having current overdraft account with the Bank, the handnote cannot be said to be without consideration. A 1953 Tripura 10 (10).

[**See also A 1950 All 632 (636, 637) (DB).** ("Price" is not necessarily cash consideration. Sale deed executed partly for arrears of maintenance and partly for the chargeholder surrendering her right the entire consideration is one which could not be expressed in terms of money.)]

(14) Promise to perform existing contract with third person can be good and valid consideration for another contract. A 1970 Madh Pra 40 (49).

(15) Promise to marry is valuable consideration. A 1970 Mad 113 (116).

(16) The mere doing of a thing which a person is already legally bound to do is no consideration for a new promise in his favour. A 1915 Mad 528 (529) (DB) ** A 1954 Orissa 80 (84) (DB) ** A 1933 All 511 (512).

(17) Where the mortgagors are already under a legal obligation by virtue of the terms of the mortgage, to pay the interest due regularly, a fresh undertaking to pay that interest regularly cannot form a good consideration for an agreement for reduction of the rate of interest payable. A 1948 Oudh 152 (154) (DB).

(18) The grant of a permit to an association to extract limestone cannot constitute any consideration in law if it confers no right on the association which it did not already possess under its prospecting licence. A 1954 All 393 (397) (DB).

(19) Motive is distinct from and therefore cannot become the consideration for a contract. A 1936 Mad 978 (980) ** A 1926 Cal 59 (63) (DB). (Amount paid so that complainant may drop a criminal prosecution for embezzlement was not consideration for dropping down the prosecution but provided only a motive.)

(20) Consideration and motive — Relinquishment by sons of their coparcenery interest in property in favour of father — Father to give up his right to receive monthly amount from sons — Father's giving up right held not consideration but motive. A 1970 Mys 270 (276) (DB).

(21) A single consideration cannot be made by force of the definition in the Contract Act, to support an indefinite series of subsequent contracts. (1910) 8 Ind Cas 302 (2) (305) (Mad) ** **A 1928 All 440 (441) (FB).** (Consideration received by a minor cannot be good consideration for fresh promise by him after attaining majority.)

(22) Suit for recovery of amount due on Bahi accounts against N brother of G. G opened accounts and died subsequently. His estate came into the possession of N. N had gone into account books, acknowledged their correctness and undertook to pay interest but subsequently pleaded want of consideration. **Held,** that undertaking to pay the amount due on the accounts by N discharges the estate of G from liability and that it was a sufficient consideration. A 1932 Lah 135 (136) (DB).

(23) An option to repurchase reserved to a vendor under a conveyance can be regarded as an irrevocable offer by the vendee to reconvey the property on the terms and conditions specified therein. The consideration for such an offer is the benefit received by the vendee under the original conveyance. A 1965 Mad 506 (507) (DB).

(24) Sale-deed with condition to reconvey land — Ostensible sale itself is consideration for agreement to recovery and agreement is valid. A 1974 Guj 19 (23).

(25) An undertaking given by the mortgagee in the mortgage deed to pay off the debts of the mortgagor constitutes good and sufficient consideration for the mortgage so far as the mortgagor is concerned. A 1943 Mad 77 (78).

(26) Agreement to reconvey was supported by consideration since the sale itself formed the content of consideration. A 1964 Mad 219 (220, 221) (DB).

(27) Where, under a compromise, a party received certain advantages by paying some amount to the other party, such payment could not be said to be without consideration. A 1960 Raj 237 (240).

(28) A mortgage executed by a major in consideration of the mortgagee paying off certain debts incurred by the mortgagor during his minority is a perfectly valid transaction supported by good consideration. A 1933 All 659 (660) (DB).

(29) Where a creditor takes a mortgage in favour of his wife in lieu of the money due to him from the debtor under certain simple bonds it results in those bonds becoming unenforceable and therefore, there

Section 2 (d) — Note 6 (contd.)

is good consideration for the mortgage executed by the debtor. A 1923 Oudh 3 (4).

(30) Marriage contracted by a person in consideration of a promise made to him constitutes a valuable consideration for the promise. A 1970 Mad 113 (117).

(31) Alteration of his position by one person constitutes good consideration for a promise on the faith of which he has so altered his position. A 1925 Cal 94 (97) (DB).

(32) A smaller sum of money advanced can validly constitute the consideration for an acceptance of liability for a bigger amount by the debtor. A 1924 Oudh 193 (195).

(33) Agreeing to accept lesser amount than what is provided by judicial order constitutes valid consideration. A 1966 Raj 163 (164).

(34) Where one brother at the request of the other agrees to place his interest in the joint property in the hands of the Court of Wards for liquidation of the debts incurred by the latter and also forgoes a large part of his share in the profits during the period of the management by the Courts of Wards and further abstains from suing his brother for accounts on the termination of the management by the Court of Wards there is consideration for the relinquishment of his proprietary interest in the estate by the other brother. (1895) 17 All 264 (269, 270) (DB).

(35) Vendor's letter to vendee stated that agreement of conditional sale was settled between them but in application for registration, sale deed was referred as unconditional sale deed. Agreement is not without consideration on account of such discrepancy. A 1965 Madh Pra 275 (283).

(36) A entering into contract of employment with a company at the instance and request of B who was its manager, B executing promissory note in favour of A for balance of remuneration due to him — It was held that there was sufficient consideration to execute the note in question. A 1965 Ker 155 (156).

(37) A debt to which the promisee has no legal right, as for instance, where it was assigned to him in spite of the prohibition contained in law, cannot constitute a valid consideration for a promissory note executed by the debtor to that person. A 1956 Mad 692 (693).

(38) Decision of the dispute or a point at issue is the consideration for an agreement to refer to arbitration and be bound by a decree passed in terms of an award and that is a valid consideration sufficient to sustain a contract. **A 1952 All 882 (885) (FB).**

(39) Mortgage executed to make good to mortgagee the loss sustained by him for having lost a property by pre-emption is valid and is supported by consideration. A 1925 Oudh 215 (216) (DB).

(40) Acceptance of the responsibility for conducting the religious ceremonies in a temple is a valuable consideration recognised by law and that is sufficient to support the gift of a property to the person who accepts the responsibility. A 1918 Bom 183 (183, 184) (DB).

(41) Co-sharers of a patti agreeing not to enforce their right to collect their share of arrears of rent and to allow one of themselves to collect the same is consideration to support the promise of the latter to pay the former their share even if the collection of the arrears become barred by limitation by his default. A 1944 Nag 307 (308).

(41A) Consideration for an agreement to maintain illegitimate child is not unlawful. A 1966 Raj 163 (164).

(41B) Oral award though not capable of enforcement, can form valid consideration for a negotiable instrument. A 1962 Raj 231 (243) (DB).

(42) Where there was a dispute between A and B as to right to receive way leave rent from C, and at the desire of B, C agreed to pay and actually paid rent to B on his executing an indemnity bond the bond was for lawful consideration. A 1963 Pat 160 (162) (DB).

(43) A person under arrest in execution of a decree by a Court having no jurisdiction to make it, gave the holder of such decree a bond for the amount of the decree and a small amount for stamping and preparation of this bond, so that he might be released from arrest. It was held that such a bond was given without consideration as the small amount paid for stamping and preparation of the bond was not "consideration" in legal sense. (1882) 4 All 352 (355) (DB).

(44) The limitation imposed on trustees to deal with the trust property as required by the trust deed cannot be considered to be a consideration for the transfer of the property to them and hence the trustees cannot be called transferees of the trust property for a valuable consideration. A 1923 Oudh 80 (86) (DB).

(45) Transfer subject to a charge — Payment towards satisfaction of the charge, held was a part of consideration for sale. **A 1972 Delhi 131 (133) (SB).**

(46) Agreement between A and State Government — A becoming purchaser of Tendu leaves — A entitled to apply for renewal of agreement for next season on condition that if he did so he would be bound by his offer till its acceptance or rejection by Government — Condition could not be said to be without consideration. A 1980 Madh Pra 91 (93) : 1980 MPLJ 227 (DB).

7. Evidence as to consideration.— (1) Section 92 of Evidence Act does not prohibit the disproof of a recital in a contract as to the consideration by showing that the actual consideration was something different to that alleged. (1882) 5 Mad 6 (8) (DB).

(2) Recital in a contract that vendor has received consideration can be disproved by him, by proving a collateral agreement to the effect that money was to remain with the vendee for a specific purpose. (1900) 22 All 370 (375) (PC).

(3) Although a mere recital in a deed by itself cannot be proof of payment of consideration still where the transaction happens to be an old one any little evidence in support of it would be enough to hold the recital to be proved. A 1950 Hyd 50 (51).

Section 2 (d) — Note 7 (contd.)

(4) Onus of proving that there was no consideration rests on a person who denies it A 1932 Lah 135 (136) (DB).

(5) No oral evidence admissible to prove variation of consideration. A 1965 Mad 147 (149) (DB).

(6) When execution of a document and receipt of consideration has been admitted at registration the burden of proving non-receipt of consideration falls upon the party who makes such allegation. (1905) 27 All 71 (72) (DB) ** (1896) 23 Cal 950 (955) (PC).

(7) When a defendant-vendor admits the execution and registration of a sale deed, but denies the receipt of the consideration, it is for the plaintiff purchaser who is kept out of possession to prove that the consideration money was paid. (1886) 8 All 641 (643) (DB).

(8) Where the price has been inflated to avoid pre-emption and the price is clearly beyond the reasonable market value, the vendee must show the actual payment of consideration and explain why an abnormal price was given. A 1919 All 340 (342) (DB).

(9) In an agreement to reconvey property the reciprocity between the parties is evidence of consideration. A 1931 All 113 (120) (DB).

(10) Where the consideration of a bond is not described but is said to be a previous account, it is not necessary to produce documentary proof of consideration of the bond. If the bond is proved that should be enough. A 1950 Kutch 80 (80).

(11) The fact that document does not contain all the terms of a contract is not of itself sufficient to sue upon the original consideration without producing the documents. A 1937 Rang 61 (62).

(12) Where document is not silent regarding consideration oral evidence to prove additional consideration not recited in document is not admissible. A 1965 Mad 147 (149).

8. Forbearance.— (1) Forbearance to sue can form valid consideration for a promise, provided some liability exists. **A 1925 All 503 (506) (FB)** ** A 1974 Bom 72 (73) ** A 1958 Ker 246 (248) ** A 1941 Pat 282 (283, 284) ** A 1938 Lah 781 (784) (DB). (The forbearance of a plaintiff to sue, coupled with his forbearance to declare the defendant a defaulter, constitutes a good consideration for fresh agreement though the original contract had been in the nature of a wagering transaction.) ** A 1930 Nag 298 (300) ** A 1928 Bom 316 (318) (DB) ** A 1923 Oudh 176 (176) ** A 1922 All 260 (262) (DB) ** A 1919 Mad 528 (529) (DB) ** (1911) 11 Ind Cas 773 (773, 774) (Burma) ** (1910) 5 Low Bur Rul 192 (194, 195) ** A 1964 Ker 267 (269) ** A 1961 All 295 (298).

(2) An agreement to accept a decree and not to appeal against it when both parties to it would have appealed is one which is supported by good consideration. A 1934 Pat 644 (645) (DB).

(3) Agreement not to file appeal against ejectment decree if tenant was given time to vacate — There is good consideration for agreement. A 1969 Bom 221 (223, 224).

(4) An agreement not to appeal, consideration for which is the mutual consent of parties to refer the matter in dispute to Court as an arbitrator, is binding. A 1915 Mad 1074 (1074).

(5) The promise or undertaking on the part of a decree-holder not to execute his decree, or the acceptance by him of a bond or mortgage or other similar contract as satisfaction of the decree is undoubtedly a consideration within the meaning of Section 2 of the Contract Act. (1885) 7 All 124 (131) (DB) ** A 1925 Nag 455 (456).

(6) Creditor forbearing to enforce execution and allowing time to pay at the request of the debtor is good consideration for a verbal promise by the debtor to pay the debt. The verbal promise constitutes a fresh contract. A 1921 Cal 67 (69).

(7) Forbearance even if it is one shown in the case of a person other than the promisor himself can constitute good consideration for the promise. (1912) 15 Oudh Cas 314 (315) ** A 1941 Pesh 6 (7) (DB).

(8) Release of principal debtor is good consideration for undertaking liability by another. A 1916 Cal 740 (740) (DB).

(9) Acceptance by creditor of sole liability of one of two joint debtors is good consideration for agreement to discharge other debtor. A 1936 Rang 396 (398) (DB).

(10) Where A and B executed a pronote for the decretal amount against A alone, the abandonment by the promisee of his decree against A is a consideration for B's liability. A 1942 Mad 134 (136) (DB).

(11) Agreement for forbearance to sue need not be for any definite time and it is enough if implied request for forbearance be inferred. A 1919 Mad 528 (529) (DB).

(12) A promise to defer bringing a suit upon contract which is void does not amount to a consideration. A 1917 Cal 485 (486) (DB).

(13) Forbearance by vendee to enforce terms of prior sale without consideration is not a consideration for subsequent compromise. A 1919 Lah 215 (216).

(14) Forbearance to sue will not constitute a valid consideration where the plaintiff does not bona fide believe in the validity of his claim. A 1929 Lah 689 (690) (DB).

(15) In order to constitute a forbearance a valid consideration for a contract there should be a request by a debtor to a creditor to refrain from suing and an acceptance by him of that request. The question whether there has or has not been a request by the debtor to the creditor to forbear from suing is a question of fact to be determined on the particular circumstances of each case. A 1952 All 996 (1010).

(16) Positive evidence as to postponement of legal action is not essential in every case but may safely be assumed when the circumstances so permit. (1931) 134 Ind Cas 1105 (1106) (DB) (Lah).

Section 2 (d) — Note 8 (contd.)

[See also 1967 Raj LW 383.]

(17) Where A did not press his claim in his partition suit against the defendant upon the defendant agreeing to transfer certain property to B who was not a party to the suit without payment of any cash price. A's forbearance to proceed with his suit held was a valuable consideration for defendant's promise to convey the property to B. ILR (1975) 1 Cal 182.

9. Future promise as consideration.— (1) A promise to do something in future is legal consideration. **A 1938 Rang 202 (203) (FB).**

(2) A promise so long as it remains executory will not amount to a consideration in the eye of the law unless it involves a legal obligation which the promisor could be compelled to perform. But where it involves no such obligation its execution alone will constitute a sufficient consideration. A 1936 Mad 709 (712) (DB).

(3) Where one of terms of a karar for partition was that other coparceners should pay certain sum for costs of marriage of daughter of one of them and in pursuance thereof pro-notes were executed, pro-note and agreement to pay are supported by consideration, namely, the agreement of the father to other term of the karar. (1913) 36 Mad 151 (153, 154) (DB).

(4) Agreement by widow to adopt a particular person is good consideration for adoptee executing agreement in widow's favour. A 1926 All 194 (198) (DB).

10. Consideration for a promise to pay subscription.— (1) A mere promise to subscribe a sum of money or the entry of such promised sum in a subscription list does not furnish any consideration and therefore the subscriber is not liable to pay it. A 1936 Mad 135 (135) ** A 1914 All 22 (23) (DB) ** (1887) 14 Cal 64 (66) (DB).

(2) In order that a mere promise to pay subscription may be enforced there must be some request by the promisor to the promisee to do something in consideration of the promised subscription or an undertaking by the promisee to do something as part of the bargain. A 1936 Mad 135 (135).

(3) Where the person asked to subscribe knows the purpose to which the money is to be applied and also knows that on the faith of their subscription an obligation to pay was to be incurred by the promisee then the obligation to pay must be taken to be incurred at the desire of the promisor and that the promise for subscription is supported by consideration. (1887) 14 Cal 64 (67) (DB).

11. Past consideration.— (1) In many cases a promise of one party is a consideration for promise of the other party, but that is not the only consideration known to law. A consideration may consist in performance which is known as executed consideration. A 1957 Cal 92 (94) (DB).

(2) An executed consideration consists in an act already done by one as consideration for a promise of the other. In an executed consideration the liability is outstanding against only one whereas in an executory consideration it is outstanding on both sides. **A 1957 SC 652 (655).**

(3) Past consideration is as good as present consideration or future consideration and a transaction cannot be held to be not supported by consideration if the consideration for the transaction was a past one. 1956-1 Mad LJ 471 (472) ** (1962) 66 Cal WN 8.

(4) Under the English law consideration must be present at the time of making the promise and there is no such thing as past consideration. A past request to the promisee to do an act even to the detriment of the promisee without simultaneous understanding that it is to be recompensed in future cannot make the act good consideration for a subsequent promise to pay. But the Indian Act does not require any such understanding. A 1915 Mad 528 (529) (DB).

(5) It is not every act on the part of the promisee, though done at the request of the promisor, which could support a subsequent promisee. The act done by the promisee must be "good or valuable" consideration in the sense in which the terms appear in English law. A 1915 Mad 528 (529) (DB).

(6) Services previously rendered at the desire of a promisor are, by Cl. (d) of Section 2 of the Contract Act (9 of 1872), placed on the same footing with services to be rendered in the future, and constitute a good consideration for a definite agreement. **(1932) 138 Ind Cas 900 (902) (PC) ** A 1939** Bom 250 (251) (DB).

(7) If the servants put forth extra work in consideration whereof a bonus is promised to them by the masters it is in law a promise for past services which is good under Indian law. A 1925 Mad 192 (194) (DB).

(8) The services performed for a person can constitute the consideration for a promissory note executed by him subsequently in favour of the person who rendered the service. A 1951 Cal 55 (59) (DB).

(9) Services rendered at the desire of a person during his minority and also continued after his majority form a good consideration for a promise made by him subsequently in favour of the person who rendered the service. (1896) 20 Bom 755 (757) (DB).

(10) Money received during minority can form the consideration for a contract made by a person of full age and competent to contract. A 1924 All 730 (731) (DB).

(11) Power of attorney given by company to Bank to sell the properties mortgaged with it was for consideration relatable to the loan advanced earlier by Bank. **A 1968 Mad 50 (52) (FB).**

(12) Promissory note to pay existing debt — It is enough consideration. (1972) 1 Andh WR 7 (DB).

(13) Old debts form good consideration for mortgage or transfer of property. A 1919 All 348 (348) (DB).

(14) A past debt even if barred by time is a good consideration for a promise to pay under Section 25 of the Contract Act. A 1958 Raj 10 (11, 12).

(15) A time-barred debt can be valid consideration for transfer of property. A 1925 Oudh 267 (268).

(16) A stated account is a promise for good consideration to pay the balance even

Section 2 (d) — Note 11 (contd.)

though some of the debts are barred by limitation. A 1941 Cal 595 (596) (DB).

(17) Fresh promise in respect of old debt is a valid consideration. 1979 Pat LJR 122 : 1979 Tax LR (NOC) 119 (DB).

(18) A settlement of accounts by all partners even if subsequent to three years from date of dissolution is valid. The mutual promises to abide by it is a good consideration to support the contract. **A 1933 PC 120 (121).**

(19) Where an old bond is said to be consideration of the new bond but in the new bond consideration has not been described at all and there is nothing to connect the two bonds except the deposition of the plaintiff who has no personal knowledge of the previous transaction, the old bond cannot form consideration of the new bond. A 1950 Kutch 80 (80, 81).

(20) That which have voluntarily been performed in the past cannot be made consideration for a promise to do something in future. There must be another promise as consideration for that promise. A 1943 Oudh 89 (90).

(21) Though past services voluntarily rendered are not consideration to support promise and not capable of being enforced by the promisee yet they can be pleaded as valuable consideration in a suit to set aside alienation made on account of such past services. (1909) 4 Ind Cas 1104 (1105) (DB) (Mad).

(22) Past co-habitation with a concubine, being an immoral consideration, cannot support a transfer. A 1952 Punj 293 (293).

(23) Past co-habitation even if it can properly be called a consideration cannot be considered an immoral consideration which would render the contract to pay an allowance to the woman ab initio void. (1881) 3 All 787 (788) (DB).

(24) Concubine and paramour render service to each other by their agreement to cohabit. Her services were given in lieu of exchange for his promise under which she obtained similar services. Having once operated as consideration for his earlier promise her past services could not be treated as a subsisting consideration for his subsequent promise to transfer properties. **A 1968 SC 253 (254).**

12. Suit by strangers to contract.— (1) Under the law of contract an agreement can be binding on and can only be enforced against the parties to it. A 1958 All 688 (690) ** 1970 Cri LJ 1176 (1179, 1180) (Madh Pra). (Sale of a house — Passing of consideration — Third party cannot challenge.) ** A 1957 Pepsu 21 (22) ** A 1940 All 98 (99) (DB). **(A 1938 All 206, Reversed.)** ** A 1967 Orissa 89 (89). (A rank trespasser and stranger to sale deed cannot question non-passing of consideration.) ** A 1960 Pat 139 (141).

[See A 1936 All 700 (701) (DB).]

(2) The general rule is that although consideration for an agreement may proceed from a third party, a person not a party to an agreement cannot sue upon it A 1943 Sind 190 (192) (DB) ** A 1957 Bom 276 (279) ** A 1957 Punj 169 (170 ** A 1953 Cal 366 (367) ** (1952) 56 Cal WN (4 DR) 91 (97) ** A 1945 Nag 261 (263) (DB) ** ILR (1944) Nag 796 ** A 1942 Cal 251 (252) (DB) ** A 1938 Rang 35 (38) ** A 1935 Lah 354 (357) (DB) ** A 1932 Mad 457 (457) (DB).

[See also A 1956 Mad 316 (319) (DB) ** A 1957 Trav-Co 189 (192) ** A 1947 All 110 (114) (DB).]

[But see A 1931 Pat 114 (125) (DB). (Person having beneficial interest under contract can sue in equity to enforce benefit although he himself is a stranger to contract.) ** A 1939 Nag 20 (21). (Do.) ** A 1939 Pat 194 (196) (DB). (Do.) ** A 1936 Cal 67 (68) (DB). (Do) ** (1936) 164 Ind Cas 477 (481) (DB) (Cal). (Do.) ** 61 Cal 841 (DB). (Do.)]

(3) The law knows nothing of a jus quaesitum tertio arising by way of contract and such a right cannot be conferred on a stranger to a contract as a right to enforce the contract in personam. **A 1933 PC 11 (14).**

(4) There is nothing in Section 2 to allow a stranger to a contract to enforce it On the other hand, the section, while it has by Clause (d) widened the definition of "consideration" so as to enable a party to a contract to enforce it, has also rigidly excluded, by the definition of "promisor" and "promisee", a stranger to a contract from enforcing the same. A 1928 Cal 518 (522) (DB) ** (1957) 61 Cal WN 78 (84).

(5) A clause in a motor insurance policy providing that the insurance company shall indemnify the insured against his legal liability in respect of death of, or accident to, passengers cannot give a right of suit against the insurance company for money due under the policy to a passenger who is a mere stranger to the contract of insurance. A 1938 Bom 217 (217).

(6) Where a motor insurance contract contains a clause for reference of any dispute arising between the owner of the car and the company out of the policy to arbitration, a third person who is not a party to the contract claiming damages against the company under the third party risk portion of the insurance contract, cannot enforce the arbitration clause. A 1951 Punj 114 (116).

(7) Where a person transfers property to another and stipulates for the payment of money by purchaser to a third person a suit to enforce that stipulation by the third party will not lie. **A 1930 Mad 382 (389) (FB)** ** A 1947 Pat 131 (132) (DB) ** 1937 Mad WN 408 (409) ** A 1933 Lah 695 (696).

[See also A 1934 All 770 (772).]

[But see A 1933 Lah 178 (179).]

(8) Although a mortgagee, with whom a portion of the consideration, has been left over by the mortgagor has agreed to pay that amount to a creditor of the mortgagor the creditor himself being a stranger to the contract of mortgage cannot recover his debt from the mortgagee. A 1914 Mad 701 (704) (DB).

(9) An agreement between the sons of a deceased Muhammadan, that one of them should take the whole property of their father and also pay his debts, is not enforceable by the creditors against that brother personally. A 1943 Sind 190 (192) (DB).

(10) A creditor, who is not a party to compromise effected between his debtors

(e) Every promise and every set of promises, forming the consideration for each other, is an agreement;

Section 2 (d) — Note 12 (contd.)
themselves, cannot institute a suit on that contract unless he stood in the capacity of a cestui que trust. A 1932 Mad 457 (457) (DB).

(11) A stranger who renders services to arbitrator as his legal adviser and indirectly to parties to an award cannot sue for the benefit conferred upon him under the award, himself not being a party to the award itself, and there being no privity of contract between him and parties to the award. A 1939 Sind 125 (126) (DB). **Exceptions to the Rule.**

(12) The principle that a person who is not a party to a contract cannot take advanage of its provisions is subject to certain recognised exceptions. A 1932 Lah 566 (568) (DB) ** ILR (1978) 2 Delhi 74 ** A 1957 Punj 169 (170) ** A 1947 Bom 169 (180) ** A 1922 Mad 397 (398) ** A 1963 Punj 538 (545) (DB) ** 1963 Ker LT 94.

(13) Except in the case of a beneficiary under a trust created by a contract or in the case of a family arrangement no right may be enforced by a person who is not a party to the contract. **A 1970 SC 504 (507, 508).** (Bank cannot enforce charge created by letter of guarantee on property of executioner.) ILR (1978) 2 Delhi 74: A 1979 (NOC) 47 ** A 1973 Cal 401 (405, 406).

(14) The general rule is that a party who is stranger to a contract cannot sue on the contract. The exceptions to this general rule are: (a) where the vendee subsequently agrees with the stranger to pay him the amount, (b) where a trust is created between the vendee and the stranger (c) where the contract charges the money to be paid out of some immovable property and (d) where the amount is due under a marriage settlement, partition or any other family arrangement. 1970 BLJR 655.

(15) A stranger to a contract can sue where one of the parties to the contract afterwards agrees with the stranger to pay him direct or is estopped from denying the liability to so pay. A 1933 Cal 407 (408) (DB) **A 1930 Mad 382 (386) (FB)** ** A 1943 Nag 266 (268) ** A 1940 Rang 91 (94) ** A 1966 Raj 89 (91). (Suit by vendee for ejectment of sub-tenant.)

(16) Where a contract has created a trust in favour of a person who is not a party to a suit by such a party as cestui que trust is maintainable. A 1942 Cal 251 (252) (DB) ** **(1910) 32 All 410 (414) (PC)** ** A 1957 Andh Pra 965 (971) ** A 1957 J & K 10 (10) ** A 1955 Pat 442 (444) ** A 1952 Mys 109 (110) ** (1950) 52 Punj LR 117 (121, 122) ** A 1947 Bom 169 (180) ** A 1943 Nag 266 (268) ** A 1937 Oudh 99 (105) (DB) ** (1936) 162 Ind Cas 889 (894) (Mad) ** A 1935 Mad 141 (143).

[**See also** A 1957 Punj 169 (170) ** A 1965 Ker 203 (206): 1964 Ker LJ 539 (DB). (Claimant to trusteeship though no party to trust deed can sue to enforce rights under deed of Public trust.) ** 1959 All LJ 271. (Addressee of an insured article can file suit on non-delivery.)

(17) A stranger to a contract can sue for the money made payable to him by it where the money is charged on immovable properties. **A 1930 Mad 382 (389) (FB)** ** A 1943 Nag 266 (268) ** A 1937 Oudh 99 (105) (DB).

(18) A party although a stranger to the transaction can sue to enforce a benefit where it is due to him under a marriage settlement, partition or other family settlement. A 1933 Cal 407 (408) (DB) ** **A 1947 PC 8 (15)** ** **A 1930 Mad 382 (386) (FB)** ** A 1957 Andh Pra 965 (971) ** A 1943 Nag 266 (268) ** A 1937 Oudh 99 (105) (DB) ** (1912) 14 Ind Cas 517 (518) (Mad).

(19) A contract to be specifically enforced by Court must as a general rule, be mutual. Relevant date on which test of mutuality is to be applied is the date of contract itself and not the date on which it is sought to be enforced. A 1969 Mad 470 (473).

(20) Where the promisor, between whom and the stranger no privity exists, creates privity by his conduct and by acknowledgment or otherwise constitutes himself an agent of the third party, then such third party can sue under the contract. A 1942 Cal 251 (252) ** A 1940 Lah 471 (473) ** A 1935 Mad 904 (906) (DB) ** (1934) 36 Punj LR 244 (246, 247) (DB).

[**See also** A 1936 Sind 119 (120) (DB).]

(21) Doctrine of privity of contract — Contract for purchase of goods entered with company — Company in turn contracting with firm for supply of such goods — Transaction between company and firm only in aid and for benefit of purchaser — All moneys for goods paid only by purchaser through company — Goods not supplied — No privity of contract or trust exists between purchaser and firm — Yet firm bound to return money to purchaser for 'prevention of unjust enrichment'. A 1969 Cal 496 (508, 509, 510, 514) (DB).

(22) Collateral agreement — Two contracts — One between debtor and creditor and the other between creditor and third party — On facts, held, no collateral agreement could be, spelt out between third party and debtor — There was no privity of contract between third party and debtor. ILR (1977) 2 Delhi 672: A 1978 (NOC) 282 (DB).

Section 2 (e)

(1) The term "agreement" is used in law in two different senses namely to mean a provisional arrangement or a concluded bargain. Whether in any particular case the agreement falls within the former category or the latter category is a matter for construction depending on the facts of each case. A 1952 Nag 220 (223, 227) (DB).

(2) Agreement as defined by S. 2 (e) is essentially and exclusively consensual in nature. That is not always the case in the case of Governmental contracts. A 1980 Andh Pra 18 (23).

(3) Every agreement must be construed with reference to language used therein. A 1967 Cal 168 (170) (DB).

(4) To find out whether there is a concluded contract by correspondence, the entire bunch of correspondence between the parties has to be looked into. The rule has no application in a

(f) Promises which form the consideration or part of the consideration for each other, are called reciprocal promises;

Section 2 (e) (contd.)

case in which the contract has to be evidenced by a formal document under Art. 299 of the Constitution. A 1959 Cal 526 (530).

(5) Agreements are of two kinds, executed and executory agreements. In an executed agreement one party has already performed his part of the agreement while the other party has to perform his part. In an executory contract both the parties have to perform their mutual promises and the fact that they have to perform their parts of the contract does not affect the validity of the contract. **A 1957 SC 652 (655).**

(6) Every "promise" as defined by Cl. (b) of Section 2 is not necessarily an "agreement" falling within Clause (e) also. The acceptance of a proposal may bring into existence a promise but yet to have an agreement it is very essential that there should be consideration for the promise. A 1948 Sind 91 (93) (DB).

[But see ('04) 28 Bom 66 (72) (DB).]

(7) A promise ripens into an agreement only after an offer has been accepted by the offeree and until there is such an agreement the question whether there was any consideration for the promise would not arise at all. **A 1957 SC 95 (102).**

(8) Where the offers were invited for purchasing the trees and the offer was accepted an agreement as contemplated by Section 2 (e) comes into existence. A 1979 All 174 (181) (DB).

(9) Agreement includes a single promise or set of promises forming the consideration for each other. Consequently, there is no difficulty in treating promises made to minors for consideration received, as contracts, for they are made by persons competent to contract for consideration received. **(1899) 23 Bom 146 (163, 164) (SB).**

(10) Where a document besides being an acknowledgment includes a stipulation to pay interest it becomes an agreement. But such a document if it is insufficiently stamped as an agreement its secondary evidence is not admissible. A 1958 Raj 72 (74) °° A 1958 Raj 260 (261).

(11) Acceptance of terms of trust deed did not mean that trustees agreed inter partes to carry out every term. Arbitration clause in trust deed in order to become an agreement, there must be proposal and acceptance. A 1965 Cal 628 (629) (DB).

(12) Supply of electricity by Government — Respondents charged for actual quantity of electrical energy consumed by them — Notification issued by Government introducing system of minimum consumption and rate charged thereon — Respondents although protesting against the introduction of new system continuing to take electrical energy — **Held**, the respondents by their conduct, accepted the terms notified in the notification and thereby made themselves liable to pay charges for the units fixed for minimum consumption. A 1968 Pat 171 (174) (DB).

(13) Where a mining lease did not provide as a term of lease that State Government should help and assist lessee for getting land and electricity for proposed plant of lessee and the lessee by letters requested Government for help and assistance of Government to get them, the expectations of lessee expressed in letters and suitably replied to by Government could not have the sanctity of a term of an agreement so as to be enforceable in law. A 1969 Orissa 152 (157) (DB). (**Overruled** on another point in A 1972 Orissa 40.)

(14) Agreement not to file appeal against ejectment decree if tenant was given time to vacate — It is a valid and enforceable agreement. A 1969 Bom 221 (223, 224).

(15) Agreement is not enforceable at the instance of a person who himself is not bound by it. A 1971 Pat 253 (255) (DB).

(16) On 2-9-1957 defendant wrote to plaintiff as follows: 'I hereby assign the said lease area of 184 acres in your favour subject to your paying one lakh and eighty thousand rupees at your option to be decided by you within three months from this date'. This offer was revoked by defendant by letter dated 31-10-1957, which reached plaintiff on 6-11-1957 On 1-11-1957, plaintiff filed a suit to enforce contract — **Held** that the document dated 2-9-1957 though worded as an agreement was in point of law only an offer. That the service of copy of plaint through medium of Court is not communication of acceptance and that there was no concluded contract between parties. **A 1969 SC 1157 (1159).** (Reg. Appeal No. 231 of 1960, D/- 19-6-1963 (Mys), **Reversed.**)

(17) Municipality M passed an order to sell a piece of land to D. D paid the sale price later on. The order did not amount to an agreement to sell the land as D was not bound to accept the same. 1970 Raj LW 238.

(18) When by agreement, course of conduct or usage of trade, acceptance by post or telegram is authorised, the bargain is struck and the contract is complete when the acceptance is put into a course of transmission. A 1980 Madh Pra 89 (90) : 1980 MPLJ 231 (DB).

(19) Agreement — Contract for hire — Rates for hire initially fixed — Cannot be subsequently revised unilaterally unless there is a specific provision in the Rules or Code under which the hire is made. A 1978 Andh Pra 281 (283) (DB).

(20) Government agreeing with contractor to supply material at fixed rate but after sometime importing that material and sending some receipts to contractor at enhanced rate when earlier receipts of same imported material were at fixed rate — Receipts of enhanced rates signed by somebody on behalf of the contractor — No contract to pay enhanced rates. A 1978 AP 281 (283) (DB).

(21) Recording of minutes of discussion between private party and State Minister — It does not suggest that a valid agreement has been arrived at between private party and the State in accordance with Article 299 of Constitution. ILR (1969) 19 Raj 461 : A 1970 Raj 118 (124) (DB).

(22) Obligation of lessee to construct building within specified time — Promise by lessor to let it to lessee — **Held**, obligation of lessee by themselves constituted consideration for lessor's promise — Contract consisted of mutual promises and was not a conditional contract. **1971 Tax LR 1576 (Eng Case).**

(g) An agreement not enforceable by law is said to be void;

(h) An agreement enforceable by law is a contract;

Section 2 (g)

(1) The words 'not enforceable by law" do not refer to a disability to sue arising under any procedural regulations such as the statute of Limitation or any of the Orders under the Civil P. C. The unenforceability which is contemplated is one which arises under the provisions of the substantive law. **A 1939 PC 110 (113).**

(2) A contract void in its inception is no contract at all; it has not passed from the stage of agreement to the stage of a contract. It is an agreement not enforceable at law. A 1937 Sind 211 (212) (DB) ** **A 1939 PC 110 (113)** ** A 1965 Andh Pra 191 (193, 196) (DB).

(3) An agreement by which the parties do not intend to create any legal obligation is not enforceable. A 1953 Pat 231 (233).

(4) Merely because parties have reached an agreement it would not follow that they are bound by it. The question as to when they would be bound depends on their intention and if it is their intention that they ought to be bound only when the agreement is embodied in a formal document then until such document is drawn up the agreement remains only a provisional arrangement. A 1952 Nag 220 (227) (DB).

(5) The manager of a joint Hindu family being only a representative of the coparceners cannot bring about a valid and binding agreement when such agreement is beyond the capacity of the coparceners themselves to enter into. A 1957 Bom 280 (282).

(6) An agreement entered into by the mother alone for the marriage of her major daughter and which was not made by her on behalf of her daughter is unenforceable. A 1954 Trav-Co 129 (130).

(7) Agreement to pay interest, not awarded by a decree, together with the decretal amount, without the sanction of the Court which passed the decree, is void. (1885) 9 Bom 176 (178) (DB).

(8) Failure to comply with statutory provisions relating to the manner in which a particular agreement should be made would render it void. A 1956 Cal 138 (142) ** ILR (1950) 2 Cal 431 (435) ** A 1940 Sind 199 (202) (DB) ** A 1967 Andh Pra 26 (38) (DB).

[See also A 1952 Bom 349 (359).]

(9) If a statement in proposal form which has been made the basis of contract is found to be untrue, the contract would be void irrespective of the question whether the statement is of a material nature or not. A 1959 Pat 102 (106) (DB).

(10) Void partnership agreement could not be made basis of an arbitration reference under Section 20 of Arbitration Act, 1940. A 1969 Pat 322 (323).

Section 2 (h)

(1) Since a contract can only be bilateral and the same party cannot be a party on both sides, there can hardly be a contract between A on the one side and A and B on the other side, particularly in a contract of employment. A 1958 Bom 467 (468).

(2) In order to be a contract, there should be an agreement which is a bilateral transaction. (1977) 4 Cri LT 57 : 1977 Cri LJ (NOC) 39 (Delhi).

(3) Many contracts have three well defined stages, namely the stage of negotiation, the stage when they have reached an agreement and thirdly when the parties reduce their agreement into writing and have a formal document. In any case where all these three stages are present it is always a question of construction as to at what stage both the parties intended to be bound by their contract. A 1952 Nag 220 (223, 224) (DB).

(4) A contract is an enforceable agreement agreed to by the parties and all its provisions are binding and effective to the extent provided in the agreement covering such matters in respect of transactions between them. (1979) 83 Cal WN 1 : A 1978 (NOC) 247 (DB).

(5) If an agreement is enforceable in the eye of law, the mere fact that the said agreement does not contain obvious stipulations regarding achievement of the purpose for which the agreement was entered into would not make such an agreement any the less enforceable and a valid agreement. (1974) 1 Mad LJ 507 (512) (DB).

(6) A lump sum contract is one wherein certain specified sum is agreed to be paid for completion of the stipulated work. A 1973 Guj 34 (42) (DB).

(7) Where the parties agree to enter into a contract such an agreement is not a contract in law at all. A 1956 Cal 280 (281).

(8) On the expiry of 3 years fresh contract on fresh terms to be entered into between parties — Provision amounts only to an agreement to enter into agreement — Same is not enforceable. ILR (1972) 1 Cal 157.

(9) A contract of lease which satisfies all the necessary requirements of Section 2 would not be rendered incomplete merely because there is a stipulation in it to the effect that the rent was to be fixed according to the market rate. A 1953 Sau 91 (91).

(10) Under Andhra Pradesh Sugar Cane (Regulation of Supply and Purchase) Act, 1961 and the Rules framed thereunder cane-grower in the factory zone is free to make or not to make an offer of sale of cane to the occupier of the factory. But if he makes an offer, the occupier of the factory is bound under law to accept it. The resulting agreement is neither void nor voidable and it is freely made. **A 1968 SC 599 (604).**

(11) Where a lease deed stipulates sale of the land if the lessor was ever required to sell and if the lessee agreed to purchase at a reasonable price, the stipulation cannot be a completed contract. A 1969 Assam 43 (45). **(Held not good law in ILR (1972) Gui 1102.)**

(12) An agreement not enforceable by law is itself void and therefore, cannot be a contract at all. A 1936 Pat 153 (156, 157) (DB).

(13) An agreement although the promise involved cannot be specifically enforced could still be a binding contract if some relief is open to the party who is aggrieved by the breach of it. A 1952 All 882 (885) (FB).

(14) A promise without consideration is unenforceable in a Court of law and cannot

Section 2 (h) (contd.)
amount to a contract between the parties. A 1952 Trav-Co 202 (202).

(15) Where the nature of disposition by a deed was the nature of a gift although settlor purported to bind himself to do certain things which were in nature of voluntary covenants of unilateral character, the deed was a unilateral document and did not contain any contract at all. A 1959 Cal 434 (436).

(16) An agreement to pay varsulka may itself be unenforceable but the promissory note executed by the promisor for the amount would not also become unenforceable on the account. In such a case it is to be regarded that the amount, although its payment could not have been enforced by the promisee, was paid by the promisor and then reinvested by the promisee as cash and hence the promisory note executed by the promisor was supported by consideration. A 1954 Trav-Co 231 (232).

(17) An admission of liability for a certain amount coupled with an undertaking to deposit the same amounts to an agreement enforceable by law and hence a contract also. 1946 Jaipur LR 386 (390).

(18) An oral agreement between two private individuals to sell or purchase immovable property can be enforced by a suit for specific performance and hence would constitute a concluded contract. A 1955 Mys 76 (78) •• A 1965 Manipur 3 (7).

[See also A 1964 Madh Pra 101 (106) (DB). A 1941 Bom 247, held reversed in A 1946 PC 97 and not good law.)]

(19) Every sale or purchase even if it is a sale or purchase across the counter, necessarily contains all the element of a contract. There is the offer of the goods at a price, there is the acceptance of the offer followed by payment and delivery of goods. The offer, the acceptance and the performance of the contract are practically simultaneous. (1974) 10 Co-op LJ 70 (72) (Andh Pra).

(20) In determining the place where a contract takes place the interpretation clauses in Section 2 which largely incorporate the substantive law of contract must be taken into account. Acceptance and intimation of acceptance are both necessary to result in a binding contract. In the case of proposal and acceptance by telephone conversation, contract is made at place where acceptance is received. A 1966 SC 543 (548, 550).

(21) It is perfectly legal for parties to a transaction to agree that their liabilities should be different from that created by statutes and a contract containing such an agreement would be given effect to provided their intention to so vary the liability is clear beyond doubt from the terms of the contract itself. A 1945 Pat 447 (449) (DB).

(22) A contract subsists till payments due thereunder are finally made. ILR (1966) 1 Punj 49 (DB).

(23) Option to repurchase reserved to a vendor under original conveyance may not by itself constitute a contract. But when the option is exercised in due conformity with the terms of the contract, that will amount to an acceptance of the offer and a binding contract for reconveyance results. A 1965 Mad 506 (507) (DB).

(24) Where an assessee approached the Collector and came to an arrangement with him agreeing to pay the amount of Sales Tax in instalments, such arrangement was not a contract. Even otherwise, it would not bind the State Government as it did not comply with Art. 299 (1) of the Constitution. (1965) 16 STC 701 (All).

(25) There can be no enforceable agreement when a manager of the Court of Wards agrees to lease a property contrary to the provisions of the statute requiring the prior sanction of the Board of Revenue and hence no binding contract. A 1952 Pat 139 (140).

(26) A term in mining lease giving option to Government to purchase certain quantity of ore on their demand, amounts to only an offer and did not constitute subsisting contract within the meaning of that term in Sec. 7 (d), Representation of the People Act. A 1964 Andh Pra 77 (84) (DB).

(27) Where the parents of a minor boy and a minor girl enter into an agreement of marriage of those minors, the agreement is merely a nudum-pactum and not a contract because whether the marriage should take place or not must depend upon the will of the minors and not solely of their parents. A 1947 Pat 132 (134).

(28) A contract which reserves to the seller the right to vary the price fixed in the contract or which reserves to him complete liberty to deliver or not to deliver or to render the contract void is no contract at all. A 1949 Cal 231 (232, 233) (Obiter).

(29) A party to a contract is not entitled in law to cancel a concluded contract unilaterally. Having entered into an agreement, it is not open to the defendant to resile from the same on untenable grounds as he pleases. Therefore, such a cancellation has no effect in law. A 1958 Ker 195 (201).

(30) Non-registration of a document compulsorily registrable does not render the contract contained in it void. ILR (1954) Patiala 244 (250).

(31) Under French Civil Code, promise of sale is itself equivalent to a sale when there is the consent of both the parties over the price and over subject-matter of the sale. The promise of sale is not subject to any particular written form. It could even be an oral transaction. Even to effect a sale of immovable property no written conveyance is necessary. Under the French Law if there is a promise of sale but no sale in actuality, parallel to what might be termed an executory agreement of sale under the law familiar to our Courts, that promise would nevertheless inhibit the promisor from dealing afresh with the property. But a vendee if he be a vendee for valuable consideration without notice of the earlier contract, would be permitted to validly purchase as in our system of law. ILR (1964) 2 Mad 471 (DB).

(32) A Managing Director, under terms of agreement was invested with extensive powers of management but to exercise his functions subject to direction and control of Board of Directors — Company credited to his account a remuneration every month but withholding it subsequent to assessment year — Agreement was contract of service. A 1967 Mad 143 (145) (DB).

(33) The word 'contract' occurring in the proviso to Sec. 4 (1) of C. P. and Berar Sales

(i) An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract;

Section 2 (h) (contd.)

Tax Act, 1947 is to be interpreted according to S. 2 (b) of the Act. A 1967 Madh Pra 234 (237) (DB).

(34) The obligations in Chap. V cannot be brought within the definition of contract contained in this section. A 1946 Bom 216 (242, 243).

(35) Where a sugar factory in compliance with directions issued by Sugar Controller of India in exercise of authority under Sugar and Sugar Product Control Order, 1946, despatches sugar to Madras Province such despatches were not result of any contract of sale. Controller did not act as agent of Province to purchase goods. No offer to purchase sugar by province and no acceptance of any offer by manufacturer is involved. A 1963 SC 1207 (1212).

(36) While it is true that delivery of the actual goods by the seller to the buyer is not required under a c. i. f. contract, delivery of the goods to a ship's master is undoubtedly required and it is also required that the goods must be of the contract description and that the relative bill of lading must not exceed or fall below the stipulated quantity even by an ounce. A 1959 Cal 328 (332, 333) (DB).

(37) Saurashtra Groundnut and Groundnut Products (Forward Contract Prohibition) Order (1949), Cl. 3 — Forward contract — Essentials — Expression "against which contracts are not transferable to third parties" — To come within this exception contract need not specifically provide that it is not transferable to third parties — Such condition may be implied from its terms and surrounding circumstances — Verawal Merchants Association Rules — Contract in pursuance of — Held, not transferable to third parties and therefore not a forward contract. A 1964 SC 1526 (1529, 1530, 1531, 1532). ((1950) 1 Mad LJ 557 and ILR (1951) Mad 723 and A 1954 Mad 528 and A 1956 Andhra 9, Overruled.)

(38) Consignee entitled to damages from Railway — Payment made by insurer of goods — Insurer subrogated to right of consignee but policy requiring consignee to join in legal actions taken by insurer — Notice of claim by consignee after being paid by insurer of goods is valid — Contract between consignee and Railway not affected. A 1969 Bom 401 (407) (DB).

(39) Contract of insurance is distinct from subject-matter of insurance — The latter exists independently of the contract. 1976 Tax LR 745 (753) (DB) (Guj).

(40) Decree for arrears of pay reinstatement etc. — On demand of arrears employee informed that amount would be settled after decision of appeal filed and requested to wait till then — There was fresh contract. A 1975 Mad 337 (341) (DB).

(41) Title suit compromised between parties plaintiff agreeing to first offer land to defendant in the event of sale — Compromise was a concluded agreement enforceable by law. A 1980 Cal 258 (260) : (1980) 2 Cal LJ 11.

(42) Acceptance of tender for supply of articles by State authority empowered in that behalf — A valid and enforceable contract comes into existence. A 1971 Mad 221 (223, 224, 225) (DB).

(43) Representation of existing fact and representation as to promise to do something in future — Other party acting on such representation — It may give rise to estoppel in former case but in latter it may result in contract or at least obligation ex contractu enforceable in equity. A 1971 SC 1021 (1024).

(44) Where correspondence between plaintiff and defendants with object of buying and selling certain property points out that there were proposals and counter proposals between them and they have themselves not resolved to commit themselves to a particular situation in the matter of the offer and acceptance of the contract to sell and buy, it was held that there was no concluded contract between the parties. (1975) 1 Mad LJ 356 (DB).

(45) Auction sale of forest produce — In absence of any evidence to show that the plaintiff had received any communication about the written acceptance of the bid or its confirmation or that he had executed any agreement there was no concluded contract between the parties which could be legally enforced. A 1975 Mad 292 (303) (DB).

(46) Section 2 (h) — Sale of jewelleries by 4 out of 5 trustees — Approval of non-participating trustee not proved as required by Sections 46 and 47 of the Trusts Act — Held sale was not concluded contract within S. 2 (h) so as to be enforceable against and binding on trustees or beneficiaries. A 1979 Andh Pra 229 (239) : (1979) 1 APLJ (HC) 264 (DB).

Section 2 (i)

(1) The word 'voidable' in the contract has been used to mean that the contract is binding on the parties unless set aside on the ground that the transaction was vitiated by fraud, undue influence, misrepresentation or any other circumstances which would entitle a party to a contract to avoid it. A 1928 Mad 986 (989) (DB).

(2) A one-sided contract although extremely unfavourable to one of the parties is still a valid and binding contract unless the Court can find that there is no mutuality or that there is really no obligation upon one of the parties to fulfil his part of the contract. ILR (1950) 1 Cal 550 (554) (DB).

(3) Where a contract is not binding upon one of the parties to it because it is not in the form in which it is required to be executed by the mandatory provisions of a statute and what has been done by that party is to be regarded only as a part performance under the contract, its consideration being executory, it is open to the other party to successfully claim that the contract is void on the ground of absence of mutuality and not merely voidable. A 1934 Bom 277 (285).

(4) A contract falling under Section 236 is a voidable contract. A 1933 Sind 207 (209) (DB).

(5) Transaction covered by second proviso to Section 20 of the Madras Estates (Abolition and Conversion into Ryotwari) Act is voidable

(j) A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable.

[Malaysian Contract Act, 1950, S. 2.]

CHAPTER I

OF THE COMMUNICATION, ACCEPTANCE AND REVOCATION OF PROPOSALS

3. Communication, acceptance and revocation of proposals.— The communication of proposals, the acceptance of proposals, and the revocation of proposals and acceptances, respectively, are deemed to be made by any act or omission of the party proposing, accepting or revoking by which he intends to communicate such proposal, acceptance or revocation, or which has the effect of communicating it.

[Malaysian Contract Act, 1950, S. 3.]

Section 2 (i) (contd.)

at the instance of the Government. A 1958 Andh Pra 522 (529) (DB).

(6) A transaction covered by the second proviso to Section 20 of the Madras Estates (Abolition and Conversion into Ryotwari) Act, 26 of 1948, being enforceable by the Government but not against it is a voidable transaction. A 1958 Andh Pra 522 (529).

(7) When a voidable contract is acted upon by a party as valid, the party is estopped from denying its validity. A 1933 Sind 207 (210) (DB).

(8) Unilateral postponement of right to claim performance of contract, with a view to take advantage or undue benefit out of such a voluntary act on self-part and take advantage of a favourable market — Contract becomes voidable. A 1977 Mad 109 (115) (DB).

(9) If the transaction is voidable only, it cannot be avoided so as to prejudice an innocent party, who has for value acquired an interest in the res which is the subject-matter of the transaction. A 1979 Ker 224 (226) : ILR (1979) 2 Ker 427.

Section 2 (j)

(1) The words "unenforceable by law" mean unenforceable by substantive law, and not by reason of some procedural regulation. **A 1939 PC 110 (113).**

(2) Failure to sue for possession of the land within 3 years as required by Article 47, Limitation Act does not entail the contract of sale void within the meaning of Section 65 of the Contract Act. A 1948 Nag 382 (384) (DB).

(3) A contract embodied in a document which is compulsorily registrable does not render the contract void ab initio if that document is not registered. ILR (1954) Patiala 244 (250).

Section 3

(1) To conclude a contract and to bring about contractual relationship between the parties, the acceptance must be communicated in some perceptible form. A mere resolve on the part of offeree to accept an offer, when there is no external manifestation by speech, writing or other act, of the intention to do so, cannot result in an enforceable or a concluded contract. Both offer and acceptance must be absolute, unqualified and unconditional. If it is conditional parties can withdraw at any moment until absolute acceptance takes place.

The position may, however, be different if there is a statutory rule having force of law precluding withdrawal of a bid in an auction sale before its acceptance or refusal is communicated to the bidder. A 1971 Mad 28 (32)

(1-A) Acceptance and revocation of proposals — A party who offers to be bound by statement of any opposite parties, cannot resile from such offer after the other party has agreed to make such statement. A 1980 Punj 284 (288, 289) (FB). (A 1976 Punj & Har 287; (1955) 57 Pun LR 327; A 1961 Punj 31 and (1978) 2 Rent LR 708, **Overruled.**)

(1-B) Unilateral contract — Offer by offeror to enter into written contract if offeree performed stipulated conditions — Whether offeror entitled to withdraw offer once offeree had embarked on performance of conditions. Daulia Ltd. v. Four Millbank Nominees Ltd. (1978) 2 All ER 557 (CA).

(2) A mere mental resolve to make an offer unless such intention is also communicated to the other party cannot bring into existence an offer which could be accepted. A 1949 Nag 286 (288).

(3) There can be an acceptance of an offer by the communication of the assent of the person to whom the offer is made or by his doing some act which he is requested by terms of the offer to do or by his accepting performance itself of the act constituting the offer. Mere silence cannot amount to any assent. A 1955 Bom 419 (430) °° A 1980 Madh Pra 89 (90) : 1980 MPLJ 231 (DB) °° A 1979 (NOC) 66 (Cal) °° ILR (1971) 2 Cal 119 °° ILR (1970) Andh Pra 282 (DB).

(4) In the case of acceptance, if there is an express or implied intimation from the offerer that a particular mode of acceptance would suffice, some overt act must be done or words spoken by the offeree which are evidence of his intention to accept and which conform to mode of acceptance indicated by the offerer. A mere tacit formation of intention cannot constitute an acceptance of an offer. A 1952 Cal 691 (694) (DB).

(5) In the absence of any express or implied directions from the offeror to the contrary an offer can be accepted by a letter. A 1952 Cal 32 (33).

(6) A contract no doubt may come into existence by offer and acceptance. But proposal for compromise drafted by a Government official or lawyer by itself or when approved by the Minister for Revenue for reference to the Finance Department does not imply the terms of compromise nor can it be regarded as an offer to the other party nor can the unofficial acceptance of such proposal of compromise be

4. Communication when complete.— The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made.

The communication of an acceptance is complete,—

as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor;

Section 3 (contd.)

regarded as its acceptance by that party in that sense. ILR (1971) 2 Cal 119.

(7) Confirmation one of the conditions of contract to become final auctions — No confirmation — No concluded contract — Only right the bidder has is to refund of all money paid by him. (1969) 17 Law Rep 365 (Mys).

(8) Where after the demand by landlord for enhancement of rent, the tenant continues to occupy the premises without any express or implied protest, he must be deemed to have accepted by conduct the proposal for enhanced rent. A 1940 Oudh 287 (288) ** 1971 WLN (Part II) 5 (Raj). (Rate of extra work by contractor fixed by other party to contract — Contractor not refusing but continuing to carry out work — Inference of willingness to work at rate fixed can be drawn.)

(9) Where an Insurance Company on receipt of a completed proposal and a cheque for the premium from the assured cashes the cheque and appropriates the money there is an acceptance of the proposal by the company. In such a case no communication to the assured is necessary to complete the acceptance. A 1952 Cal 691 (695) (DB) ** 1979 All LJ 602 (607).

(10) Where an Insurance Company offered to revive a lapsed policy if the assured remitted the premium amount before a specified date it was held that remittance by post must have been the mode of payment which was in contemplation of the company and hence the policy became revived as soon as the assured put the money into the post office. The fact that the assured could have recalled the money from the post office did not in any way prevent the payment to it operating as an acceptance which had become effective against the company immediately. A 1947 Mad 122 (123).

(11) Contract of insurance when becomes binding — Acceptance of proposal does not necessarily result in a binding insurance contract — However, like other contracts, it may be concluded by offer and acceptance — If there is a stipulation that liability will attach itself under contract only if premium is paid that will be a condition precedent to policy taking effect. A 1963 Andh Pra 353 (355) (DB).

(12) Contract of life insurance — Contract when complete — Proposal of assured accepted subject to personal statement duly completed by doctor — Risk to commence from date of receipt issued — Held acceptance was not qualified and contract was completed by acceptance of offer. A 1962 Punj 125 (126, 127).

(13) Acceptance — Signing of proposal form of policy by P on behalf of X as owner of vehicle — Insurer communicating acceptance to X by post — X keeping silent and not disowning ownership of vehicle — Held, X was owner of the vehicle and vehicle was properly insured. (1967) 69 Pun LR 578.

(14) Where pending a suit in regard to certain property in possession of the Court of Wards certain interested parties had an informal discussion to explore the possibilities for a compromise and one of them who was also a member of the Court of Wards suggested to the Court of Wards, that a compromise may be agreed to on certain terms and they passed a resolution to that effect it was held that the resolution amounted to neither an offer nor an acceptance. A 1941 Oudh 529 (539).

(15) A bid in the public auction of excise shops itself constitutes an offer which the auctioneer is free to accept or reject. Such an acceptance of sale by auction is complete when the auctioneer announces its completion by the fall of the hammer. Consequently, until such announcement is made any bid may be retracted. A 1973 Andh Pra 178 (FB). (A 1963 Andh Pra 110, Overruled.)

(16) Auctions of plots — Auction-purchaser — Bid accepted subject to approval of Government — Withdrawal of bid before acceptance — Subsequent approval by Government will not bind the auction-purchaser. (1979) 81 Punj LR 314 : 1979 Pun LJ 324.

(17) Proposal and acceptance by telephone conversation — Contract is made at place when acceptance is received and part of cause of action for suit for damages for breach arises at that place — Analogy of — Contract by Post and Telegram does not apply. A 1966 SC 543 (547) ** A 1980 Kant 168 : (1979) 2 Kant LJ 410.

(18) Party signing order form wherein was printed in bold letters "subject to Madras Jurisdiction" — Jurisdiction of other Courts is excluded. A 1963 Guj 148 (149, 150).

(19) Acceptance — What amounts to — A offering B certain terms for divorce — B obtaining decree for divorce based on those terms — Both parties acting upon the terms — B's conduct amounts to acceptance of A's terms — There is concluded contract binding on both. A 1964 Mad 52 (53).

(20) Where applicant made an offer to decide the case on statement made on special oath by P, who, apart from being father and brother of some of the opposite parties also was an advocate for all the opposite parties empowered under Vakalatnama to do all which opposite parties could have done in the case held that as soon as P accepted the offer a binding contract came into existence between applicant and opposite parties. 1969 Cri LJ 70 (73) (All)

(21) Service — Terms in advertisement — Conditions changed in the appointment order — Advertisement was only an invitation to offer in response to offer of petitioner in the form of his application for appointment — Petitioner joined service on basis of appointment order — Terms in advertisement cannot be enforced. 1972 Cur LJ 408.

(22) Renewal clause providing for yearly renewal of agreement by 31st Jan. — Renewal order for 1969 passed before 31-1-1969 but communicated to A after that date — Renewed order is invalid. A 1980 Madh Pra 93 (95) : 1980 MPLJ 218 (DB).

Section 4

1. Communication of proposal.— (1) Unless a proposal is communicated to the person to whom it is made, it is not complete and is in-

as against the acceptor, when it comes to the knowledge of the proposer.

The communication of a revocation is complete,—

as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it;

as against the person to whom it is made, when it comes to his knowledge.

Illustrations

(a) A proposes, by letter, to sell a house to B at a certain price.

The communication of the proposal is complete when B receives the letter.

Section 4 — Note 1 (contd.)

choate and inconclusive. A 1954 Bom 491 (494) (DB) ** A 1937 Mad 571 (573) (DB).

[See (1964) 68 Cal WN 1109.]

(2) An offer is made not at the place where, if it is made by letter, the letter is put into post, but at the place where the letter is delivered. A 1949 Pat 270 (276) ** A 1947 All 337 (339) (DB) ** A 1920 Mad 177 (180) (DB).

(3) A party who offers to be bound by the statement of any of the opposite parties, cannot resile from such an offer the other party has agreed to make such statement. A 1980 Punj 284 (288, 289) (FB).

(4) There can be no valid proposal until it comes to the knowledge of the person to whom it is made. A 1953 Madh B 38 (39).

(5) Offer by letter must be deemed to have reached the addressee, when the letter ordinarily would be delivered at the addressee's residence. Any delay in addressee actually receiving it in his hands, caused owing to his failure to make proper arrangements to receive the communication, will not be considered. A 1927 Lah 50 (50, 51).

(6) Tender — Validity — Debtor sending demand draft by post prior to stipulated time — Creditor receiving it only after expiry of period — Tender valid. ILR (1971) 1 Ker 494 (513).

(7) If under Section 4 of the Contract Act the offer is not complete unless and until it is communicated to the person to whom it is made, then it follows that the offer is completed not at the place from where it was sent but where it was received. A 1959 Madh Pra 234 (235, 236).

(8) The object of Sections 4 to 6 is to fix the point of time at which either party is precluded from revoking the offer or acceptance. A 1959 Madh Pra 234 (237).

2. Communication of acceptance.— (1) A contract complete and absolute can come into existence when the acceptance of an offer has been communicated to the offerer. A 1957 Punj 261 (264) (DB) ** A 1947 All 332 (334) (DB).

(2) The contract is completed when an offer made is accepted. It is the acceptance that gives rise to the cause of action and not merely an offer. A 1980 Kant 168 (169) : (1979) 2 Kant LJ 410.

(3) A contract of service comes into existence as soon as the offer is made by the institution and accepted by the teacher irrespective of the fact that the time for performance on the part of the teacher is postponed till a specified date. (1980) 21 Guj LR 573 (576).

(4) Communication of acceptance is necessary to convert into a promise an offer which seeks a promise in return. A 1954 Pat 14 (16).

(5) Concept of intimation implies two persons — The person to intimate and the person to be intimated. There can never be any valid intimation or communication in the eye of law when the person to be intimated or communicated was not properly or correctly or duly addressed. ILR (1976) Andh Pra 585 (592) (DB).

(6) A mere resolve on the part of offeree to accept an offer, when there is no external manifestation by speech, writing or other act, of the intention to do so, cannot result in an enforceable or a concluded contract. Both offer and acceptance must be absolute, unqualified and unconditional. A 1971 Mad 28 (32).

(7) The Court when communicating the offer of one party to be bound by the oath of the other acts merely as an intermediary and hence a completed agreement between the parties can arise only when the Court conveys the acceptance by the other party of the offer to the offerer. A 1952 All 882 (884, 885) (FB).

(8) Where the acceptance of a bid in an auction sale is a conditional acceptance, and it is communicated to the bidder, there is no need for a further communication of the fulfilment of the condition. A 1951 Mad 322 (324).

(9) As soon as the acceptance is posted or sent by telegram, the acceptance is complete against the proposer and the contract is concluded. A 1954 Bom 491 (494) (DB) ** A 1945 Lah 260 (264) (DB) ** (1977) 2 Kant LJ 140 (144) ** (1975) 88 Mad LW 485 (DB) ** A 1972 All 137 (139) : 1971 All LJ 1269.

(10) Where the proposal and acceptance are made by letters, the contract is made at the time when and at the place where the letter of acceptance is posted. (1904) 27 Mad 355 (359) (DB) ** A 1954 Bom 491 (494, 498) (DB) ** ILR (1954) 4 Raj 252 (257) ** A 1952 Cal 32 (33, 34) ** A 1952 Mys 111 (113) (DB) ** A 1937 Mad 571 (573) (DB) ** A 1967 Delhi 88 (91) : 1967 Cri LJ 1300 ** 1958 Andh LT 930.

(11) The actual despatch of a letter of acceptance must be established by evidence and it is not permissible to presume the fact from any course of business followed by the offeree. (1887) 9 All 366 (384) (DB).

(12) A letter of acceptance to a proposer, not correctly addresed, could not, although posted, be said to have been "put in a course of transmission" to him. (1887) 9 All 366 (385) (DB).

(13) The act of acceptance is a continuous act and it becomes effective so as to bind the acceptor completely when the acceptance comes to the knowledge of the proposer. A 1954 Bom 491 (494) (DB) ** A 1949 Pat 270 (278) (DB).

(14) The cover note despatched by an Insurance Company on receipt of the proposal

(b) B accepts A's proposal by a letter sent by post.
The communication of the acceptance is complete,
as against A when the letter is posted;
as against B when the letter is received by A.
(c) A revokes his proposal by telegram.
The revocation is complete as against A when the telegram is despatched. It is complete as against B when B receives it.
B revokes his acceptance by telegram. B's revocation is complete as against B when the telegram is despatched, and as against A when it reaches him.

[Malaysian Contract Act, 1950, S. 4.]

5. Revocation of proposals and acceptances.— A proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards.

Section 4 — Note 2 (contd.)

and the insurance premium, accepting the risk without any condition that a policy would be issued only if on further consideration the proposal was accepted on its receipt by the assured amounts to a binding acceptance and the non-issue of a formal policy would not affect the liability of the compay in regard to the risk which it had undertaken to insure. A 1934 All 298 (300) (DB).

(15) The post office is the agent of the sender of letter or telegram and not the agent of the addressee and hence an acceptance becomes complete only at the place where it is communicated to the offerer. A 1949 Pat 270 (276) (DB).

(16) Where before an acceptance sent by letter reaches the offerer a telegram revoking the acceptance reaches him no concluded contract can come into existence. A 1949 Pat 270 (276) (DB).

(17) The communication of acceptance does not make any change in the place where the contract is made but only affects the time of its complete formation. 1896 Pun Re No. 76 p. 234 (238) (DB).

(18) The communication of the acceptance to the proposer cannot be said to be such an integral part of the completion as to constitute a part of the cause of action in a suit and even if the acceptance does not reach the proposer being lost or misplaced in transit, the contract would be complete. A 1954 Bom 491 (494) (DB).

(19) In the case of an offer which seeks an act from the other party the performance of the act alone is sufficient to convert it into a promise without any further communication of an acceptance. A 1954 Pat 14 (16) ** A 1929 Lah 656 (656).

(20) Premium tendered by cheque along with the proposal — Cheque encashed by life Insurance Corporation of India — Corporation bound to accept the proposal. 1979 All LJ 602.

(21) A paying money to B with some conditions — B accepting the money and performing some of the conditions — B's acceptance implied — B liable to repay A. A 1979 (NOC) 66 (Cal).

(22) Proposal and acceptance by telephone conversation — Contract is made at place when acceptance is received and part of cause of action for suit for damages for breach arises at that place — Analogy of contract by post and telegram does not apply. A 1966 SC 543 (547).

(23) Where in an auction the final bids are made subject to the confirmation by another superior authority, it is only when the bid is approved that the contract of sale would be deemed to be complete, and until such confirmation or approval is made, the person whose bid has been sent for confirmation is entitled to withdraw his bid. When the bid is so withdrawn before it is accepted by such authority, there would be no concluded contract and as a result, the bidder will not be liable for damages on account of any breach of contract or for the shortfall on the resale. A 1973 Andh Pra 178 (180) (FB). (A 1963 Andh Pra 110, Overruled.) ** (1979) 81 Punj LR 314 (316) : 1979 Pun LJ 324 ** A 1975 Mad 292.

(24) Concluded contract — Auction sale — Conditional acceptance of bid — Papers sent to Government for confirmation of acceptance — No communication of confirmation of acceptance — Held no concluded contract. A 1972 SC 1242 ** A 1980 Madh Pra 89 : 1980 MPLJ 231 (DB).

(25) Where an offer is made by a person to purchase a house belonging to a co-operative society it is necessary that the resolution of the society accepting the offer of the would be purchaser should be duly communicated to the latter and, unless there is such a communication of the resolution, there is no completed contract. A 1961 Mad 289 (291).

(26) Acceptance — What amounts to — A offering B certain terms for divorce — B obtaining decree for divorce based on those terms — Both parties acting upon the terms — B's conduct amounts to acceptance of A's terms — There is concluded contract binding on both. A 1964 Mad 52 (53).

(27) Acceptance — Signing of proposal form of policy P on behalf of X as owner of vehicle — Insurer communicating acceptance to X by post — X keeping silent and not disowning ownership of vehicle — Held X was owner of the vehicle and vehicle was properly insured. (1967) 69 Punj LR 578.

(28) Receivers appointed to sell property negotiating with tenants for sale to them — Court's sanction sought to sell property — Contract is concluded the moment Court accords sanction. (1972) 13 Guj LR 773.

Section 5

(1) An offer to sell and to keep the offer open till a certain time is nudum pactum and, can, at any time before acceptance, be recalled. A 1916 Low Bur 18 (19) ** (1892) 2 Mad LJ 57 (64) (DB).

An acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but not afterwards.

Illustrations

A proposes, by a letter sent by post, to sell his house to B.

B accepts the proposal by a letter sent by post.

A may revoke his proposal at any time before or at the moment when B posts his letter of acceptance, but not afterwards.

Section 5 (contd.)

(2) Section 5 must be read subject to S. 8. (1959) 10 STC 74 (81) (DB) (Pat).

(3) Revocation of proposals — A person who makes an offer is entitled to withdraw it before its acceptance is intimated to him. A 1972 Madh Pra 131 (132).

(4) Acceptance and revocation of proposals — A party who offers to be bound by statement of any of opposite parties, cannot resile from the offer after the other party has agreed to make such statement. A 1980 Punj 284 (288, 289) (FB).

(5) There is in principle a material distinction between acceptance of an offer which asks for a promise and an offer which asks for an act on the condition of the offer becoming a promise. In the former case where the acceptance is to consist of a promise, there must be communication to the proposer. But in the latter class of cases, as for example, despatching goods ordered by post, the rule is that no further communication of acceptance is necessary than performance of proposed act. (1959) 10 STC 74 (81) (Pat) (DB).

(6) A bidder at an auction sale only makes an offer which he can withdraw before its acceptance by the fall of the hammer. A 1947 Mad 366 (367) (DB) °° (1913) 18 Cal LJ 53 (56) (DB) °° 1977 Rajdhani LR 347 °° A 1971 Mad 28 (30, 31).

(7) Where an auction sale is held under the express condition that the acceptance of the highest bid would be subject to the confirmation by a particular authority the bidder could withdraw his offer before such confirmation in spite of the bid having been provisionally accepted. A 1953 Punj 274 (278) °° A 1947 Mad 366 (368) °° 1977 Rajdhani LR 26 °° A 1971 Mad 28.

(8) A bidder at auction sale makes an offer to purchase. Where terms of auction provide that acceptance of bid will be communicated after expiry of seven days of the auction, the authority holding the auction is under a contractual obligation to communicate the acceptance and if it fails to do so the bidder is entitled to revoke his offer and claim refund of earnest money paid. ILR (1973) 2 Punj 19 (DB) °° ILR (1972) 1 Delhi 110. (Acceptance communicated after communication of revocation — There is no concluded contract between parties.)

(9) After a transaction has ripened into a contract it requires the consent of both parties to revoke or modify it. A 1925 PC 232 (232).

(10) Once an offer to be bound by the special oath of the other party has been made by party and accepted by the other, it cannot be revoked. He cannot, therefore, be allowed to resile from his offer before the special oath has actually been taken. A 1952 Pat 208 (210) (DB) °° A 1952 All 882 (889) (FB) °° A 1957 Orissa 226 (227).

(11) An original proposal becomes superseded by the counter-proposal made by the other party and would not be revived even if the maker of the proposal rejects the counter offer. Quite a different result would however follow if the person making the counter-proposal withdraws it before the other either accepts the counter-proposal or rejects it. ILR (1956) 1 Cal 164 (170).

(12) Madras District Municipalities Act, Sections 68, 68-A and 69 — Public auction by Commissioner — Highest bidder withdrawing his bid before acceptance by Council, the only authority to accept offer — Effect of withdrawal — Contract concluded liability of the highest bidder for damages for breach ot contract. (1969) 1 Mad LJ 394.

(13) Tender notice calling for quotations — Mere offer of quotations does not create contract — Rights and duties of person calling for quotations — Distinction between Government and private person — Acceptance of lowest quotation — Not obligatory — Refusal by Government to accept lowest quotations — Writ petition not maintainable. A 1962 Manipur 47 (51).

(14) Tender for sale of country liquor group shops — Withdrawal prior to acceptance — Statutory condition in the tender form that tenderer had no right to withdraw — Earnest money forfeited on withdrawal by tenderer. A 1976 Raj 215 (217).

(15) Tender submitted by S accepted by Government and acceptance communicated to S through a letter — Telegram by S revoking tender reaching Government after it had posted letter of acceptance — Held that contract was complete between S and Government as soon as letter of acceptance was posted. A 1972 All 137.

(16) Displaced Persons (Compensation and Rehabilitation) Rules (1955), Rule 90 (10) — Auction sale under — Provisional or conditional acceptance — Bidder held entitled to withdraw his offer and revoke bid — Displaced Persons (Compensation and Rehabilitation) Act (1954), S. 20. A 1968 Pat 433 (438) (DB).

(17) Auction sale — Acceptance of bid subject to confirmation of Chief Commissioner — No completed contract till such confirmation — Bid can be withdrawn — Auction-purchaser not liable for shortfall on resale. A 1963 Punj 274 (278) °° A 1978 Orissa 41 (DB) °° A 1973 Madh Pra 24 (25, 26).

(19) Revocation of communication completed at N — Court at N has jurisdiction to try suit for breach of contract. A 1965 Punj 107 (109, 110) °° 1972 MPLJ 981.

B may revoke his acceptance at any time before or at the moment when the letter communicating it reaches A, but not afterwards.

[Malaysian Contract Act 1950, S. 5.]

STATE AMENDMENT

Uttar Pradesh

In its application to the State of Uttar Pradesh, at the end of the first paragraph, insert following Explanation :—

Explanation.—Where an invitation to a proposal contains a condition that any proposal made in response to such invitation shall be kept open for a specified time and a proposal is thereupon made accepting such condition, such proposal may not be revoked within such time.—U. P. Act 57 of 1976, S. 25 (1-1-1977).

6. Revocation how made.— A proposal is revoked—

(1) by the communication of notice of revocation by the proposer to the other party;

(2) by the lapse of the time prescribed in such proposal for its acceptance, or, if no time is so prescribed, by the lapse of a reasonable time, without communication of the acceptance;

(3) by the failure of the acceptor to fulfil a condition precedent to acceptance; or

(4) by the death or insanity of the proposer, if the fact of his death or insanity comes to the knowledge of the acceptor before acceptance.

[Malaysian Contract Act 1950, S. 6.]

7. Acceptance must be absolute.— In order to convert a proposal into a promise, the acceptance must—

(1) be absolute and unqualified;

(2) be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted. If the proposal

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Section 6

(1) Where application for shares of a company was made in March and July 1933 and December 1934, but there was no allotment of shares till August 1935, no notice of allotment being given to proposer till then, and there was nothing in the conduct of the applicant amounting to waiver of revocation, held that Section 6 (2) applied and the proposals must be deemed to have been revoked. A 1939 Nag 225 (226).

(2) Acceptance of shares allotted after delay amounts to acquiescence on the part of the applicant and he cannot thereafter repudiate the allotment on the ground that as his offer became revoked by delay in allotment there could have been no valid allotment of the shares to him. 1955 Mad WN 80 (81).

(3) Auction sale — Provisional or conditional acceptance — No concluded contract — Bid can be revoked by serving a notice to that effect. A 1968 Pat 433 (435, 436) (DB).

(4) Displaced Persons (Compensation and Rehabilitation) Act (1954), S. 20 — Auction sale of evacuee property — Auction-purchaser, a displaced person — He repudiating his liability on the ground that the area of the property auctioned was less than the area represented at the time of sale — Sale in his favour cancelled and resale ordered — Resale of property at an appreciated price — Held, that auction-purchaser could not contend that the sale in his favour should not have been cancelled — Further the authorities were not bound to accept his conditional offer that he was prepared to accept property if proportionate reduction in the price offered by him was allowed as the area had been found less than what was represented. A 1976 SC 2128 (2129).

(5) If there is an express refusal to accept the proposal, the proposal stands revoked. A 1973 All 263 (266).

(6) Government advancing loan to a company — Initially rate of interest was proposed by Government — Rate was not fixed — Company all the while bargaining as regards rate of interest — It could not be said that the company acquiesced to the rate of interest initially proposed, or there was any implied contract. 1978 Tax LR 273 (Madh Pra).

SECTION 7 — SYNOPSIS

1. Acceptance must be unconditional and absolute.
2. Counter proposal.
3. Manner of acceptance.

1. Acceptance must be unconditional and absolute.— (1) The theory of offer and acceptance has received statutory recognition in India so that every transaction to be recognised as a contract must, in its ultimate analysis, resolve itself into a proposal and its absolute and unqualified acceptance. A 1951 All 93 (97) (FB) °° A 1922 Pat 24 (26) °° (1904) 28 Bom 420 (425) (DB) °° (1900) 24 Bom 510 (523) (DB) °° A 1970 SC 706 (712). (Offer and acceptance Invitation to other party to make offer — No unconditional acceptance — No contract.) °° A 1977 All 494 (498). (Plea that non-refund of alleged deposit amounted to implied acceptance was rejected.)

(2) Acceptance must be absolute — Submission of tender by a contractor — Letter accepting tender on behalf of President of India re-

prescribes a manner in which it is to be accepted, and the acceptance is not made in such manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise; but if he fails to do so, he accepts the acceptance.

[Malaysian Contract Act 1950, S. 7.]

Section 7 — Note 1 (contd.)

quiring the contractor to execute a formal agreement — Signatory of letter neither purported to accept tender nor purported to append his signature for and on behalf of the President — Terms of formal agreement objected to by the contractor — Formal agreement not executed — Held, there was no concluded contract between the parties. A 1972 Delhi 110 (113 to 117).

(3) Until there is absolute acceptance of a proposal the parties are still in the stage of negotiations and no legal obligations attach to them. (1900) 24 Bom 510 (523) (DB) ** (1956) 60 Cal WN 423 (433).

(4) Government advancing loan to a company — Interest remaining in a fluid state — Company all the while bargaining as regards the rate of interest — Company could not be said to have acquiesced to rate of interest initially proposed by the Government. 1978 Tax LR 273 (278, 279) (Madh Pra).

(5) An absolute and unqualified acceptance may, even when there is no express communication from the offeree, be inferred from his conduct. A 1919 All 7 (8, 9).

(6) Where there is a definite acceptance of an offer, resulting in a concluded contract the accompanying statement that a formal contract will be issued shortly is neither a term of the bargain nor is it a condition precedent to the coming into force of the contract. ILR (1971) 1 Delhi 355.

(7) An acceptance which does not extend to all the terms of a contract cannot make a binding contract. A 1958 Andh Pra 533 (536) ** 1972 Cur LJ 408 (Punj).

(8) An acceptance which leaves one of the conditions essential to the implementing of the acceptance to the discretion of a third person is not an unqualified acceptance and fails as an acceptance. A 1941 Oudh 529 (543).

(9) An acceptance which is qualified by certain conditions cannot amount to an absolute and unqualified acceptance which is capable of resulting in a completed contract. A 1947 All 332 (334).

(10) Where an acceptance is in substance only a provisional arrangement subject to something more being done to complete the arrangement it cannot make a binding contract. A 1958 Andh Pra 533 (536).

(11) Concluded contract — Lease of Municipal plot of land — Resolution of Municipal Committee to grant renewal if lessee paid upset price and annual rent within specified period — Lessee not complying but approaching higher authorities — Counter offer by lessee rejected by committee — Held, that the Municipal Commr. had no authority to go on negotiating with the lessee and to accept payment and his act was thus unauthorised. A 1973 SC 508 (510).

(12) Where the acceptance of the highest bid at an auction sale by the sale officer or the auctioneer is subject to the confirmation by a superior authority there is only a provisional or conditional acceptance and the bidder will be bound by his offer only after such confirmation is received. A 1951 Mad 322 (325) ** A 1953 Punj 274 (278) ** A 1971 SC 2295 (2297) ** A 1977 All 494 (498). (The mere fact that the tender was highest could vest in it no right to compel its acceptance, especially where the invitation reserves the right to reject a tender.)

(13) Auction of liquor shops — Highest bidder not depositing prescribed minimum — Reauction fetching smaller amount than offered in earlier auction — Suit for loss by State against highest bidder in earlier auction — Bid offered not sanctioned by Excise Commissioner — No concluded contract between State and auction-bidder to hold bidder liable for breach of contract. A 1980 SC 680 (682) : 1980 All LJ 278.

(14) When an order for goods is accepted "subject to confirmation by mail" the acceptance is conditional and the contract cannot be said to have been complete on the date of such acceptance. A 1930 Lah 325 (326) (DB) ** A 1930 Lah 114 (115) (DB).

(15) An acceptance which at the same time exempts the acceptor of any obligation is not an acceptance capable of creating a binding contract. A 1931 Lah 260 (263) (DB).

(16) Where by the absolute and unequivocal acceptance of an offer a binding contract has come into existence between the parties the non-execution of a formal document cannot absolve the parties of their engagement. A 1934 All 298 (300) (DB). (Proposal by insurance accepted by company — Non-issue of policy before happening of risk cannot absolve company of its liability.)

(17) Acceptance must be absolute — When there is variance between the offer and acceptance even in respect of any material term, acceptance cannot be said to be absolute and unqualified and the same will not result in the formation of a legal contract. A 1972 Delhi 110 (115, 116).

(18) A covenant in a sale deed that the vendee in the event of selling the property in future must sell it to the vendor or his heirs for the same price and also the price of any building he might have erected on the property amounts to a completed contract and not merely a standing offer which requires acceptance before it could become a contract. A 1933 Mad 322 (323) (FB).

(19) Auction sale — Property auctioned less than the area represented at the time of sale — Auction purchaser's offer to purchase if the authorities allowed proportionate reduction in price offered by him — Conditional offer — Authorities not bound to accept it. A 1976 SC 2128 (2129).

(20) A condition in a concluded contract of insurance that the liability under it will attach itself only on the insured paying the premium is only a condition precedent for the policy taking effect inserted for the benefit of the insurer which can be waived by him. A 1954 Mad 520 (521) (DB).

Section 7 — Note 1 (contd.)

(21) Contract of insurance is concluded by offer and acceptance — Issue of policy is a subsequent act. 1970 ACJ 101 (Delhi).

(22) Contract of insurance — Duty of insured to supply true information regarding himself — Information supplied found false — Contract null and void. A 1977 Mad 381 (384).

(23) In order to decide whether there is an absolute and unqualified agreement between the parties to a contract, the entire negotiations and correspondence should be considered. A 1958 Andh Pra 533 (536) ** A 1930 Mad 654 (655, 656) (DB).

(24) A new collateral term annexed to an acceptance of a contract does not affect the original contract accepted absolutely. A 1958 Andh Pra 533 (536).

(25) During the course of the negotiations for the sale of a horse the seller gave a warranty that the horse was sound. The buyer accepted the bargain by telegram and later sent a letter stating that he confirmed the telegram and would take the horse if the seller had no objection to get a veterinary certificate. It was held that the warranty was not a proposal. Therefore it could not be said that by asking for the certificate the buyer had not accepted the warranty absolutely and without qualification and therefore the seller was not bound by it. (1912) 14 Ind Cas 135 (135) (DB) (All).

(26) Vendor agreed to sell certain premises and the purchasers agreed to purchase — Clause of agreement made the vendor liable to execute the sale deed within a certain time — There was a concluded contract. **A 1973 SC 559 (560).**

(27) Acceptance of offer must be absolute and unconditional — Tender for supply of oil subject to conditions of contract — Condition subsequent as to security deposit — Acceptance letter stating that contract was concluded but it was subject to making security deposit — Held there was a concluded contract. **A 1962 SC 378 (385)** ** A 1977 All 494 (496). (Seeking clarification of offer — Neither amounts to acceptance nor to the making of a counter offer.)

(28) Acceptance of proposal — Tender — Even if special conditions are given with the invitation to tender showing general conditions, former cannot apply when acceptance specifies only those general conditions.

The letter of acceptance is the counter offer and when acted upon it becomes accepted. Then the special conditions can never become part of the contract. A 1972 Cal 217 (220).

(29) When one party makes a composite offer, each part thereof being dependent on the other the other party cannot by accepting a part of the offer, compel the other to confine its dispute only to that part not accepted, unless the party offering the composite offer agrees to that course. **A 1964 SC 892 (895).**

(30) Agreement for sale of land — Price and area of land and time for completion of sale fixed — Mere omission to settle mode of payment does not affect the completeness of contract. **A 1968 SC 1028 (1032).**

(31) Oral agreement — Reference to execution of formal contract does not establish the proposition that the parties cannot be bound by previous agreement. **A 1968 SC 1028 (1031).**

(32) Auction sale — Provisional or conditional acceptance — No concluded contract, Bidder held entitled to withdraw his offer and revoke bid. A 1968 Pat 433 (435, 436) (DB) ** A 1972 SC 1242 (1245, 1246).

(33) Offer by plaintiffs to sell certain quantity of oil at certain rate accepted by defendants without any qualification or condition — Fresh negotiations between parties regarding payment of Vidya fund which was not mentioned earlier — Further negotiations held did not affect main contract as to sale of oil which was already concluded: A 1962 Punj 56 (60, 61, 62) (DB).

(34) Acceptance of tenders of certain firm for purchase of forest products — Failure of firm to make initial deposit — Acceptance, was not a valid one and there was no concluded contract between the firm and the Chief Conservator. **A 1973 SC 1164 (1165 to 1167).**

(35) In order that acceptance of the proposal be inferred the acceptance of the consideration must be unconditional. Of course, if by any action on the part of the acceptee the proposer cannot be restored to his former position, then the acceptee cannot be permitted to say that his acceptance should be treated as other than as per the original proposal. But in the absence of such estoppel being applicable the conditional acceptance cannot become absolute acceptance. A 1968 Bom 294 (296).

(36) Contract to purchase several tons of iron scrap belonging to Government — Is concluded on acceptance of purchaser's tender — Condition for payment of price does not make the contract conditional. A 1969 Bom 163 (171).

(37) A notice communicating to its constituent the decision of the bank to raise the rate of interest from a certain date may not amount to an express proposal within the meaning of Section 2 (a) but it neverthless contains an implied proposal to the effect that if the constituent wanted to keep alive his overdraft account with the Bank or desired to take further advances from the Bank it could be done only on the terms contained in the notice. A 1958 Cal 644 (646, 647, 648) (DB).

(38) Where an oral contract for reconveyance is entered into, the question whether it would be enforceable as a completed contract notwithstanding the omission of the parties to execute a written agreement would depend on the question whether the written agreement was a term of bargain or whether it was merely an expression of desire. It is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. 1959 Ker LT 595.

2. Counter proposal.— (1) An acceptance with a variation in the terms of the offer or with a qualification is simply a counter proposal. (1900) 24 Bom 510 (523) (DB) ** ILR (1956) 1 Cal 164 (167) ** A 1938 Lah 341 (344) (DB) ** 1913 Pun Re No. 92 (DB) ** (1908) 2 Sind LR 7 (8, 9) (DB).

(2) A policy containing the condition that no insurance shall be deemed to have been effected until the premium in full is paid and accepted is only in the nature of a counter offer and not an absolute and unqualified acceptance of the proposal for insurance. **A 1928 Bom 260** (261, 262) (DB).

(3) An acceptance by an insurance company of a proposal for life insurance on condition that the first premium thereunder should be

8. Acceptance by performing conditions, or receiving consideration.— Performance of the conditions of a proposal, or the acceptance of any consid-

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Section 7 — Note 2 (contd.)
paid within 30 days from the date of acceptance is in law a counter-offer to be completed thereafter into contract by the fulfilment of that condition as required thereunder. A 1959 Pat 540 (541) (DB).

(4) A counter-offer amounts to a rejection of the original offer. A 1938 Lah 341 (344) (DB).

(5) If counter proposal is withdrawn before it has been either accepted or rejected, then it must be held that the original proposal stands unrejected, and capable of being accepted. ILR (1956) 1 Cal 164 (170).

(6) A counter proposal must be accepted by the original offerer before contract can result. (1900) 24 Bom 510 (523) ** ILR (1950) All 112 (115) ** A 1947 Cal 14 (16) (DB).

(7) The acceptance of a counter-offer results in a contract whose situs is the place where the counter-offer was received and accepted. ILR (1954) 4 Raj 252 (257).

(8) The plaintiff while accepting the defendant's offer of a lease made a counter proposal for insertion of a clause in the lease note providing for a renewal of lease for another five years. The defendant's estate manager replied "I am making necessary arrangements." It was held that the counter offer was not accepted. A 1921 Bom 200 (201) (DB).

(9) Offer, counter-offer and acceptance — Acceptance of offer with introduction of new term — Effect of — Counter-offer. The offeree must unreservedly assent to the exact terms of the offer to bring about a concluded contract. If, while purporting to accept the offer as a whole, he introduces a new term which the offerer has had no opportunity of examining, he is in fact merely making a counter-offer. The effect of such a counter-offer in the eyes of law is to destroy the original offer. An offer once refused is dead and cannot be accepted unless renewed. The question whether the terms added are intended to be part of the contract or are merely in the nature of enquiries for further information has to be decided by the Court in individual cases by looking into the effect of the words used in particular cases and thereby gathering the intention of the parties. A 1961 Ker 21 (23) (DB).

(10) Where after rejecting the counter proposal the offerer repeats his original offer and the offeree accepts the same a binding contract arises between the parties. A 1938 Cal 343 (346).

(11) It is not every slight variation in the acceptance that would affect the validity of a contract. It must be a material variation to bring about that result. (1908) 2 Sind LR 7 (8, 9) (DB).

3. Manner of acceptance.— (1) Where a person in an offer made by him to another person expressly or impliedly intimates a particular mode of acceptance as sufficient to make the bargain binding it is only necessary for the other person to whom such offer is made to follow the indicated mode of acceptance; and if the person making the offer expressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating acceptance of it to himself, performance of the conditions is a sufficient acceptance, without notification. A 1952 Cal 691 (695) ** A 1937 Bom 39 (43).

(2) Where a letter makes offer for sale of property, directing that purchaser should write about acceptance to a certain person and the intending purchaser instead of so writing communicates directly with the seller, there is no contravention of Section 7 as to render contract not binding on seller. A 1936 Cal 87 (91) (DB).

(3) Assent must be by express words or positive conduct. A 1927 All 407 (410) (DB) ** A 1914 Lah 436 (438) (DB).

(4) Where a constituent of a bank after a notice enhancing the rate of interest renews his overdraft account and also obtains further advances it must be taken that he has accepted the implied proposal of the bank contained in the notice to keep alive his account and to make further advances only at the higher rate of interest and therefore is bound to pay such interest. A 1958 Cal 644 (648).

(5) The law does not cast a duty on the person to whom an offer is made to reply to that offer and hence acceptance cannot be inferred from the silence of the offeree. A 1927 All 407 (410) (DB) ** A 1939 Cal 500 (501) ** A 1930 Lah 374 (375) (DB) ** A 1917 Mad 13 (14) (DB).

(6) There is one further case in which there may be acceptance by conduct which is not covered by Sections 7, 8 and 9. It is when trade or mercantile usage or local usage can be invoked to import into the transaction a promise by the promisee which is not made either expressly or impliedly. A 1927 All 407 (409) (DB).

(7) Acceptance of proposal — Can be in a form other than Sections 7 and 8. A 1968 All 292 (294).

(8) Offer — Acceptance cannot be by serving copy of plaint in a suit for specific performance through Court. A 1969 SC 1157 (1159).

Section 8

(1) In case where an offer asks for an act the performance of the desired act without any further communication of the acceptance is sufficient to render the offer a promise. A 1954 Pat 14 (16) (DB).

(2) Where an aunt promised to purchase and settle property on her niece if she resided with her and after the purchase also wrote a letter to that effect whereupon the niece resided with her, the letter coupled with the conduct of niece constituted a binding contract which was specifically enforceable. A 1916 PC 9 (13).

(3) A surety asked the creditor by letter to advance money to the debtor to certain amount and made himself responsible for the amount. The letter did not contemplate any communication of acceptance. It was held that the advancement of money amounts to acceptance

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eration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal.

[Malaysian Contract Act 1950, S. 8.]

9. Promises, express and implied.— In so far as the proposal or acceptance of any promise is made in words, the promise is said to be express. In

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Section 8 (contd.)

of the proposal and the contract of guarantee was complete. A 1928 Lah 938 (939).

(4) Surety bond submitted by A for making good an amount embezzled by B if he was appointed Tahsildar in Tehri Garhwal State — No evidence that the Contract Act or any analogous law was in force in that State at the relevant time — Held that mere appointment of B as Tahsildar did not amount to acceptance of bond by the State — A was not liable for the amount embezzled by B in the course of his service. 1971 UJ (SC) 262.

(5) Where a party accepts a payment offered in full satisfaction of his claim without any objection, it should be deemed that he has accepted it on the condition on which it was offered and it is not open to him to say subsequently that he accepted the payment in part satisfaction of his claim. A 1953 All 745 (745, 746).

(6) Acceptance by performing conditions — Despite the demand for balance amount of claim, suit therefor will not lie if that demand had been made after encashing cheque for a smaller amount specified to be in full and final settlement of the claim. A 1973 Gauhati 111 (112, 113, 114).

(7) The acceptance of the cheque by the landlord of the tenant was the acceptance of a consideration. A 1953 All 745 (746).

(8) Section 5 must be read subject to provisions of Section 8. (1959) 10 STC 74 (81) (DB) (Pat).

(9) Provisions contained in Section 8 are not exhaustive but illustrative. A 1968 All 292 (294).

(10) Section 8 is an illustration of implied acceptance of proposal. A 1968 All 292 (294).

(11) Bank affording overdraft facilities to firm — Agreement providing for calculating interest on daily balance of account and charging same to the account on last day of each month — Firm availing overdraft facilities — Periodical statements of account charging compound interest sent — No objection by firm — Firm held agreed to compound rate of interest. A 1975 Andh Pra 113 (117, 119).

(12) In order that acceptance of the proposal be inferred the acceptace of the consideration must be unconditional. A 1968 Bom 294 (296).

(13) A notice communicating to its constituents the decision of the bank to raise the rate of interest from a certain date may not amount to an express proposal within meaning of S. 2 (a) but it nevertheless contains an implied proposal to the effect that if the constituent wanted to keep alive his overdraft account with the bank or desired to take further advance from bank it could be done only on the terms contained in the notice. This implied proposal invites from him in the words of Section 8 a 'reciprocal promise' to pay interest at the higher rate. A 1958 Cal 644 (646, 647).

(14) Where the Government advanced loan to a company and initially proposed the rate of interest, but the rate was not fixed, company was all the while bargaining as regards the rate of interest, but did not protest to the rate initially proposed by Government — Held, it could not be said that the company acquiesced to the rate of interest initially proposed. 1978 Tax LR 273 (Madh Pra).

(15) Proceedings under Section 145, Cr. P. Code — Applicant making offer to decide the case on statement made on special oath by P — P apart from being father and brother of some of the opposite parties also advocate for all the opposite parties empowered under Vakalatnama to do all which opposite parties could have done in the case — Held, as soon as P accepted the offer a binding contract came into existence between applicant and opposite parties. 1969 Cri LJ 70 (All).

(16) Decree-holder agreeing under compromise to accept less than decretal amount if paid before fixed date — Delay in depositing amount — Withdrawal of deposit by decree-holder — Decree-holder must be deemed to have condoned delay and accepted payment in full satisfaction of his claim. A 1961 All 91 (92).

(17) Plaintiff accepting payment offered on condition that it should be in full satisfaction of his claim — Plaintiff cannot subsequently say that he accepted it in part satisfaction and sue for balance. A 1965 All 34 (36, 37).

(18) Condition imposed unilaterally after acceptance of offer is not valid. 1964 Raj LW 416.

(19) Company's claims against railway pending — During pendency railway sending cheque making it clear that it was in full and final settlement — Company held must be deemed to have accepted implied condition that amount was tendered in full settlement. A 1966 All 104 (104).

(20) Acceptance of tenders of certain firm for purchase of forest products — Failure of firm to make initial deposit — Initial deposit a condition precedent, for acceptance of tender — Acceptance not valid. A 1973 SC 1164.

(21) Auction of quarry lease by Government — B's bid highest — B depositing security amount — B's bid accepted later but acceptance communicated to wrong person instead of B — There is no formation of contract between B and Government — Demand of lease money from B is illegal. A 1980 Madh Pra 89 : 1980 MPLJ 231 (DB).

Section 9

(1) A contract may be either express or implied. It may also be of mixed character, that is partly express and partly implied. A 1942 Lah 47 (49) (DB).

(2) An "express contract" means the reciprocal promises contained in the words of the contract or resulting from a true construction of them and excludes stipulations which may arise out of any usage or custom or which may be inferred from the conduct or course of dealings between the parties. A 1958 Andh Pra 550 (554) (DB).

so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied.

[Malaysian Contract Act 1950, S. 9.]

Section 9 (contd.)

(3) Contract whether implied or express gives an equal cause of action. A 1925 Lah 174 (174) ** (1912) 16 Ind Cas 609 (610) (DB) (Mad).

(4) The question of an express contract as well as an implied contract is one of inference to be drawn from the facts. (1912) 16 Ind Cas 609 (610) (DB) (Mad).

(5) Where the facts and circumstances lead to an irresistible conclusion that the parties must have agreed to do a thing on a particular footing though they may not have expressed it in their contract, be it written or oral, the Court should imply an agreement or a term to that effect and in so doing the Court does not make a new contract for them but it only gives effect to their presumed intention. (1972) 76 Cal WN 528.

(6) An express contract can be proved by written or spoken words which constitute an agreement between the parties while an implied promise may be proved by circumstantial evidence of an agreement. A 1942 Lah 47 (49) (DB).

(7) A covenant to repay is implied in every transaction of loan. A 1934 Pat 433 (435).

(8) Where a person after receiving a notice from his bank which impliedly proposes to him that it would keep his overdraft account alive and also make further advances only at a higher rate of interest, renews his overdraft account and also obtains further advances it is to be taken that he has agreed to pay the higher rate of interest stipulated by the Bank. A 1958 Cal 644 (646) (DB).

(9) A person accepting money for appropriation upon a certain contingency is under an implied promise to refund the same if the contingency does not arise and there is no appropriation of the amount. A 1957 All 799 (801) (DB).

(10) Under an award made on reference to arbitration regarding disputes between A and B, C as surety of A paid the amount found due to B. On reference being discovered to be void, C filed a suit against A for the recovery of amount. Held that there was an implied contract between C and A for reimbursement of the amount paid and therefore the suit was maintainable. A 1939 Lah 187 (188).

(11) Wherever a contract for work is found to be invalid it is always assumed, unless the express contract excludes it, that there is an implied contract to pay the person who has to do the work reasonably for the work done by him. A 1941 Mad 887 (887, 888).

(12) In cases where the relationship of principal and agent subsists agent's claim for extra remuneration on implied contract is enforceable. A 1915 Mad 931 (934) (DB).

(13) Where the course of dealings between A and B shows that A to whom B was despatching goods on account for sale was debiting B with losses arising not only on the consignments of his own goods but also on the consignments of goods which belonged to his constituent and that B without demur sent more goods in discharge of that liability it was held that these circumstances gave rise to the inference that B had undertaken a personal liability for the losses incurred on the constituent's consignments also. A 1935 PC 154 (157).

(14) An implied contract to pay compound interest may be implied from long course of dealings between parties. A 1920 PC 61 (62, 63).

(15) The owner whose goods have been converted by another can bring a suit against the other for the sale proceeds as for money had and received based on an implied contract of agency. A 1953 Madh B 38 (39).

(16) Although there may be no express contract there is an implied obligation on all persons who are in possession of land as tenants to pay the rent. ILR (1952) 2 Cal 161 (164) (DB).

(17) Nearly every contract of necessity, leaves matters which are to be implied and what matters are implied in any contract must be determined with reference to the surrounding circumstances and the parties who made them. A 1947 Nag 17 (24) (FB).

(18) Promises which although have not been made either expressly or impliedly by the offeree can be imported into transactions under trade, mercantile or local usage wherever such usage can be invoked. A 1927 All 407 (409) (DB).

(19) Unless there is a mercantile usage, no interest can be imported into a contract containing no stipulation to that effect either under Hindu or English law. (1863) 9 Moo Ind App 256 (266, 267) (PC).

(20) A promise which is excluded by the express terms of the contract cannot be implied into it. A 1941 Mad 887 (888).

(21) It is not competent to the Government to contract so as to fetter its freedom of future executive action which it must have to protect the welfare of the State and no contract which would have such effect can be implied against it. A 1947 PC 29 (31).

(22) Provisions do not contemplate an implied contract between Government and any other person — Forest contractor accepting the rules of the auction sales and depositing the earnest money — Contract, before it could be accepted resulted in cancellation due to failure of bidder to pay the part consideration — Re-auction by Government resulting in deficiency — Enforcement of deficiency as arrears of land revenue cannot be made — There is no implied contract and S. 155 (b) of Madhya Pradesh Land Revenue Code does not apply. A 1967 SC 203 (206).

(23) Where in a contract, it is stated that the Railway Administration will not be liable for anything that may happen to the suppliers' commodities until the same passed into the physical possession of the Railway Administration as a buyer, in the absence of any contract express or implied, that the supply of wagons by the railway would be a condition precedent to the supply of the commodities by the supplier, such an implied contract cannot be inferred. A 1960 Pat 87 (96).

CHAPTER II

OF CONTRACTS, VOIDABLE CONTRACTS AND VOID AGREEMENTS

10. What agreements are contracts.—All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

SECTION 10 — SYNOPSIS

1. Essentials of contracts.
2. Parties' intention to execute document — Effect of.
3. Written agreements.
4. Oral contracts.
5. Parties to contract.
6. Formalities prescribed by law in force.
7. Construction of contracts.
   (a) Nomenclature of deed — If conclusive.
8. Implied terms.

1. Essentials of contracts.— (1) An agreement is an act in the law whereby two or more persons declare their consent as to any act or thing to be done or forborne by some or one of those persons for the use of the others or other of them. (1912) 6 Sind LR 278 (280) ** A 1966 Mys 118 (122) (DB) ** A 1960 Punj 585 (587, 588) (DB).

(2) Where it was contended that plea of benami could not be raised in a suit for specific performance of contract it was held that in case of contracts the question for consideration is whether a person has entered into contract on his behalf or on behalf of somebody else and therefore benami is not strictly applicable to contracts. A 1973 All 63 (66).

(3) A contract is a consensual act the parties being free to settle any terms they please. A 1956 Mad 695 (701) (DB) ** A 1961 Punj 314 (316) (DB).

(4) Fair rent not fixed — Agreement for enhancing rent is valid. A 1969 Mad 473 (476, 477).

(5) A promise which is voluntary and by which the parties do not intend to create any legal obligation cannot amount to a contract. A 1953 Pat 231 (233) (DB).

(6) In spite of the fact that an agreement is embodied in a document the parties could show even by oral evidence that when the document was signed they intended that it should not operate as an agreement and therefore there is no contract at all. A 1936 PC 70 (74).

[See also (1969) 1 Comp LJ 153 (Cal). (Contract of Insurance — Nature of evidence to show that terms of policy do not represent true intention can be adduced — Section 92, Evidence Act is no bar.)]

[See however A 1965 Punj 25 (26, 27) (DB).]

(7) It is upon the party who pleads that the contract upon which he is sued was not intended to be acted upon to prove the allegation. ILR (1950) All 32 (45) (DB).

(8) So long as one of the parties to the transaction could back out of it at his choice there can be no concluded or binding contract between the parties although they may have agreed upon many of the material terms. A 1955 Cal 210 (215) (DB).

(9) A clause in a concluded contract which is in no sense continuing one giving an option to one party to cancel the contract is void and unenforceable. A 1957 Mad 82 (86) (DB).

(10) Concluded contract — Clause allowing one party to wholly defeat main purpose of contract — Clause must be disregarded. (1975) 2 Kant LJ 46.

(11) Any stipulation unilaterally introduced by a party into an instrument handed over by him to the other would not constitute a contract unless agreed to by the other. A 1957 J & K 7 (7) ** A 1961 Mad 281 (282) ** A 1961 Punj 66 (70) (DB).

[See however A 1964 Mad 474 (476).]

(12) In commercial contracts, time is ordinarily of the essence of the contract. A 1961 SC 1295 (1296).

(13) Where two adults enter into a valid contract the default of one to do something as undertaken by him under the contract is not sufficient to deprive the other of the right to specific performance of the contract. A 1951 Mad 612 (615, 616).

(14) The persons designated in the contract as parties to it cannot show by evidence that in reality some other persons and not they intended to incur obligations under the contract. A 1956 Bom 165 (167) ** A 1963 Punj 538 (545) (DB).

[See also A 1968 Bom 156 (167) (DB). (Terms of contract express or implied are only binding on the parties to the contract.)]

(15) An agreement between man and woman both sui juris, to marry is a contract the promise of each being the consideration for the promise of the other. A 1947 Pat 132 (134).

(16) In a Hindu family a betrothal is in the nature of a contract to which the Contract Act is applicable. A 1950 All 592 (594) (DB).

(17) For the family settlement to be binding it must be voluntary and should not be induced by fraud, coercion or undue influence. A 1976 SC 807 (813).

(18) An agreement between the parents of a minor boy and a minor girl to arrange for the marriage between the minors is a mere nudum pactum and not a contract. A 1947 Pat 132 (134).

(19) An arbitration agreement which satisfies the requirements of the section is a contract. A 1947 All 406 (407) (DB).

[See also A 1959 Cal 603 (606). (Agreement that disputes to be settled by arbitration in New York according to Rules of American Arbitration Association — Not vague.)]

(20) When a contract is invalid, every part of it, including the clause as to arbitration contained therein must also be invalid. A 1974 SC 1579 (1582).

(21) A settlement in a conciliation proceeding after it has received the assent of the conciliator does not retain the character of a contract as between the original parties to the dispute. A 1965 Bom 146 (150) (DB).

(22) A compromise decree is creature of agreement on which it is based and is subject to all incidents of such agreement, that it is but a contract with the command of a judge

Nothing herein contained shall affect any law in force in [a][India] and not hereby expressly repealed by which any contract is required to be made in writing[b] or in the presence of witnesses, or any law relating to the registration of documents.

[Malaysian Contract Act 1950, S. 10.]

[a] Substituted for "Part A States and Part C States", by the Part B States (Laws) Act, 1951 (3 of 1951), S. 3 and Sch. (1-4-1951).

[b] See e. g. Ss. 25, 28, Expl. (2) of this Act; the Copyright Act, 1957 (14 of 1957), S. 19; First Schedule; the Apprentices Act, 1961 (52 of 1961) S. 4; the Carriers Act, 1865 (3 of 1865), Ss. 6 and 7; Companies Act, 1956 (1 of 1956), Ss. 12, 29, 30, 46 and 108—T. P. Act, 1882 (4 of 1882), Ss. 54, 107.

Section 10 — Note 1 (contd.)

superadded to it and in construing its provisions fundamental principles governing construction of contract are applicable. **A 1969 All 296 (303) (FB).**

(23) Approval of terms of a proposal for compromise is not the same thing as its acceptance — Acceptance by one party of offer must be communicated to other party for concluded contract. ILR (1971) 2 Cal 119.

(24) A partition arrangement which contains a stipulation that the co-sharer who wishes to sell his share must offer the option of purchase to other co-sharers at price to be determined by respectable persons is a completed contract which is capable of being enforced. 1956 Andh WR 801 (803, 804).

(25) Auction sale — Agreements between bidders not to bid against each other, not void — Such agreement is not against public policy. A 1975 Delhi 159 (161, 163, 164).

(26) Although a permit-holder for a stage carriage, by reason of a condition in the permit, is under an obligation to carry for remuneration mails when called upon to do so by the postal authorities yet the agreement entered into by him with the postal authorities is nonetheless a contract inasmuch as it is an agreement between two competent parties with their free consent and is supported by lawful consideration. **A 1955 SC 459 (463).**

(27) A control regulation which requires the owner of goods to sell it at a certain price and in certain quantities only to the quota holders as directed by an authority no doubt places restrictions on the freedom of contract of the owners but that does not mean that when the owner agrees to sell a quota holder at the specified price the quantity fixed by the authority there is no consensus ad idem between them and therefore no contract. ILR (1956) Andhra 502 (507, 509).

(28) Incidence of any insurance contracts in India are on the same footing as in England and the agreement is not enforceable by law if the basis of the agreement is broken. **A 1959 Pat 102 (106) (DB).**

(29) An undertaking executed to the Court by a person whereby he agreed that if the decree-holder who was given possession of the property decreed did not restore it in the event of his failure in the appeal he would make compensation to the Court to the extent of a certain amount is an agreement which satisfies all the requirements of Section 10 of the Act and is therefore a contract. In the intrinsic nature of the agreement there is nothing which would make it unenforceable. **A 1931 Oudh 99 (102) (SB).**

[See however A 1931 All 189.]

(30) Bids for right to collect Tehbazari dues were offers — Bid knocked down as the highest and confirmed by resolution of the municipality was acceptance — Conditions under Section 10 being fulfilled agreement was contract. A 1980 All 143 (144).

(31) Overdraft arrangement between bank and its customer — Is a contract — Cannot be terminated by bank unilaterally, even if it is a temporary one — Such contract can be inferred from conduct of parties such as enjoyment of overdraft facility for about four years uninterruptedly. A 1980 Guj 158 (160) : (1980) 21 Guj LR 132 (134) (DB).

(32) An agreement by a party to do something can be proved by evidence of his conduct even if there is no oral evidence of the agreement itself. **A 1944 Nag 124 (126) (DB).**

(33) The admission of the defendant that he received earnest money from plaintiff is evidence against him to show that there was a concluded contract of sale between them. A 1957 Madh B 190 (191).

(34) Where the authority competent to enter into a contract accepts a tender for supply of goods by agreeing to purchase the goods specified in the tender from the tenderer during the contract period a concluded contract comes into existence. A condition in the tender that the authority may not purchase any of the specified goods is not fatal to the contract. A 1971 Mad 393 (398, 400).

(35) Auction sale of forest produce — Conditions of sale laid down in sale notification — Mere acceptance of highest bid by sale officer held did not conclude contract. A 1975 Mad 292.

(36) In contracts for sale of immovable property, time is generally not of the essence of the agreement. The proper criterion is to ascertain whether agreement goes to show that it was the intention of the parties that time should be of the essence of the contract for the sale of immovable property. 1967 Raj LW 498.

(37) Courts cannot absolve a party from liability to perform his part of the contract on grounds of hardship. (1969) 1 SCWR 765.

(38) If for amicable settlement parties agreed to abide by certain terms it cannot be said that such an agreement is without consideration. (1966) All WR (HC) 134.

(39) A contract entered into in defiance of a legal provision continues to be illegal even after the legal provision ceases to be effective and a plea that the contract, when it was to be enforced, was not hit by any subsisting law is not open to the party seeking to enforce it. A 1963 All 206 (209) (DB).

Section 10 — Note 1 (contd.)

(40) The core of the doctrine of privity of contract is that consideration must move from promisee. A 1969 Cal 496 (509) (DB).

2. Parties' intention to execute document — Effect of.— (1) Intention of the parties to the contract is matter of inference from their conduct. If a reasonable man would infer from the conduct that the party intended to contract in a particular way then he will be bound to make good his promise. A 1976 Orissa 4 (8) (DB).

(2) Where parties enter into an executory agreement which is to be carried out by a deed afterwards to be executed the real completed contract is to be found in the deed. The contract is merged in the deed. (1938) 173 Ind Cas 88 (89, 90) (PC).

(3) Intention — Intention of parties must be ascertained from document itself — Intention is to be gathered from relevant terms of contract and not from subsequent conduct of parties. A 1970 Madh Pra 119 (122).

(4) Written contract — Intention of parties to be gathered from its terms and conditions. A 1976 SC 2108 : 1976 Tax LR 1928.

(5) Intention of parties to be ascertained — To ascertain intention surrounding circumstances to be taken into consideration. A 1970 Bom 251.

(6) There is only a provisional agreement and not a concluded contract between the parties where in order to make the agreement a binding contract one of them should take certain steps and those steps have not been taken. A 1954 Nag 142 (148) (DB).

(7) Whether intention to have formal document drawn up postpones formation of contract depends on circumstances of each case. A 1936 Mad 752 (755) (DB) ** A 1968 SC 1028 (1031).

(8) When counsel of a party to a suit proposed to the counsel of the other party reference of the dispute to arbitration and the latter who was not counsel on record in that suit accepted it specifically referring to preparation of a formal document and he also received a draft document from the former held, the execution of the document being a condition of the acceptance was necessary for the contract to be effective. (1971) 1 Mad LJ 59.

(9) Where the execution of a further document containing the contract between the parties is a condition or the term of their bargain then unless such a document is executed there can be no enforceable contract between the parties because either the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. A 1933 PC 29 (31) ** A 1947 Sind 6 (11) ** A 1946 Bom 149 (153) (DB) ** A 1942 Pesh 33 (34, 35) (DB) ** 1970 Ker LT 523.

(10) Where the parties to a bargain contemplate the execution of a further contract merely as an expression of their desire as to the manner in which the transaction already agreed to will in fact go through, the non-execution of such a document will not affect the finality and the binding character of the contract already concluded between them. A 1933 PC 29 (31) ** (1911) 9 Ind Cas 104 (105) (FB) (Mad) ** A 1946 Bom 149 (153) (DB) ** A 1967 Mys 156 (158, 159).

(11) Unregistered document — Executants agreeing to sell properties and execute a document of conveyance whenever demanded — Document held, merely an agreement to sell and a suit for specific performance could be based on it — Mere fact that the document mentioned that executants had received sale consideration or that possession had been handed over did not mean that it was a deed of conveyance — Agreement to execute formal deed of conveyance could be specifically enforced. A 1969 Mad 418 (419, 421). (A 1934 Mad 418 and A 1937 Mad 22, Held Overruled by A 1943 Mad 761 (FB); A 1929 PC 362, held no longer good law.)

(12) Specific performance — Agreement for sale of leasehold rights purchased at Government auction — Term that the sale will be completed after obtaining necessary permission from Government — Held that the agreement could be specifically enforced under the Specific Relief Act and O. 21, R. 35, Civil P. C. ILR (1971) 2 Delhi 249.

(13) Contract for purchase of cocoanut oil of K. M. P. brand a specified goods — Sales Tax Declaration in statutory form No. C — Payment to be made through Banker — Held that it was a non-transferable specific delivery contract and as such not hit by the Forward Contracts (Regulation) Act (1952). ILR (1974) 2 Cal 194.

(14) Agreement between K Distillery and the Government — K supplying quantity of liquor agreed upon — Part of it disposed of by Government and the remaining stock taken over by it — Held, on the terms of the contract the Government was bound to pay the price of liquor taken over by it at the contracted rate — Plea of the Government that the contract had come to an end by efflux of time and that they could fix the price according to the Excise Rules and Regulations cannot be acceded — Agreement in question was a bilateral contract the terms of which could not be changed according to the will of the Government. A 1977 SC 509.

(15) Where it is a point in issue in a case whether negotiations started with the object of forming a contract were still open to bargaining or had resulted in the formation of a contract the decision should depend on the intention of the parties to be ascertained from all the facts and circumstances of that particular case. A 1951 All 93 (97) (FB) ** A 1969 SC 9 (12) ** A 1959 SC 633 (637) ** A 1968 Delhi 68 (70, 71) (DB) ** A 1968 Raj 278 (282) ** A 1966 Mys 118 (122) (DB) ** A 1962 Mad 369 (371, 372) (DB) ** A 1962 Pat 28 (30) (DB) ** A 1960 Cal 752 (758, 759, 760) (DB).

(16) When words of contract are clear and unambiguous there is no scope for drawing upon hypothetical considerations or supposed intentions of the parties. A 1959 SC 1362 (1368).

(17) Whether an agreement is a completed bargain or merely a provisional agreement depends on the intention of the parties as deducible from the language used while negotiations take a concrete shape. A 1941 All 377 (383) (DB) ** A 1968 Raj 129 (135) (DB). (Reversed on another point in 1972 Tax LR 309.) ** A 1962 All 147 (148) (FB).

(18) In order to find out whether the parties have concluded a binding contract or not the

Section 10 — Note 2 (contd.)
negotiations and the correspondence should be looked at as a whole. A 1939 Rang 423 (423) (DB) ** A 1921 Nag 42 (44) ** A 1920 Mad 177 (179) (DB).

(19) Hire purchase agreement — Parties held had reached completed agreement through correspondence — Absence of formal agreement did not affect its validity. A 1977 Kant 24.

(20) Whether a concluded contract has been made or not is a question of fact to be determined in each case by a consideration of all the relevant circumstances and facts and cannot be concluded by the parties' or the solicitors' description of the situation either as a contract or negotiation. A 1960 Cal 752 (754) (DB).

(21) Vendor agreed to sell certain premises and the purchasers agreed to purchase — Clause of agreement made the vendor liable to execute the sale deed within a certain time — There was a concluded contract. A 1973 SC 559.

(22) Where, on the question whether there had been a concluded agreement of compromise between the plaintiff and the Government of Bihar, the entire office file of the Government of Bihar relating to the alleged compromise had been called for by the plaintiff and was produced by the defendant Government of Bihar in the Court and was admitted into evidence and marked as an Exhibit in the Court and both the parties relied on the office notes contained in the file. Held, that the relevant office notes furnished best evidence on the question. ILR (1971) 2 Cal 119.

(23) Question whether in fact a concluded agreement of compromises was arrived at between the plaintiff Company and the defendant Government of Bihar — Correctness or bona fides of opinion or advice given by Advocate-General to the Government with respect to desirability or terms of compromise are immaterial. ILR (1971) 2 Cal 119.

(24) The conduct of the parties in acting upon the contract before the formal agreement is drawn up is clear evidence of the fact that they did not intend the execution of a further contract as a condition or a term of the bargain. A 1942 Pesh 33 (34, 35) (DB) ** (1969) 1 Mad LJ 557 ** A 1964 Mad 52 (53) ** (1964) 68 Cal WN 611.

(25) The subsequent waiver by a party of any of his rights is irrelevant to the question whether a binding contract came into existence between the parties on the day on which it is alleged to have been entered into. A 1955 Cal 210 (215) (DB).

[See also A 1980 Cal 258 (260) : (1980) 2 Cal LJ 11. (Title suit compromised between parties — Plaintiff agreeing to first offer land to defendant in event of sale — Compromise was a concluded agreement enforceable by law — Fact that defendant could waive his right to purchase was not a criterion to determine whether there was a binding contract.)]

(26) Where a lease deed stipulates sale of land if lessor was ever required to sell and if lessee agreed to purchase at a reasonable price, the stipulation cannot be a completed contract. A 1969 Assam 43 (45).

3. Written agreements.— (1) A written agreement is an instrument whereby parties perform the act declaring their consent as to any act or thing to be done or forborne by some or one of those persons for the use of the others or other of them through the process of writing. (1912) 6 Sind LR 278 (280).

(2) Contract to supply hay according to sample and specification — Supply rejected by the Government as being not as per sample — Suit by contractor for damages for breach of contract by the Government — Officer A, at the behest of officer B who had reported that the supply was as per sample, issuing a certificate therefor — B's report not produced — Certificate of A of no avail to the contractor. A 1980 Sikkim 22 (30).

(3) It is not necessary for the existence of a written agreement that the parties should put their signatures to the document embodying the terms of the agreement because the plain acceptance of a document containing all the terms is sufficient. A 1956 All 725 (728) (DB) ** A 1968 Raj 89 (92, 93) ** A 1965 Cal 404 (406) (DB).

(4) Where it is definitely ascertained that a party who has signed an instrument intended to be bound by it as a concluded contract the fact that his signature is not at the end of the document as is usual but at some other place in it will not render the execution of it ineffective. A 1955 Raj 91 (92, 93) (DB).

(5) Contract in writing does not require signature of both parties. A bond executed by a party and delivered to the other party and accepted by him completes the agreement between the parties and in law this amounts to a contract in writing A 1916 Cal 771 (773) (DB) ** A 1963 Pat 160 (162) (DB).

(6) When a contract is reduced into writing the previous negotiations, whether they resulted in a binding agreement or not is presumptively merged in the writing. A 1945 Lah 35 (40) (DB) ** (1968) 9 Guj LR 1082.

4. Oral contracts.— (1) An oral contract by which itself the parties intended to be bound is valid and enforceable. A 1946 PC 97 (99).

(2) An agreement of resale is not required by law to be reduced to the form of a document. ILR (1950) All 32 (38) (DB).

(3) A contract to pay does not require a writing. A 1944 Nag 124 (126) (DB) ** A 1968 Raj 278 (280).

(4) Where the owner of a premises accepted only orally the proposal made to him by another to take on lease the premises it was held that there was only an oral contract to lease and not a lease in writing. A 1938 Cal 136 (138) (DB).

(5) Oral agreements require clearest and most satisfactory evidence. (1941) 43 Pun LR 97 (103) (DB).

(6) A mere reference to a future formal contract in an oral agreement does not prevent a binding bargain between the parties. A 1968 SC 1028 (1031).

5. Parties to contract.— (1) A contract implies two parties. A 1916 Cal 771 (2) (773) ** 1958 MPLJ 410.

(2) A contract can only be bilateral. The same party cannot be a party to a contract on both sides and hence there can hardly be a contract between A on the one side and A and B on other side. A 1958 Bom 467 (468) : ILR (1958) Bom 428 (DB) ** (1968) 9 Guj LR 1082.

Section 10 — Note 5 (contd.)

(3) Agreement is not enforceable at the instance of a person who himself is not bound by it. There must be reciprocity as to the binding nature of the agreement between the person who wants to enforce it and the person against whom it is sought to be enforced. A 1971 Pat 253 (255, 256).

(4) In an ordinary contract to sell immovable property the personality of the party is not usually material. It is sufficient if the identity of the purchaser is ascertainable. It is not necessary to utter the actual name unless the personality is an essential part of the contract. A 1960 Cal 752 (757, 758) (DB).

(5) 'A' contracting with 'B' for purchase of goods from 'B' — 'B' independently arranging with 'C' for supply — There is no contract between 'A' and 'C' for want of privity — Yet if goods are not supplied, C bound to return money to A for 'prevention of unjust enrichment.' A 1969 Cal 496 (509, 510, 514) (DB).

(6) Where there is no express or implied condition in a contract that the contracting party should continue to live for its continued subsistence the contract survives the maker of it and devolves on his personal representatives both in respect of the benefit and the burden of it. ILR (1952) 2 Cal 161 (165) (DB).

(7) In the case of a statutory person who is incompetent to make any contract except in compliance with the formalities prescribed by statutes there is no inherent disqualification or incompetency to make a contract as in the case of a minor or a lunatic. A 1955 Assam 33 (44) (DB).

(8) Corporation is fully capable of binding itself by any contract as is an individual, except as to those contracts which from the nature of the objects of the Corporation or from the express or implied terms of its constitution it is prohibited from making. 1979 Lab IC 486 : 1978 Mah LJ 832 (835).

(9) A minor cannot enter into a contract of partnership. Fact that the minor was represented by his guardian would not make the agreement valid, as a minor can only be admitted to benefits of partnership under the law and cannot be made a partner even by his guardian. (1962) 45 ITR 170 (DB) (Cal).

(10) A contract to be specifically enforced by Court must, as a general rule, be mutual, that is to say that it might at the time it was entered into, have been enforced by either of the parties against the other of them. The relevant date on which this test of mutuality is to be applied is the date of contract itself and not the date on which it is sought to be enforced. Where an infant plaintiff claims under a party who himself could have obtained specific performance, such infancy is no ground for refusing specific performance. A 1969 Mad 470 (473).

6. Formalities prescribed by law in force.— (1) Where the law has prescribed certain formalities those formalities should be complied with to create a contract capable of attaching liability. A 1930 All 118 (120) (DB).

(2) A party acting upon a contract required by law to be executed in a particular manner but not so executed cannot sue for breach of such contract. A 1937 Rang 378 (380).

(3) Where the law prescribes that a valid contract could be executed only in a certain form and no other the Court cannot look at the terms of a contract which has not been executed in that form even to determine the nature of transaction entered into between the parties. A 1956 Punj 181 (184) (DB).

(4) Where a statute requires an agreement to be 'in the form' or 'in accordance with the form' prescribed by it, then unless the contrary is clearly expressed, it is a sufficient compliance with the statute if the agreement is substantially in the form. An immaterial variation in such a case does not amount to a violation or non-compliance with the provisions of the statute. A 1956 All 725 (728) (DB).

(5) The failure to conclude a contract in accordance with the provisions of a special law which are not mandatory does not render the contract unenforceable. A 1957 Madh B 190 (191).

(6) Where the bought and the sold notes have by the Bye-laws to be in writing and in the prescribed form if there be any discrepancy between the two, there is no concluded contract. A 1968 SC 1308 (1310).

(7) Under Section 30 of the Government of India Act of 1919 a contract to be enforceable by or against the Secretary of State for India had to comply with its provisions and as subsection (2) of that section implied the execution of a document, oral contracts were completely excluded by the section and therefore could not be enforced. A 1941 All 377 (384) (DB) ** A 1952 Pat 393 (403) (DB).

(8) Considering Section 175 (3) of Government of India Act (1935), a contract may be validly made by correspondence or by tender and its acceptance or by informal documents. A 1958 Andh Pra 533 (538) (DB) ** A 1957 Assam 159 (160, 161) (DB) ** A 1941 All 377 (384) (DB) ** A 1969 Bom 163 (171) ** A 1967 Mys 156 (158, 159) ** A 1964 Punj 230 (231) ** A 1962 Manipur 47 (51).

[See however A 1966 SC 1724 (1726, 1728) ** A 1968 Mys 279 (282, 283) (DB).]

(9) A contract executed by a person who was not authorised by the Governor-General under sub-section (3) of Section 175 of the Government of India Act, 1935 was held to be not capable of binding the Government. A 1955 Assam 33 (41) (DB) ** A 1965 Cal 191 (194, 195) ** A 1959 Bom 56 (58).

(10) Where a contract is not in strict conformity with the provision of Section 175 (3) of the Government of India Act (1935), such contract though unenforceable against the Government, is binding upon the officer, who actually made the contract under Section 230 (3) of the Contract Act. A 1962 Pat 372 (375).

(11) See also Article 299, Constitution of India.

7. Construction of contracts.— (1) A contract should be construed as a whole in order to determine the rights of the parties thereto. A 1958 Cal 21 (23) (DB) ** A 1956 Bom 151 (153, 155) ** 1955 BLJR 93 (94, 95) (DB) ** A 1964 SC 1526 (1531). (The question whether the impugned contract is transferable must depend upon the language of the contract interpreted in the light of surrounding circumstances.) ** A 1962 SC 378 (385) ** A 1969 All 296 (303) (FB). (Entire contract must be taken as constituting an organic synthesis, embodying provisions which balance in the sum of reciprocal rights and obligations. It is through the prism of that principle that the terms of compromise

Section 10 — Note 7 (contd.)

decree must be analysed.) ** (1969) 23 STC 374 (377) (Mad) (DB) ** A 1968 Cal 496 (499) (DB) ** A 1967 Cal 99 (104) (DB) ** (1966) 2 ITJ 697 (DB) (Guj) ** A 1966 Punj 436 (440) (FB) ** 1969 MPLJ 911 (FB) ** A 1964 Raj 184 (189, 190) (DB) ** A 1960 Mad 480 (481) (DB) ** A 1959 Madh Pra 151 (161) (FB) ** A 1958 Cal 21 (23) (DB).

(2) For correct interpretation of contract Courts have to look primarily to the document itself, but must also take into consideration circumstances in which it was written, drafting ability of parties, intention which writing was to convey and how parties acted under it. A 1959 All 29 (32) (DB).

(3) The terms and conditions and the nature of the contract between the parties have to be ascertained from all the facts and circumstances of the case. A 1959 Assam 75 (90).

(4) Construction of contract — No term should be considered as superflouous if it can be given some reasonable meaning. (1970) 2 SCJ 377.

(5) No author of a formal document intended to be acted upon by the others should be presumed to have used words without meaning. The Court must as far as possible avoid a construction which would render the words used by the author of document meaningless and futile or reduce to silence any part of document and make it inapplicable. A 1979 SC 1628 (1633).

(6) A contract must be interpreted by itself and without reference to another contract unless the expressions used in both and the facts and surrounding circumstances also are the same or identical. A 1916 Cal 548 (550) (DB) ** A 1956 Bom 151 (152).

[See also A 1959 Andh Pra 370 (374) (DB). (Decision on similar contract — However similar contracts may appear, decision as to each must depend on consideration of the language of the particular contract.)]

(7) If the transaction was contained in more than one document between the same parties, they must be read and interpreted together and they have same legal effect for all purposes as if they are one document.

It is also open to the Court to ascertain and determine the legal effect and the intention of the parties to the contract on taking the entire surrounding circumstances and the acts done in pursuance of the same into consideration in the event of any ambiguity occurring in the language of the contract. ILR (1970) 1 Delhi 621.

(8) Where the question is what exactly were the terms and conditions of the contract of carriage by sea in a particular case, reference to other bills of lading, issued by the shipping company in connection with the same voyage cannot be made. A 1957 Trav-Co 133 (134) (DB).

(9) If a letter of credit authorises payment against bills of lading such payment should be made only against clean bills of lading. The recognised practice is to interpret the letter of credit as authorising payment only against clean bills of lading. (1961) 2 Mad LJ 88 (DB).

(10) A contract must be construed according to its own terms and not explained or interpreted by any antecedent contract. A 1949 Cal 174 (176) ** A 1959 Madh Pra 151 (161) (FB) ** (1969) 23 STC 374 (377) (DB) (Mad) ** (1962) 4 Orissa JD 349 ** A 1962 Punj 383 (384).

(11) Power-of-attorney should be construed strictly — Document contains the words "to put his (agent's) signature" — Document not empowering execution of sale deeds — Fact that the agent had hitherto been selling, held, could not alter the legal position. 1969 Pat LJR 156 (DB).

(12) A preliminary written contract is entirely governed by the subsequent deed, where there is any difference between them. A 1938 Mad 81 (82).

[See A 1962 All 425 (431) (DB). (The two agreements have to be read together in order to find out what was the intention of the parties and the final contract between them.)]

(13) The Court while construing the whole document embodying a contract can give preference to an earlier recital over a later one if it finds that the recital is the most important one to convey the actual intention of the parties. 1955 BLJR 93 (94, 95) (DB) ** A 1968 Cal 496 (499) (DB).

(14) Though a heading of a clause cannot control the interpretation of the clause if its meaning is otherwise plain and unambiguous, it can certainly be referred to as indicating the general drift of the clause and affording a key to a better understanding of its meaning. A 1974 SC 1265 (1270 to 1273).

(15) In the case of an ambiguous instrument, there is no reason why subsequent interpreting statement should be inadmissible. Extrinsic evidence to determine the effect of an instrument is permissible where there remains a doubt as to its true meaning. A 1975 SC 32 (37, 38).

(16) In construing provisions of an agreement, it is not a rigid rule that the same meaning ought to be given to an expression in every part of the document in which it appears. A 1966 Mad 60 (63).

(17) Contracts ought to be construed according to the primary and natural meaning of the language in which the contracting parties have chosen to express the terms of their mutual agreement. 1955 BLJR 93 (94) (DB) ** A 1968 Cal 496 (499) (DB) ** A 1967 Cal 168 (170) (DB) ** A 1967 Cal 119 (125) (DB) ** A 1964 All 526 (526) ** A 1962 Cal 12 (18) (DB) ** A 1961 Assam 173 (175). (If the language is vague, the surrounding circumstances may be looked into to interpret the contract.) ** A 1966 Him Pra 54 (56).

(18) The grammatical or the natural and usual meaning should be imputed to the words in a contract. A 1954 Cal 179 (182) ** A 1961 SC 1295 (1296) ** A 1960 Cal 320 (322, 323) ** A 1960 Orissa 199 (202) (DB).

(19) In construing contracts the Courts cannot give the words of the contract an entirely different sense from their natural and grammatical meaning even to avoid a superfluity. A 1949 Bom 356 (357) (DB).

(20) Words used in contract must be interpreted literally and without aid of principles of natural justice. A 1980 Pat 24.

(21) Where in a contract there exists an apparent inconsistency according to the literal construction of the words used, and if by any other reasonably possible construction that inconsistency can be reconciled, that construction should be adopted. A 1940 PC 151 (152, 153)

Section 10 — Note 7 (contd.)
** A 1964 Raj 72 (75). (Deed capable of two interpretations — One favouring right to sue and other hampering it — Construction advancing right to sue should be preferred.)

(22) Prima facie printed clauses and type-written clauses in a contract have to be given equal effect unless there is an inconsistency between the two in which case greater force may be given to the type-written clause. (1950) 85 Cal LJ 136 (142) ** A 1943 Bom 229 (236) ** A 1942 Mad 139 (141) (DB).

(23) Where there is inconsistency between the printed and the written provisions print cannot be discarded but the real meaning is to be discovered from the printed as well as from written words. (1906) 30 Bom 1 (14) (DB).

(24) Greater force must be given to the written clauses in a contract on a printed form when there is inconsistency between these clauses and the printed clauses in the contract. A 1949 Cal 231 (233) ** A 1943 Bom 229 (236) ** A 1917 Bom 246 (248) ** A 1961 SC 1295 (1297) ** A 1962 Cal 325 (330) (DB).

(25) In construing written contracts Courts ought not to resort to evidence of negotiation except to the extent necessary for clarifying what is ambiguous in the contract. A 1946 PC 50 (50, 51) ** A 1965 SC 1288 (1290, 1291) ** A 1969 Andh Pra 88 (90) (DB).

(26) When there is ambiguity in the sale deed as to what exactly was agreed to be sold, the contract of sale can be looked into. A 1958 Andh Pra 278 (280).

(27) The subsequent conduct of the parties in the performance of a contract cannot change the true effect of the clear and unambiguous words of the contract. A 1938 PC 26 (29) ** A 1959 SC 1362 (1368) ** A 1964 Orissa 73 (74, 75) (DB) ** A 1959 J & K 24 (25) (DB).

(28) Where the purchaser of the houses agreed to pay the cost of connecting the houses bought, to the water mains and electric cables, notwithstanding the usage that the developer of the housing estate should bear such cost, the purchaser, in view of the clear language of the contract would be liable to pay such cost. (1979) 2 Malayan LJ 147 (148) (PC). ((1976) 2 MLJ 12, Affirmed.)

(29) An illustration can in no event override an express provision in the contract. 1946 Nag LJ 128 (136).

(30) When conditions of a contract are separately printed, and the very sentence (not to speak of the paragraph) speaking of it refers to a particular class of orders and there is nothing in that paragraph showing that part of it is of general application, one has to hold that the condition is a self-contained one applying to that particular class only. 1964 Jab LJ 342.

(31) Rules of construction which are only aids for ascertaining intention of the parties, cannot be relied on to override declared intention of the parties unequivocally expressed. A 1966 Ker 303 (305) (DB).

(32) Agreement to supply milk at certain rate providing that if it became a controlled article the contractor shall be paid at controlled rate — Fixation of maximum price of milk by a notification under Section 3 — Contractor entitled to the price mentioned in notification since his case is covered by the express terms of the contract. 1974 UJSC 668.

(33) The terms of a contract should be interpreted on two well-established principles. Firstly, there must be a clear intention, which is beyond the possibility of any dispute. Secondly, the construction to be placed on a deed ought to be such as to make it just to both the parties rather than unjust to one of them. A 1969 Tripura 19 (21).

(34) Construction of contract — Covenant ought to receive that construction which its language will admit, which will best effectuate intention of parties. 1970 MPLJ 55.

(35) A contract being a commercial document must be interpreted in such manner as to give efficacy to the contract rather than to invalidate it. A 1976 SC 2257 (2262).

(36) While interpreting a commercial contract, a broader outlook has to be adopted and care should be taken to avoid an artificial and unrealistic approach in the matter of the understanding the meaning and purpose of such documents. In such cases, the Courts should occupy the chair of the contracting parties and reasonably understand their minds and intents. If after such an approach the instrument still presents circumstances which, the conscience of a reasonable and prudent person cannot accept and if ex facie the terms are so unconscionable, illegal and designed to avoid or evade law, then only the doctrine of public policy will intervene, and will not implement such bargains. A 1978 Mad 178 (184) (DB).

(37) Where terms of memorandum of Association of Company are ambiguous or silent, it has to be read together with the Articles of Association. A 1963 SC 1185 (1191).

(38) Power of attorney which gives the power to the mokhtar-am to present for registration documents such as 'sale deeds' can be interpreted to give the mokhtar-am the authority to present a deed of mortgage for such registration. A 1958 Pat 63 (65) (DB).

(39) Arbitration Clause of agreement between Electricity Board and consumers excluding from its purview a dispute regarding recovery of charges for energy consumed and any other charges such as "minimum charges, miscellaneous or other charges" — Dispute whether Board is entitled to recover surcharge and fuel adjustment charge is 'a dispute regarding recovery of other charges' within words of exclusion in clause — Arbitration clause held not attracted. A 1969 MP 105 (110) (DB).

(40) Contract for supply of meat to military authorities — Condition providing for increase or decrease of rates by reviewing Tribunal according to rise or fall in the market rates — On application by contractor, one member of Tribunal recommending enhancement — Held in view of plain language of condition and on facts, that condition for enhanced rate was complied with. A 1970 SC 479 (483).

(41) The agreement was ". . . . . it is agreed that the sellers will sell all standing and fallen trees (excluding sandalwood, cocount, arecanut and all specified fruit tress grown and standing in . . . . . Sembar estate (now known as Shanti Plantations) . . . . . ". Held, that mango trees and jack fruit trees were fruit trees, as well as timber. Considering the language of the agreement and conduct of the parties it could not be held that it was restricted to only timber trees excluding fruit trees which were not timber. It covered all timber trees and also other trees on the land excluding fruit trees specified in it. Mango and jack fruit trees

Section 10 — Note 7 (contd.)
were not specified for exclusion under the agreement. A 1972 Mad 272 (273, 274).

(42) In determining the question whether there was in fact a finalised or concluded agreement of compromise between the plaintiff Company and the Government of Bihar, it is necessary to determine their mutual position with respect to the alleged compromise from day to day by construing the evidence on record and to find out at what point of time it was so finalised or concluded. ILR (1971) 2 Cal 119.

(43) Policy of insurance — Accident policy — Construction of — Rules applicable to other contracts equally applicable. 1975 Tax LR 570 (581) (Mad).

(44) Insurance contract — Construction — Insurance policy covering risk during transport of goods and for three days after arrival of train at destination — Another clause in policy covering risk due to theft not mentioning any period — Contract should be read as a whole — Theft occurring three days after articles reached destination — Insurance will not cover loss due to theft. (1972) 85 Mad LW 254.

(45) Court must read a condition in a fire insurance policy in a sensible way and not assume that the general insurance companies intended to entrap their policy-holders and to destroy the value of the contract of idemnity by reason of the accidental contract of somebody else, which had no connection with the subject-matter of the contract or with the price paid for the insurance. 1971 Tax LR 362 (365) (DB) (Mad).

(46) Transaction is benami if the purchaser purchases in another's name for his own benefit. Source of consideration and close relationship with ostensible owner are other tests though not conclusive and per se insufficient to lead to the conclusion. (1973) 75 Pun LR 194.

7 (a). Nomenclature of deed — If conclusive.— (1) Court has, unless prohibited by statute, power to go behind the documents and to determine the nature of the transaction, whatever may be the form of the documents. A 1966 SC 1178 (1185) °° (1967) 1 Mad LJ 352.

(2) For the purpose of determining as to which category a particular contract comes under, Court will look at the substance of the agreement and not at the mere words describing the category. A 1961 SC 440 (446).

(3) Name given by parties to a document is not conclusive as to its real legal nature and effect. Where language used in the document is unambiguous and clear real nature of the document is to be determined by its contents, uninfluenced by any intention of the parties. A 1967 Him Pra 29 (31-32).

(4) Intention of the parties and the effect of the document are to be ascertained from the contents of the document. Mere description of the document is not the criterion to determine the intention of the parties. The intention is to be judged from the material recitals contained therein. On facts held that the executant T intended that title to the property was not to pass in praesenti on execution of the document but was to pass in future after her death. The document was therefore a will and not a deed of gift. (1972) 2 Cut WR 1451 °° A 1976 SC 640 (644) : 1976 Tax LR 344. (A party cannot escape the consequences of law merely by describing an agreement in a particular form though in essence and in substance it may be a different transaction. Under the circumstances, therefore, if Courts construe the agreement as a sort of a joint venture of a transaction like a partnership which has been given the form and appearance of a contract of agency the law must have its course.)

(5) Sale or hire-purchase agreement or financial transaction — Loan granted by financier to defendant for repair of jeep — Agreement that same would be treated as the purchase price under fresh agreement — Held, that the transaction in fact was financial one repayable by agreed instalments with the vehicle as security and not a real hire-purchase or sale. A 1979 Cal 197.

(6) Transaction whether a loan or deposit — Nature of business carried on by promisor or the fact that the document bore four anna stamp has no relevance in deciding the character of transaction. 1970 UJSC 83.

(7) In a contract for construction of a channel the contractor was to manufacture bricks and use them in the work. One of the clauses in the deed of contract provided for the manufacture of pre-cast brick concrete slabs at work site and laying the same dry with break points to profile for lining the bed and sides of the channel. Rate of the bricks was to be Rs. 100. On the question whether the contract was a works contract only or also included a contract for sale of bricks.

Held that the contract in question was contract for work and labour. There was no contract for sale of bricks. It only showed the nature of works the contractor was to do in connection with the construction of channel. Merely because the rates for the manufacture of pre-cast bricks concrete slabs have been mentioned for the purpose of computing the total amount charged for execution of different works, it did not indicate an agreement of sale of goods. 41 STC 112 : 1977 Tax LR (NOC) 74 (Cal).

(8) Name is prima facie a valuable indication of the purport of a deed, especially when the transaction named is a well known transaction carrying with it certain well-defined legal incidents and, when the terms themselves are equivocal the name may be conclusive. 1961 Ker LT 1033.

(9) The question whether a contract is of apprenticeship or of employment ultimately depends on a construction of the terms of agreement between the person concerned and the employer and not on the description of the person either as apprentice or as workman. A 1966 Pat 445 (448) (DB).

(10) The real criterion to test whether a particular agreement is an agreement to sell or a hire-purchase agreement is to find out whether the purchaser has any option to return the chattel and determine the contract. If such an option is given then it is a hire-purchase agreement. But if the purchaser is under an obligation to purchase and has no option to return it, then it is an agreement of sale and not an agreement of hire-purchase. (1965) 1 Andh WR 229.

8. Implied terms.— (1) In a written contract, which can be fulfilled as it stands, no term can be imported merely on the ground that such a term should reasonably have been there in the contract. A 1956 Bom 151 (153) °° ILR (1966) 1 Punj 49 (DB) °° (1960) 1 Lab LJ 628 (Mad).

Section 11 — Note 5 (contd.)

(16A) Agreement made by guardian — Suit for specific performance by minor — Maintainability — Such contracts can be enforced by or against the minors if two conditions are satisfied (i) If the contract is one which is within the competence of the guardian to enter into on behalf of the minor so as to bind him by it and (ii) It is for the benefit of the minor. (1970) 72 Pun LR 218.

(17) The powers of a Hindu father as the natural guardian of his minor son are the same whether he is dealing with the coparcenary or separate property of the minor. Under certain circumstances, a Hindu father has a right to enter into a contract for and on behalf of the son with respect to all the property of the minor son. (1966) 68 Bom LR 891.

(18) A guardian steps in to fill in the lack of capacity in a minor to enter into contracts. But he can function only within the doctrine of legal necessity or benefit. **A 1956 Andhra 33 (37): ILR (1955) Andhra 311 (FB).**

(19) Where contracting party is a minor represented by a guardian and the contract is clearly for benefit of minor and was made at the request of the guardian for benefit of minor, it binds minor. A 1923 All 17 (17, 18) ** (1966) 1 Andh LT 233.

(20) Where an agreement for purchase of certain property entered into by a Hindu father on behalf of his minor son provides for the forfeiture of earnest money and for penalty in case of breach of contract by either party, the possibility of a loss or penalty in the event of non-performance of the agreement by the minor himself cannot amount to want of benefit on the completion of the agreement by the minor. 1966 Mah LJ 446.

(21) A contract entered into by the guardian on behalf of the minor ward which is to the benefit of the minor can be specifically enforced against him. (1912) 13 Ind Cas 673 (677) (DB) (Cal) ** 1966 Mah LJ 446. (Contract by manager or guardian can be specifically enforced by or against the minor.) ** A 1960 Cal 65 (66) ** A 1958 Bom 202 (203).

(22) An executory contract to sell entered into by the guardian of the minor is void and not binding on the minor. A 1949 Pat 405 (407) (DB).

(23) A guardian has no power to bind the minor or the minor's estate by contract for purchase of immovable property. A 1920 Mad 423 (423) (DB) ** (1912) 39 Cal 232 (237) (PC) ** A 1956 Bom 566 (569) ** (1964) 2 Andh WR 183 (DB) ** A 1968 Madh Pra 150 (155) (DB). (Contract entered into by minor's guardian for sale or purchase of property — Cannot specially be enforced either by the minor or other party.)

[See also (1966) 1 Andh WR 110).]

(24) Where property is purchased by manager subject to agreement to resell it at the option of seller, the transaction is not an agreement of transfer of property by manager but purchase of property subject to an agreement to resell it at the option of the seller. Question whether purchase is for benefit of minor is irrelevant. If agreement is for minor's benefit he is bound by it and if not for his benefit he can reconvey the property and claim return of the sale price. A 1963 All 194 (199).

(25) A Muslim 'de jure' guardian is competent to bind the minor with a contract for purchase of property and the minor can sue to obtain the benefit by asking for specific performance. **A 1952 Hyd 120 (133) (FB).**

(26) A sale of his property by a guardian to his minor wards in satisfaction of the money that is due from him to the minors is valid and enforceable if it is bona fide and for the benefit of the minors. (1911) 33 All 657 (658, 659).

(27) Under a contract entered into by the guardian the minor personally incurs no contractual obligations. A 1916 All 366 (369) (DB).

(28) Personal liability arising out of guardian's contract entered on behalf of a minor is the liability of the minor's estate only. **A 1956 Andhra 33 (37) (FB).**

(29) In case of purchase by a guardian with a covenant to pay, the minor's property can be proceeded against for the debt due under the personal covenant. The minor cannot approbate the bargain by retaining the property and reprobate it by the plea that the guardian had no authority to acquire it by making a promise on his behalf to pay the cash consideration so as to bind him. A 1931 Mad 140 (143, 144): 54 Mad 163 (DB).

(30) A minor may not be answerable for the fraud of his guardian, but he cannot take advantage of it. A 1921 Low Bur 63 (66) (DB).

(31) It is open to a minor to take up and carry on an arrangement of lease entered into on his behalf by a person without authority in such a way after he attains majority so as to bind himself by the transaction as to the whole period during which the arrangement was in existence. A 1937 Sind 310 (311) (DB).

(32) Where a minor, on attaining majority, approves of a mining lease of his land, granted by his guardians during his minority, and strikes his own bargain with the lessee by a patta, this patta and the kabuliyat as executed by the parties, alone govern the rights of the parties and not the original agreement. **A 1942 PC 1 (3).**

(32A) A contract by a guardian on behalf of a minor is not initially void but only voidable. On attaining majority it is open to him to repudiate the transaction as a whole but if he chooses to take advantage under the transaction in that event he cannot repudiate his personal liability under the same transaction. (1971) 73 Bom LR 481.

(33) A minor can avoid on attaining majority a voidable transaction entered into by his guardian by diverse ways by acts and omission, and not necessarily by a suit. A 1938 Pat 337 (349) (DB) ** A 1940 Cal 589 (591) ** A 1938 Mad 822 (823) (DB).

(34) In Kutch, a minor cannot avoid a contract entered into by his guardian on behalf of the minor, after attaining majority, when it is for his good, and therefore it is binding. **A 1949 Kutch 23 (24).**

Section 11 — Note 5 (contd.)

(35) Where a person was neither a natural guardian nor a de facto guardian, nor a guardian appointed by any Court, but was a self-appointed guardian presumably for the particular transaction, he having no authority to create a mortgage on behalf of the minor, the mortgage bond must be held to be a void transaction as against the minor. A 1958 Pat 79 (80).

(36) A de facto guardian of a minor has no authority to take a premises on lease and start a new business there on behalf of the minor.

Where a minor is charged with obligations by the other contracting party, the principle that a contract entered into with an infant is not voidable but void will apply. A de facto guardian cannot alienate the property of a minor without legal necessity. A de facto guardian cannot also start a new business on behalf of the minor which will impose a liability on the minor. A 1970 Guj 106 (108).

6. Sale, purchase and partition.— (1) An agreement by the minor to purchase property cannot be enforced against him because in law he is incompetent to contract. A 1916 Low Bur 91 (92, 93) (Sale).

(2) All that the law does is to prevent the seller of goods to a minor from enforcing the minor's promise to pay for them if he fails to pay. It does not however bar the minor himself from making the payment and render the payment lawful. (1907) 11 Cal WN 135 (139).

(3) A sale by a minor is void. (1910) 32 All 25 (26) (DB) ** A 1958 Pat 79 (80) ** A 1959 Mys 188 (189, 190).

(4) Partition agreement between father and his minor children is not valid. A 1934 Rang 2 (4) (DB).

(5) Possession of mortgagee if and when can become adverse against mortgagor — Mortgagee cannot by unilateral act change character of his possession. **A 1963 SC 70 (73).** (Sale of mortgaged property by minor owner to mortgagee — Ineffective in law to change character of possession of mortgagee) ** A 1967 Raj 258 (261).

7. Mortgage.— (1) A mortgage executed by minor is not merely voidable but void. (1904) 26 All 342 (344) (DB) (Mortgage.)

(2) A mortgage executed by a person who at the time was still a minor because a guardian for his person and property had been appointed is void. A 1931 Cal 393 (396).

(3) Execution of English mortgage in favour of minor advancing whole money is not a nullity. (1965) 69 Cal WN 593.

8 Lease.— (1) Lease by minor is void and confers no rights to possession in the lessee. A 1924 Rang 288 (288) (Lease).

(2) Contract of lease by guardian — Contract when not for benefit of minor's estate is invalid — Fact that the guardian as an owner of impartible estate was under obligation to maintain his juniors does not entitle him to transfer specific lands to minors to escape assessment of agricultural Income-tax. (1969) 1 ITJ 84 (Cal).

9. Marriage contracts.— (1) A contract to marry in future entered into by a minor is void. A 1939 Rang 86 (88) ** A 1941 Rang 179 (180).

(2) A Muhammadan who is a major according to Muhammadan law is entitled to enter into contracts of marriage and dower despite the fact that he is not a major according to the provisions of the Majority Act. A 1925 Cal 322 (323, 324) (DB).

(3) An agreement for marriage made for a daughter under age by her guardian, such being the custom of the parties community, is an exception to the general rule that an infant's contract under Indian law is altogether void. A 1951 Mad 466 (469).

(4) According to personal law, where the parties are Hindus or Muhammadans, a father is the legal guardian for contracting them into marriage. When a contract of marriage is, therefore, entered into by him for the benefit of his children he makes the contract as their legal guardian and the real parties to the contract are the children and not their fathers. 1909 Pun Re No. 3, page 5 (5) ** A 1925 Cal 1255 (1256) (DB).

(5) Minor can maintain suit for damages for breach of contract of marriage entered into on his behalf, by his natural guardian. A 1925 Bom 97 (103) (DB) ** 1909 Pun Re No. 3, page 5 (6)

(6) Christian marriage solemnized under Rules and rites of Roman Catholic Church — It is sacrament although it also partakes of nature of contract — Contract Act therefore would not apply. (1969) 73 Cal WN 1001.

10. Partnership.— (1) A minor cannot become a partner in his own right as he is incapable of contracting under Section 11 and hence he cannot sue as a partner for dissolution of the partnership. A 1917 Mad 63 (64) (DB) ** A 1951 Nag 448 (449) (DB).

(2) A contract by the guardian of a minor under which he lends money belonging to the minor to another who required the same for business on the condition that the latter would pay instead of interest a half share of the profits of the business is neither void nor invalid because it is within the power of the guardian to enter into such contracts and the effect of it is also not to make the minor a partner. A 1956 All 136 (136).

(3) Even though the original agreement of partnership between the parties was void because one of them was a minor yet when the parties continued the relationship on the terms of that void agreement even after the minor attained majority and carried on business under that relationship it was held that there was a fresh partnership between the parties as from the date on which the minor became a major. A 1943 Bom 362 (365)

(4) Where an agreement of partnership is void as against some of the partners on the ground that they are minors it cannot survive even as regards the rest who are major partners. A 1949 Cal 617 (621) (DB) ** A 1968 Punj 84 (86) (DB).

(5) Registration of firms — Joint Hindu family — Two or more coparceners entering into partnership with stranger — They qua the stranger become partners — Firm can be granted registration. **A 1971 SC 383.**

Section 11 — Note 10 (contd.)

(6) Firm — Minor admitted to shares of firm — Minor attaining majority — Has the effect of change in constitution of firm — Firm to apply for fresh registration. 1971 UPTC 791 (All) (DB).

(7) A partnership deed cannot be held invalid if it is found that a minor has been admitted merely to the benefits of the partnership and not as a full-fledged partner. Hence registration of firm or renewal thereof cannot be denied on that ground. (1971) 79 ITR 306 (Andh Pra).

11. Relinquishment.— (1) A release by a minor of his rights in a property is absolutely infructuous in law. **A 1954 SC 263 (265).**

12. Service contracts.— (1) A contract for personal service by minor is void under the Indian law and the mere fact that it is for the benefit would not entitle the minor to sue under the contract. A 1949 Bom 215 (220, 221).

(2) A minor may bind himself by a contract of apprenticeship, if it be for his benefit but he cannot be sued for failing to serve as such. (1910) 33 Mad 288 (290).

(3) Contract with minor does not create legal contractual relationship between the parties. Minor girls entering into a contract of service with a person can leave the service at any time without committing any actionable wrong. A 1939 Rang 266 (268, 270).

13. Compromise.— (1) A compromise entered into by minors settling dispute as regards inheritance between themselves and their father's collaterals is void and not binding on them. Such a transaction cannot be upheld as a family settlement because a party cannot by describing a contract as a family settlement claim for it an exemption from the law governing the capacity of a person to make a valid contract. **A 1938 PC 181 (182, 183).**

(2) A consent decree against a minor stands on no higher footing than a contract and cannot be given effect to by a Court of law. A 1927 Pat 271 (279, 280) (DB).

(3) Compromise entered into by brothers does not cease to be binding on them by reason of minority of one of them where the same is effected on behalf of the minor by one of them as the head of the family. 1971 All WR (HC) 132.

14. Joint promise.— (1) A promissory note executed by a minor, for himself and another person jointly, is void against both. (1909) 3 Ind Cas 403 (407).

(2) If a contract is void only in so far as some of the joint and several promisors are concerned, it can still be valid with regard to the rest. There would still be consideration for their promises. 1963 Ker LJ 125.

15. Ratification.— (1) Minor's contract being void ab initio cannot be ratified by the minor on attaining majority. A 1927 All 242 (242) (DB) ** **A 1935 Lah 561 (565) (FB)** ** 1941 Nag LJ 363 (364) ** A 1931 Bom 178 (182) (DB) ** A 1919 Cal 875 (883) (DB).

[See also A 1953 Sau 177 (178).]

(2) A person, after attaining majority can elect to pay a debt, incurred by him, during minority. No question of ratification of a contract entered into by a person during minority, arises in such a case. A 1940 All 12 (14, 15) (DB).

(3) Contract entered into on behalf of a minor by a person who is not his legal guardian and who has no authority in that behalf is void in its inception and is incapable of being ratified by the minor on attaining majority. A 1937 Nag 390 (391).

(4) Officer having no authority to enter into contracts entering into works contract — Work done to property of which the Government not the owner — Government sanctioning work for certain limited purposes — Act of sanctioning does not amount to ratification. A 1959 Bom 56 (59, 60).

16. Restitution.— (1) Where a minor, representing to be major, enters into a contract, the contract is void and unenforceable against him. The minor cannot, in a suit against him on the contract be compelled under Section 65, or any equitable principle, to refund the money, received by him under the contract. **A 1937 All 610 (618) (FB)** ** A 1956 Andhra 182 (186) (DB).

[**But see A 1928 Lah 609 (612) (FB)** ** A 1914 Mad 641 (642) (DB) ** A 1936 Cal 567 (570).]

(2) A contract by a minor is void. He cannot in a suit to avoid such contract be made to repay the moneys received under such contract, except, in the exercise of discretion under Section 41, Specific Relief Act. **(1903) 30 Cal 539 (547, 550) (PC).**

(3) Equity requires a minor who seeks to avoid a contract which he induced the opposite party to enter into with him by a fraudulent misrepresentation as to his age to return the consideration which he received under it and this equitable principle is also found statutorily embodied in Sections 41 and 39 of the Specific Relief Act. Therefore Court should not grant the relief to the minor without at the same time imposing a condition that he should return what he received under the contract. A 1956 Andhra 182 (188) (DB). (A 1928 Lah 609 (FB), **Dissented from.**)

(4) The Court has while cancelling a bond at the suit of its executant on the ground of his minority has a discretion under Section 41, Specific Relief Act to order him, if the circumstances of the case justify it, to repay the money received by him under the bond. A 1922 Oudh 271 (273).

(5) A minor, who sues to set aside a contract, which he by fraudulent representation as to his age induced the other party to enter into with him should be ordered by the Court to restore the benefit received by him before it sets aside the contract. A 1933 All 372 (373) (DB). (A 1931 All 371, **Affirmed.**)

(6) A person who seeks to obtain a declaration that a mortgage is not binding on him on the ground that it was executed by him during his minority must refund the amount if at the time of its execution he induced the mortgagee to enter into the transaction by a fraudulent representation that he was a major. A 1921 All 326 (327). (Suit for declaration that mortgage is void.)

Section 11 — Note 16 (contd.)

(7) Where a minor by false representation as to his contractual capacity induced another to purchase his property and subsequently sued to recover the property on the ground that the sale was not valid because of his minority it was held that he was bound in equity to restore the consideration received by him to the purchaser. (1909) 31 All 21 (30) (DB) ** A 1930 Mad 945 (951, 954) (DB).

(8) In the absence of fraudulent misrepresentation on the part of a vendor and also proper enquiry as to his true age by the vendee the Court which has in equity a discretion to order the plaintiff vendor seeking to avoid the sale on the ground of his minority to refund the consideration to the vendee will not exercise that discretion in favour of negligent vendee. A 1924 All 156 (157) (DB) ** A 1934 Lah 304 (304) (DB).

(9) Where a sale by a minor was set aside as null and void and there was no misrepresentation by the minor as to his age and the vendee was aware of the age of the minor it was held that the vendee was not entitled to be paid any compensation. A 1937 Oudh 521 (523).

(10) Mere non-disclosure of minority is not misrepresentation or fraud. A 1937 Lah 598 (598).

(11) Where a person who purchased goods from the minor resisted the suit of the minor for price on the ground that the contract was void on the ground of the minority of the plaintiff it was held that he was bound under the provisions of Section 65 of the Act to return the goods or pay compensation for it. Madh BLJ (1954) HCR 1749 (1750, 1751).

17. Specific performance and doctrine of mutuality.— (1) In a suit by a promisee for enforcement of specific performance of a contract it is necessary that the parties should have the capacity to contract. A 1950 Pat 535 (538) (DB) ** A 1941 Nag 105 (106) (DB).

(2) A contract which is beyond the powers of the guardian and therefore cannot bind the minor ward does not bind even the other party on the principle of mutuality. Hence the minor cannot enforce such contract. A 1956 Bom 566 (569) ** (1912) 39 Cal 232 (237) (PC) ** A 1920 Mad 423 (423) (DB) ** A 1918 Nag 110 (111) ** A 1917 Nag 213 (213).

(3) A suit by a minor after his majority on a contract entered into by the karta on behalf of the Hindu joint family of which he is a member cannot be rejected on the ground of want of mutuality. A 1937 Mad 869 (870, 872).

(4) Where the major brother when purchasing property jointly in his and his minor brother's name entered into an agreement both for himself and on behalf of his minor brother to reconvey the property after the latter became a major it was held that as the property belonged to the brothers as tenants-in-common the agreement for reconveyance could be enforced against the minor on his attaining majority without the doctrine of mutuality interfering with the same. A 1956 Mad 261 (264) (FB).

(5) Where the plaintiff-purchaser was a minor, at the time of the argeement, there is want of mutuality because the agreement could not have been enforced against the plaintiff by the defendant. This defect disentitles the plaintiff to enforce the agreement for specific performance against the defendant irrespective of whether the defendant was of sound or unsound mind, when he made the agreement. A 1964 All 527 (528) (DB).

(6) Where father of minor plaintiffs sold his property to defendant and on the same date the defendant executed a registered deed of agreement for resale in favour of plaintiff's father who assigned his rights under the agreement of resale to the plaintiffs, there can be no valid legal objection to granting decree for specific performance in favour of plaintiffs. A 1969 Mad 470 (473).

(7) Contract by minor for purchase of immovable property — Contract being one not binding on the minor neither party can claim specific performance because of want of mutuality. 1972 Jab LJ 459.

18. Burden of proof and estoppel.— (1) Where in a suit upon contract the defendant denies the validity of the contract on the gound that he was not of full age at the time of its execution the burden lies in the first instance on the plaintiff to establish by prima facie evidence that the contract is not invalid and that the defendant when he executed it was a competent party. (1909) 2 Ind Cas 839 (840) (DB) (All) ** (1910) 4 Sind LR 250 (254, 255).

(2) The burden of proving minority lies on the party, who alleges that he was a minor, at the date of the contract. A 1925 Oudh 487 (487) (DB) ** A 1925 All 399 (399).

(3) Where a minor enters into a contract by representing that he was of full age he is not estopped from pleading his minority in avoidance of the contract. **A 1928 PC 152 (156).** (Deed executed by minor is nullity and incapable of founding a plea of estoppel.) ** **A 1931 Bom 561 (569) (FB). (Overruling** A 1923 Bom 169 (DB); A 1917 Bom 221 (DB).) ** **A 1928 Lah 609 (615) (FB). (Overruling** A 1921 Lah 312 and 60 Ind Cas 267 (1) (Lah)) ** A 1940 Nag 327 (328) ** A 1933 Mad 94 (95) ** A 1929 Bom 201 (202) (DB) ** A 1926 Nag 491 (492) ** A 1920 Bom 269 (269) ** A 1920 Mad 661 (662) ** A 1914 Mad 641 (2) (642) (DB).

(4) Deed executed by minor is nullity and incapable of founding a plea of estoppel. **A 1928 PC 152 (156)** ** A 1920 Mad 661 (662). (Estoppel cannot form basis of cause of action where contract itself is void.)

(5) Where a minor after alleging himself to be a major when the contract was executed by him seeks to plead his minority in avoidance of the contract a very heavy

Section 11 — Note 18 (contd.)
burden rests upon him to prove his defence. **A 1928 PC 152 (156).**

(6) Where a Kobala is executed by the Hindu mother on behalf of minor on the footing that she is competent to transfer the property of the minor and this position is accepted by the alienee who has obtained an advantage by the transaction of sale and got the entire property, including the share of the minor and has agreed to reconvey the property in its entirety, the alienee cannot turn round and repudiate the authority of the mother to effect the sale on behalf of the minor or to repurchase the property of the minor upon refund of the consideration money. He will be estopped by his conduct from doing so. A 1960 Cal 65 (66).

19. Contract by adult persons in favour of infants.— (1) A contract between an adult person and a minor cannot be void where the consideration for the promise of the adult is not a reciprocal promise by the minor but is something which had actually been done by the minor. A 1936 Pat 153 (157) (DB).

(2) A minor can enforce a contract made in his favour for a valuable consideration, as while no liability can be incurred by a minor, he is not debarred from acquiring a title to anything valuable. A 1927 Lah 24 (27) (DB).

(3) An executory contract cannot be entered into by a minor. But a minor or a lunatic is not disqualified as such from being the transferee of immovable property as purchaser or mortgagee under an executed contract. A 1945 All 156 (157) (DB) ** A 1922 Nag 239 (241).

(4) Merely because the conveyance of property is made in favour of a minor, there is no defective title passed. (1913) 18 Ind Cas 451 (451) (DB) (Cal). (Sale.)

(5) Where a sale-deed was taken in the name of the mother she paying the consideration from the monies belonging to her major and minor sons it was held that it was in no sense a sale to the minors themselves but a sale either to the mother herself as a trustee for her sons or a purchase by the major son with the family funds in the name of the mother. A 1914 Mad 666 (667).

(6) A mortgage in favour of a minor who has advanced the whole of the mortgage money is a valid transaction and is enforceable by him or by other persons on his behalf. **A 1917 Mad 630 (635) (FB).** **(Overruling** 33 Mad 312.) ** A 1936 Pat 153 (157) (DB) ** A 1928 All 102 (103) (DB) ** A 1919 Pat 561 (563) (DB) ** A 1918 Cal 1027 (1028) (DB).

(7) Where the defendants have received goods from the minor plaintiff there is no reason why they should not pay the price. A 1934 Lah 480 (480).

(8) A pronote executed in favour of a minor is valid and can be sued upon when the minor did not subject himself to any detriment by accepting it. (1913) 18 Ind Cas 968 (969) (Mad) ** A 1924 Rang 136 (136, 137).

(9) A money bond executed in favour of a minor is good in law and may be sued upon. (1889) 13 Bom 50 (51) (DB).

(10) A lease in a minor's favour imposing a liability on him is null and void. A 1918 Pat 626 (627) (DB).

(11) Purchase of property for the benefit of a minor by his maternal uncle is valid and if the property is alienated by a minor's father, the minor is entitled to recover it back. A 1915 Mad 412 (414) (DB).

(12) A minor, although not competent to contract can accept a gift through his natural guardian. There is no principle forbidding a natural guardian to accept a gift subject to a condition, and then perform that condition, if the whole transaction is for the minor's benefit. ILR (1947) 2 Cal 1 (13).

20. Restrictions on power to contract does not relate to competency.— (1) A statutory person is not on the same footing with a minor in the matter of his capacity to contract. While a minor's incapacity is an inherent one the statutory person suffers from no such incapacity. No doubt he can exercise the power only subject to his complying with the formalities imposed by the statute but that restriction on the exercise of power does not amount to inherent disqualification or incapacity. A 1952 Cal 306 (309) ** A 1955 Assam 86 (93) (DB) ** (1952) 89 Cal LJ 342 (372).

21. Disqualification under any other law. —(1) There is no disability attached to a female, married or unmarried, to preclude her from entering into a contract either on the ground of sex or coverture. A 1947 Nag 84 (85).

(2) The law of England which prohibits a barrister from entering into any contract of fees with his client does not operate in India and hence he is entitled while practising as an advocate of a High Court in India, to enter into contracts of fees with his clients. **A 1933 All 417 (420) (FB).** (25 All 509, **Overruled.**)

(3) It cannot be said that the Governor General of India, except in respect of contracts complying with Section 175 (3), Government of India Act of 1935, was a disqualified person without any contractual capacity. (1952) 89 Cal LJ 342 (375).

(4) Government cannot by contract fetter its future executive action which may concern welfare of State. **A 1947 PC 29 (31)**

(5) A person whose estate is under the Court of Wards is under Section 31, C. P. Court of Wards Act, incompetent to enter into any kind of contract involving pecuniary liability. A 1936 Nag 15 (15) (DB).

(6) A ward of Court loses his power to contract affecting property which goes under the control of the Court of Wards but does not become absolutely incapacitated from contracting. (1882) 8 Cal 620 (629) (DB).

(7) Judgment debtor to whom Schedule III, Paragraph 11, Civil P. C., applies is person disqualified within the meaning of Section 11. **A 1917 Nag 215 (223, 224) (FB).**

(8) Agreements by disqualified persons or by minors are void. A 1924 Oudh 438 (441) (DB) **** A 1917 Nag 215 (223, 224) (FB)** ** A 1953 Sau 177 (177) ** A 1936 Nag 15 (16) (DB).**

12. What is a sound mind for the purposes of contracting.— A person is said to be of sound mind for the purpose of making a contract if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests.

A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind.

Section 11 — Note 21 (contd.)

(9) Where a person entered into an agreement to sell while he was under a statutory disability to sell and in pursuance of that void agreement he executed the sale deed after his disability ceased it was held that the sale also could not be enforced. A 1928 All 112 (114) (DB).

(10) A person whose estate is under Court of Wards is in no better position than a minor and any contract made by him is void. But when he contracts a debt, though he is not liable for it and it cannot be enforced against him still a debt comes into existence and if his son renders himself liable for repayment of the same by the execution of a bond, the bond can be enforced against him. A 1918 Lah 109 (110) (DB).

(11) Evacuee is competent to enter mto any agreement in respect of evacuee property though he cannot transfer his right or interest in it — Administration of Evacuee Property Ordinance (1949), Section 38 or Section 40 of the Act of 1950 operates only on transfers creating right or interest in immovable property and not on agreements to transfer. A 1970 Guj 12 (20) (DB).

Section 12

1. Unsoundness of mind.— (1) A contract entered into by a person who at the time was of unsound mind is void. (1908) 10 Bom LR 1004 (1006) ** A 1957 Pat 491 (492) (DB).

(2) The test of unsoundness of mind is whether the person is incapable of understanding the business concerned, and its implications. A 1944 Nag 232 (234) ** A 1932 PC 69 (72) ** A 1957 Pat 491 (493) (DB) ** A 1927 Cal 889 (899) (DB) ** A 1923 Pat 187 (192) (DB).

(3) Even a person who by appearance behaves normally would be protected by the law if in reality he is one incapable of forming a judgment as to what is to his interest. A 1957 Pat 491 (493) (DB).

(4) Mere weakness of mind does not amount to unsoundness of mind. A 1944 Nag 232 (234) ** A 1923 Pat 187 (192) (DB).

(5) In case of a person who is illiterate or who is not in a position to read contents of a document, the contract cannot be imposed upon him simply because he has endorsed his signature thereon unless further it is proved that he did that after understanding the contents of the same. A 1959 Pat 540 (546-547) (DB).

(6) Mere loss of memory does not make a person unfit for the management of his own affair in his lifetime. A 1932 PC 69 (72).

(7) A person who being subject to undue influence is unable to exercise freely his judgment cannot be brought within the category of persons of unsound mind contemplated by Section 12. A 1927 Cal 889 (896) (DB).

(8) Idiocy is the most extreme form of mental unsoundness. A 1944 Nag 232 (233).

(9) An idiot is one who has been of unsound mind since birth and hence is subject to all the legal disabilities and incapacities which attach to a person of unsound mind. (1863) 1 Mad HCR 214 (215) (DB).

(10) An order in lunacy though not a judgment which under Section 41, Evidence Act, is conclusive against the whole world is relevant and binding upon the parties and those who claim under them. A 1933 Mad 624 (625).

(11) If a party to a contract seeks to enforce a contract which is void under Section 12, it is not permissible to give equitable relief. However, statutory relief can be given under Sections 38 and 41 of the Specific Relief Act when decision is asked for on the ground that the contract is void under Section 12. (1908) 10 Bom LR 1004 (1006, 1007).

2. Evidence and proof.— (1) The question whether a person is of unsound mind at the time of execution of a document is a question of fact. A 1953 Assam 94 (95).

(2) Pleadings and evidence must be scrutinized before deciding issue of mental condition. A 1938 Nag 204 (208).

(3) Circumstances evincing insanity have to be considered together and not individually and their cumulative effect gauged. A 1941 Nag 251 (254) (DB).

(4) Question whether contract is invalidated by unsoundness of mind does not depend merely on belief or disbelief of the witnesses before Court but largely upon inference to be drawn from evidence. A 1956 Cal 213 (214) (DB) ** A 1953 Assam 94 (95) ** A 1941 Nag 251 (252) (DB).

(5) In the case of a registered document, in deciding the question relating to the mental condition of the executant, the Registrar's endorsement on the deed cannot be discarded. A 1938 Nag 204 (209).

(6) Once it has been established that a person is usually of unsound mind, the burden of proof is on the party who alleges that the document was executed during a lucid interval. A 1941 Nag 251 (252) (DB) ** A 1958 Andh Pra 22 (27) (DB).

(7) It is doubtful whether it could be held that any person was by reason of unsoundness of mind incapable of entering into a contract in the absence of any medical evidence. A 1953 Assam 94 (95).

(8) When it is shown that a person suffered from senile dementia on a particular day a presumption of its continuance would arise and it would then be on the party who tries to uphold the subsequent transaction of that person to show that at the time of the transaction there was no in-

A person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind.

Illustrations

(a) A patient in a lunatic asylum, who is at intervals of sound mind, may contract during those intervals.

(b) A sane man, who is delirious from fever or who is so drunk that he cannot understand the terms of a contract or form a rational judgment as to its effect on his interests, cannot contract whilst such delirium or drunkenness lasts.

[Malaysian Contract Act 1950, S. 12.]

13. "Consent" defined.— Two or more persons are said to consent when they agree upon the same thing in the same sense.

[Malaysian Contract Act 1950, S. 13.]

Section 12 — Note 2 (contd.)

capacity. A 1940 Mad 73 (74, 75) (DB) **A 1956 Cal 213 (214) (DB).

(9) An allegation of the unsoundness of mind of a person should be established by proof which shows that he was incapable of understanding business and forming a rational judgment as to the effect of his transaction upon his interest. A 1957 Pat 491 (492) (DB) ** A 1927 Cal 889 (899) (DB) ** A 1923 Pat 187 (192) (DB).

(10) In order to avoid a contract on the ground of unsoundness of mind, the all important question to be decided is whether that person was of unsound mind when the contract was made. A 1927 Cal 889 (892) (DB) ** A 1933 Lah 458 (460).

(11) The executant of a deed might be a hard drunkard who might frequently be unsober but to hold that his deed is not binding it must be established that he was unsober when the deed was executed. A 1926 Oudh 470 (472) (DB).

(12) Proof that a person was suffering from delusions by itself is not sufficient to set aside his transaction but it must be established that the delusions influenced the disposition or the contract. (1908) 10 Bom LR 1004 (1016).

(13) A case of lucid interval cannot be established by the solitary fact that on the day on which the transaction took place the person in question did not show any instability or insanity. A 1956 Cal 213 (214) (DB).

(14) Where unsoundness of mind has been proved by definite medical evidence lucid intervals should also be proved by as strong and as much demonstrative evidence. A 1932 Rang 24 (25).

(15) It is not legitimate for a Court to commute an insufficient case of insanity into a complete case of weakness, when the type of insanity connoted in the evidence is something quite different. (1905) 27 All 1 (10) (PC).

Burden of proof.

(16) Normal presumption is in favour of sanity. The onus of proving insanity is on person who alleges it. A 1923 Pat 187 (192) (DB) ** (1908) 10 Bom LR 1004 (1007) ** A 1967 J & K 85 (88) ** (1960) 2 Orissa JD 492. (Mere endorsement in the document to the effect that it was read over to the lady and understood by her, cannot be relied upon, when the writer of the endorsement has not been examined as a witness.) ** A 1970 Raj 190 (194). (Party opposing the adoption puts in evidence an inquisition finding the adopting father to have been lunatic, at a date previous to the making of the adoption, this evidence shifts the burden to the party who asserts the adopting father's sanity.)

Section 13

1. Consent.— (1) 'Consent' is a legal term of wide import which would include both express and implied consent. Tacit consent and connivance would also fall within that legal import of the term. A 1958 Raj 324 (332) (DB).

(2) A consent induced by false representation may not be 'free' within the meaning of Section 14, but it can nevertheless be real, and ordinarily the effect of fraud or misrepresentation is to render a transaction voidable only and not void. A 1954 SC 181 (184).

(3) Whether there is consent or not has to be proved as a fact in accordance with the principles of the law of contract. A 1954 SC 181 (185).

(4) For a deed to be binding on its executant it is necessary that there should be not only the physical act of execution but also the mental act in the sense that the mind accompanied the act of execution. A 1933 Pat 306 (335) (DB) ** A 1925 PC 204 (209).

(5) Where a person is induced to execute a deed of one kind under the belief that he is signing an instrument of a wholly different kind the transaction is void and not only voidable. A 1971 Cal 786 (788) (DB) ** A 1956 Cal 575 (577) (DB) ** A 1939 Lah 439 (451) (DB) ** (1879) 3 Bom 242 (266, 267).

(6) Where there is error either in regard to the identity of the party or the subject-matter of the contract there is no consent within the meaning of the section. A 1954 SC 181 (184) ** A 1932 Bom 151 (153) (DB).

(7) When there is mutual misapprehension between both parties to a sale of a bill of exchange as to the particular kind of bill wanted by the purchaser their minds cannot be said to have met, or in the words of this section there would be no consent. (1882) 4 All 334 (336, 337) (DB).

Section 13 — Note 1 (contd.)

(8) A person who entered into an agreement to compound an offence under the Forest Act of 1926 by payment of 'price' of forest produce as assessed by the Forest Officer and also paid the same cannot turn round and say that as there was no consensus ad idem on the meaning of the word 'price' there was no contract at all and therefore a part of the amount which was paid by him according to the assessed value should be paid back to him as being an amount which is in excess of what could be taken from him if the officer had estimated the value according to certain executive instructions issued by the department. A 1957 Madh Pra 169 (170, 171): 1957 Cri LJ 1146.

(9) Where a policy of insurance is issued by a company, subject to the regulations and conditions comprised in the prospectus, it is unnecessary to prove that the company's prospectus had been read by or specially brought to the notice of the assured, apart from the reference made to it in the policy. (1902) 25 Mad 183 (205) (DB).

(10) It would not avail a party seeking to avoid any condition in a contract executed by him on a printed form to plead either that he did not read the contract or that it was in a language not understood by him. In the latter case it would be for him to ask for and obtain an explanation of the terms. He can avoid a condition, especially one which is usually found in such contracts, only by showing that he signed the contract on the assurance given to him that he would not be bound by it. A 1921 Sind 121 (123).

(11) The fact that a document is in a language which is not known to its executant does not necessarily lead to the conclusion that he did not understand its contents. **A 1949 FC 78 (80, 81).**

(12) A passenger, who has sufficient notice from the passage-ticket itself that he and his luggage are being carried subject to certain conditions printed on the back of it, must, if he is ignorant of the language in which these conditions are printed, get them explained and translated to him before he goes on board. If he negligently omits to do so he will be bound by these conditions and his ignorance of the language will not help him to avoid them. (1881) 6 Cal 227 (234) (DB).

(13) A person who is not illiterate cannot escape a document executed by him on the plea that he did not read it. A 1930 Pat 601 (602) (DB).

(14) Persons signing a printed form of contract without studying its terms is bound thereby. (1938) 40 Pun LR 701 (705).

(15) No effective contract can come into existence unless the parties are ad idem on all the essential terms of the transaction. A 1958 Andh Pra 533 (536).

(16) If a party to an agreement embodied in a document is told that any stipulation in the agreement would not be enforced, he cannot be held to have assented to it. **A 1936 PC 70 (74).**

(17) The person who sets up and relies upon a document executed by a person of disability like the purdanashin lady has to prove that she executed it after fully understanding the nature of the disposition freely and willingly. **A 1925 PC 204 (209)** ** A 1953 Madh B 32 (34) ** A 1939 All 348 (361) (DB).

(18) Where the contents of the document were merely read out but not explained to and understood by the executant who was an illiterate man it must be held that there is no consensus ad idem and hence the executant is not bound by it. A 1918 Cal 546 (547) (DB) (Per Chatterjee J.)

(19) In the case of a person who is sui juris and not under any disability, the mental act of intending the execution is, also, presumed, where there is admission of execution, or where the execution is proved. A 1933 Pat 306 (335) (DB).

(20) An agent's consent on behalf of his principal is as effective and binding on the latter as when the same is given by himself. **A 1954 SC 181 (185).**

(21) The definition of the word 'consent' given in this section applies to that word as used in Section 30 (2) of the Sale of Goods Act. **A 1954 SC 181 (184).**

2. Transactions of purdanashin women.— (1) A pardanashin lady, in the true sense of that term is a lady living in seclusion that is, the "zanana," and having no communication with any male strangers except from behind a screen. A 1930 Lah 985 (987) (DB).

(2) Merely because a woman lives in some degree of seclusion it will not entitle her to be treated as a purdanashin woman when as a matter of fact she is found to have appeared before the registrar and also in Courts and transacted her bussiness herself. (1902) 4 Bom LR 146 (149) (DB) ** A 1947 Lah 54 (67) ** A 1935 Lah 184 (188) (DB) ** A 1933 All 955 (956).

(3) Where a deed is executed by a pardanashin lady, it must be reasonably established that the deed was the free and intelligent act of the executant. **A 1925 PC 204 (210) ** A 1931 PC 100 (104)** ** A 1946 All 121 (125) ** A 1944 All 42 (54) ** A 1943 Mad 677 (680) (DB) ** A 1939 All 348 (362) (DB) ** A 1939 Cal 569 (577) (DB) ** A 1939 Nag 159 (161) (DB) ** A 1937 Lah 353 (358) (DB) ** A 1934 All 179 (182) (DB).

(4) The disposition of a pardanashin lady must be substantially understood by her. Its execution must not merely be her physical act but also her mental act. **A 1925 PC 204 (209) ** A 1938 PC 38 (40) ** A 1931 PC 303 (305) ** A 1931 PC 100 (104) ** (1912) 34 All 455 (462) (PC)** ** A 1955 Cal 17 (19) (DB) ** A 1954 Nag 11 (15) (DB) ** (1954) 94 Cal LJ 39 (42) ** A 1952 Pat 19 (20) (DB) ** A 1946 All 178 (180) (DB) ** A 1939 Nag 159 (160, 161) (DB). (The document executed must be bona fide.) ** (1909) 1 Ind Cas 573 (585) (DB) (Cal) ** (1907) 31 Bom 165 (180) (DB).

(5) A pardanashin woman would be bound by her disposition when she had executed it with a substantial understanding of its nature. **A 1940 PC 134 (136) ** A 1919 PC 24 (26) ** A 1948 Cal 84 (87).**

(6) The question whether a disposition by a pardanashin woman can be sustained as her free and intelligent act will depend upon whether it had been explained to her so as to make her understand it. **A 1931**

14. "Free consent" defined.— Consent is said to be free when it is not caused by—

(1) coercion, as defined in Section 15, or

(2) undue influence, as defined in Section 16, or

Section 13 — Note 2 (contd.)

PC 303 (305) ** A 1938 PC 276 (277) ** (1877) 3 Cal 324 (327) (PC) ** (1869-70) 13 Moo Ind App 419 (419) (PC) ** A 1954 Nag 11 (15) (DB).

(7) If, for want of explanation a pardanashin lady did not understand an important feature of the transaction it cannot be held that her mind and free consent went with her act in executing the deed. **A 1940 PC 134 (135).**

(8) A mere reading of the document to the pardanashin lady is not sufficient to show that which is necessary, namely that she has understood its nature and effect. **A 1934 PC 208 (209) ** (1901) 28 Cal 546 (556) (PC)** A 1950 Pat 247 (250) (DB) ** A 1935 Cal 495 (497) ** A 1935 Lah 184 (187) (DB).

(9) The explanation given to the pardanashin lady to be sufficient must be such that it must be able to make her understand the full bearing of the transaction upon her interest and the nature of the liabilities it throws upon her. A 1931 Oudh 146 (155) (DB).

(10) The extent and character of the explanation required must depend on the circumstances, length, intricacy, the number and complexity of the dispositions, or the unfamiliarity of the subject matter, and are all reasons for requiring an increased amount and efficiency of explanation. **A 1925 PC 208 (209) ** A 1931 PC 100 (104) ** A** 1936 Oudh 196 (199) (DB).

(11) The essential requisite for sustaining a deed of a pardanashin lady being her understanding of its terms, it is immaterial, when there is such understanding, that there is no independent advice. **A 1938 PC 38 (40) ** A 1936 PC 207 (210, 211) ** A 1931 PC 100 (104) ** A 1925 PC 204 (209)** A 1958 Orissa 62 (63, 64) ** A 1954 Nag 11 (15) (DB) ** A 1952 Pat 19 (20) (DB) ** A 1944 All 42 (54).**

[See however A 1959 Pat 540 (546, 547) (DB).]

(12) There is no absolute rule of law that in every case of pardanashin lady a transaction entered into by her without independent advice should be declared void. **(1914) 36 All 81 (91, 92) (PC) **** A 1943 Mad 677 (680) (DB).

(13) Where upon the nature of the thing done, and the training and habit of the mind of the grantor as well as the proximate circumstances, affecting the execution the conclusion is reached that the independent advice could not have altered the results then the absence of it does not detract from the valid nature of the consent. A 1943 Mad 677 (680) (DB) ** A 1936 PC 207 (210).**

(14) Where a pardanashin lady is intelligent to understand the nature and effect of transaction and has got intelligent relations to assist her it cannot be said that she had no independant advice. **A 1935 Cal 234 (237).**

(15) The independent advice which might have become necessary in any case should have been given before and not after the event. **A 1934 PC 210 (212).**

(16) The burden of proving the intelligent execution of the document by the purdanashin woman lies on the party who relies upon it. ILR (1955) 1 All 772 (778) ** **(1902) 29 Cal 749 (757) (PC) ** (1881) 7 Cal 245 (250) (PC)** A 1955 Cal 17 (19) (DB) ** A 1952 Pat 19 (20) (DB) ** A 1946 All 178 (180) (DB) ** A 1946 Mad 353 (364) (DB) ** A 1914 Cal 223 (227).**

(17) Whether there is enough proof of intelligent execution in any particular case would depend upon the facts of that case. While the knowledge alone of the purdanashin woman of the nature of the document would be sufficient to infer intelligent execution in cases where no special connection subsists between her and the beneficiary no such inference would readily follow when there is a fiduciary relationship between them. A 1952 Pat 19 (20) (DB).

[See also A 1951 Nag 379 (380) ** A 1961 Orissa 100 (101).]

(18) The absence of duress, protest or want of comprehension is not by itself a proof of a true understanding mind in the purdanashin lady who executed a document. **A 1925 PC 204 (209) **** A 1955 Cal 17 (20) (DB) ** A 1935 Cal 671 (673, 674) (DB).**

(19) The mere fact that the woman lives in seclusion or sits behind a pardah does not necessarily show that she is weak-minded, ignorant or incapable of understanding her affairs. **A 1934 PC 208 (209) ** A 1935 Lah 184 (187) (DB).**

[See also (1938) 32 Sind LR 262 (264) (PC).]

(20) Although it is for the party who relies upon a document executed by the agent of a purdanashin lady to show that the power of attorney under which the agent acted was executed by the lady upon a full understanding of its meaning yet where there is prima facie evidence of her having consented to its terms it is she who has to rebut it by her own evidence. **A 1932 PC 134 (135).**

(21) Where vendor's letter to vendee indicated that an agreement of conditional sale was settled upon but the sale deed was referred as unconditional sale deed in an application for registration, it cannot be said that there was no consideration or consent on account of such discrepancy. **A 1965** Madh Pra 275 (283) (DB).

Section 14

(1) That definition of coercion in Sec. 15 is expressly inserted for the special object of applying to Section 14 i. e. to define what is the criterion whether an agreement was made by means of a consent extorted by coercion and does not control the interpretation of coercion when the word is used in other surroundings. A 1970 Guj 59 (64).

(3) fraud, as defined in Section 17, or

(4) misrepresentation, as defined in Section 18, or

(5) mistake, subject to the provisions of Sections 20, 21 and 22.

Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake.

[Malaysian Contract Act 1950, S. 14.]

15 "Coercion" defined.— "Coercion" is the committing, or threatening to commit, any act forbidden by the Indian Penal Code, or the unlawful detaining, or threatening to detain, any property, to the prejudice of any per-

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Section 14 (contd.)

(2) Consent is free, when the activity of man, by which it is effective, works without obstacles to impede its exercise. A 1945 Cal 218 (238) (DB).

(3) General averment that consent was not freely obtained is not enough to set up the plea that there was one of the vitiating elements enumerated under Section 14. **A 1915 PC 7 (13).**

(4) The law upon the question of free consent is given in the statute itself, and therefore, the Court has to administer the law to a case when it comes within its provisions irrespective of the consideration whether the application of the provisions would or would not disfavour the abuse of moral influence or encourage moral cowardice. A 1945 Cal 218 (235) (DB).

(5) Consent obtained under duress, whether the duress is physical or moral, is not free. But the fear caused by the duress must be real — Non metus vani hominis — and must be such as would induce a reasonable man to enter into a contract. A 1945 Cal 218 (235) (DB).

[**See also A 1939 All 348 (361) (DB).**]

(6) Where one of the parties enters into a contract, as a result of the deception practised upon him by the other, the consent is not free. 1866 Punj Re No. 21 p. 28 (29).

(7) Where by a special law regulating the production, supply and distribution of certain essential commodities representative dealers could sell them only to certain quota holders and at the price fixed by the Government there is only a restriction on the freedom of contract of the person who chooses to become a representative dealer in those commodities. Thereby it cannot be said that when he becomes such a dealer and sells to the quota holder the contract is not freely entered into because he has not the freedom to choose the purchaser or fix his own price as he could have if he dealt in the open market. In such a case no question can arise at all of there being force, or threat of force or fear of personal suffering or abuse of legal proceeding merely because of the restrictions imposed on him. ILR (1956) Andhra 502 (509). ** **A 1970 All 518 (522) (FB).**

(8) While absence of consent would render the transaction void a consent which is not free would only render it voidable. **A 1954 SC 181 (184).**

(9) Offer by canegrower to sell his cane, to occupier of sugar factory — Occupier has to accept offer and enter into agreement with cane-grower under provisions of A P Sugar-cane (Regulation of Supply and Purchase) Act and Rules thereunder — Consent of occupier to agreement is free within the contemplation of Section 14 and not under undue influence. **A 1968 SC 599 (603).**

(10) Where agreement reached by parties is accepted by the Court, under the provisions of O. 23, R. 3-A of Civil P. C. (Kerala Amendment), party can resile from such agreement only on grounds contemplated by Contract Act. A 1967 Ker 15 (16).

SECTION 15 — SYNOPSIS

1. **Scope.**
2. **"Act forbidden by the Penal Code."**
3. **Detention of property.**
4. **"Prejudice."**
5. **Proof.**

1. Scope.— (1) In India, the English Common law doctrine relating to duress is not the law which is to be applied where a plaintiff seeks to avoid a contract on a plea of coercion. The law which governs such plea is to be sought in this section and it is much wider than anything to be found in English authorities. (1912) 15 Oudh Cas 192 (197) ** (1971) 1 Mys LJ 258.

(2) Coercion as defined in Section 15 implies committing or threatening to commit some act, which is contrary to law. (1900) 22 All 224 (225) (DB).

(3) Coercion means every kind of compulsion even if it does not measure up to definition under Section 15. A 1969 Mys 230 (235) (DB).

(4) The mere need for raising a loan is not by itself sufficient to enable the debtor to avoid his agreement on the ground of coercion. 1936 All WR 84 (84) (DB).

(5) Where the Government in order to realise fine, due from the son, has attached the property belonging both to son and father and the father pays the fine in order to save property from being sold, payment made by the father is under coercion in view of the definition in Section 15 of the Act. A 1939 All 373 (374, 375).

(6) Refusal to withdraw prosecution, already launched, unless a bond for the amount due is executed would not be covered by Section 15. A 1926 Cal 455 (456, 457) (DB).

(7) "Coercion" need not proceed from party to contract or be immediately directed against the party whom, it is intended to coerce, to enter into the contract. A 1917 Mad 288 (290) (DB) ** (1912) 15 Oudh Cas 192 (197).

son whatever, with the intention of causing any person to enter into an agreement.

Explanation.— It is immaterial whether the Indian Penal Code is or is not in force in the place where the coercion is employed.

Illustration

A, on board an English ship on the high seas, causes B to enter into an agreement by an act amounting to criminal intimidation under the Indian Penal Code.

A afterwards sues B for breach of contract at Calcutta.

Section 15 — Note 1 (contd.)

(8) The definition contained in Section 15 is solely intended for the purpose of considering whether the consent in any particular case is a free consent falling within Section 14 and it does not govern the meaning of the word coercion as used in Section 72 of the Act. **(1913) 40 Cal 598 (612) (PC)** ** A 1954 Mad 213 (213) ** (1888) 15 Cal 656 (665) (DB) ** A 1970 Guj 59 (64).

(9) The threat of strike is neither a threat to commit any offence under the Penal Code nor is it unlawful detaining or threatening to detain any property. Hence it does not come under the definition of "coercion". A 1966 Assam 115 (118) (DB).

(10) Though the occupier of the factory is obliged to enter into agreement under Andhra Pradesh Sugar-cane (Regulation of Supply and Purchase) Act, 45 of 1961 and Rules framed thereunder, the compulsion of law is not coercion. In spite of the compulsion, the agreement is neither void nor voidable. **A 1968 SC 599 (604).**

(11) Where it was alleged in written statement that when there was state of emergency in country on account of Qabaili raids, defendant was forced to affix his thumb impression on some paper where it was written that the land in question belonged to a mosque and that what was written on paper was contrary to facts, held that this was an all too inadequate and unsatisfactory form of pleading coercion. A 1960 J & K 132 (135).

(12) Illegal loan transaction — Third person having no knowledge of illegality of transaction executing deed in favour of creditor and taking sale chit from debtor for 10 of his bulls and an agreement allowing debtor to keep the bulls for a period of six months — **Held,** that there was no coercion. (1967) 2 Andh WR 80.

(13) By conjoint operation of Section 25, Cl. (iii) of the Special Marriage Act, 1954 and Section 15 coercion would mean threatening to commit any act forbidden by the Penal Code. A 1969 Cal 293 (299) (DB).

(14) Sales in canteen for workers in compliance with factory legislation are sales — There is no compulsion, coercion or undue influence in such sales. 1972 Tax LR 1641 (Andh Pra).

(15) Lawful process of law such as appointment of Receiver and compulsion to enter into agreement which is result of such process cannot be considered as coercion under the section. (1971) 1 Mys LJ 258.

(16) The expression "coercion" in Section 72 cannot be given limited meaning as given to it under Section 15 of the Act. Its meaning is not controlled by the definition of coercion as given in Section 15. When any amount is paid by one person to another with a view to inducing that another not to set up his legal and valid claim, that payment does not amount to payment under coercion or payment involuntarily made and as such it cannot be asked to be refunded by resorting to the provisions contained under Section 72 of Contract Act. 1975 WLN (UC) 401 (Raj) (DB).

2. "Act forbidden by the Penal Code."— (1) In dealing with a case of coercion the Court should decide, whether the alleged act of coercion amounts to an offence under the Indian Penal Code. A 1917 Mad 288 (290) (DB) ** ILR (1973) 2 Cal 508.

(2) In England the law is that duress always avoids a contract except in certain cases where the imprisonment is lawful. But that exception does not apply to a case where a man is in custody upon a criminal charge in a country where there is no settled system of law and Judges have arbitrary power and the person suffering imprisonment made an agreement to give benefit to another to get release from that charge. Such a contract is void in England. **(1876) 1 Cal 330 (334, 335) (PC).**

(3) Where a person who had been taken in arrest in execution of a decree passed by a Court having no jurisdiction executed a bond for the decretal amount while under duress to obtain his release it was held that the bond had been obtained by coercion within the meaning of this section. (1882) 4 All 352 (354) (DB).

(4) A threat of bringing a false charge with the object of making another do a thing amounts to blackmail or coercion. A 1936 Lah 6 (7).

(5) To threaten another with criminal prosecution is not per se forbidden by the Penal Code. Such act could be forbidden by the Penal Code only when it amounts to a false charge. (1912) 15 Oudh Cas 192 (197, 198) ** 1927 Mad WN 761 (762) (DB) ** ILR (1970) 2 All 94.

(6) Where a criminal prosecution is instituted against a person, and such person, fearing the result of the prosecution, entered into an agreement in favour of the complainant in consideration of his abandoning the prosecution : **Held,** that it cannot be held simply on these grounds that the consent of such person was caused by coercion. 1882 Pun Re No. 135, p. 398 (399, 400) (DB).

A has employed coercion, although his act is not an offence by the law of England, and although Section 506 of the Indian Penal Code was not in force at the time when or place where the act was done.

[Malaysian Contract Act 1950, S. 15.]

[16. "Undue influence" defined.— (1) A contract is said to be induced by "undue influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another—

(a) where he holds a real or apparent authority over the other or where he stands in a fiduciary relation to the other; or

(b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

Section 15 — Note 2 (contd.)

(7) Where consequent to the accused entering into an agreement to refer the dispute to arbitration the pending prosecution against him was withdrawn and even after such withdrawal he attended the arbitration proceedings it was held that there was no substance in his contention that he entered into the agreement under coercion. **(1901) 25 Bom 10 (12) (SB).**

(8) A threat to commit suicide in consequence of which a document is executed by a person, is a threat to commit an "act forbidden by the Penal Code" and amounts to coercion. **A 1918 Mad 414 (416) (SB)** ** A 1917 Mad 288 (289) (DB) ** A 1969 Cal 293 (299) (DB). (Threat to commit murder.)

3. **Detention of property.**— (1) Seizure and detention of property even if the person who does that has a colour of right amounts to unlawful detention of property within the meaning of Section 15. A 1920 Low Bur 38 (40) (DB).

(2) Where a dismissed agent detained the accounts in order to obtain his release deed it was held that the release deed obtained was the result of coercion. A 1927 Mad 852 (855) (DB).

4. **"Prejudice".**— (1) The word 'prejudice' in Section 15 does not mean mere sentimental. prejudice. Some legal injury must flow before a person can be said to be 'prejudiced' under the section. **A 1918 Mad 414 (416) (SB).**

5. **Proof.**— (1) The question of coercion is one of fact depending upon the circumstances of each case. A 1953 Sau 53 (55) ** A 1954 Mad 213 (214) ** A 1971 All 151.

(2) To establish coercion a person must prove (1) utterance of threat (2) of an act forbidden by Penal Code (3) with the intention of compelling the plaintiff to make the agreement complained of. (1912) 15 Oudh Cas 192 (197, 198) (DB).

(3) Where coercion is alleged the allegation must by law be supported by particulars. It is only after due proof of those particulars that the Court can find that the alleged coercion is proved. A 1915 Bom 68 (71) (DB).

(4) Coercion under the Contract Act can be pleaded only where the end arrived at was achieved by the use of something in the nature of unlawful force, or the threat of unlawful force, against the person or the mind of the contracting party. A 1945 Cal 218 (238) (DB).

(5) Suspicion or probability of the existence of coercion cannot take the place of proof. There must be actual proof to support the plea of coercion. A 1915 Bom 68 (70) (DB).

SECTION 16 — SYNOPSIS

1. Undue influence — General.
2. Position to dominate.
   (a) General.
   (b) Husband and wife.
   (c) Master and servant.
   (d) Uncle and nephew.
   (e) Creditor and debtor.
   (f) Landlord and tenant.
   (g) Other relationship.
3. Fiduciary relationship.
   (a) General.
   (b) Next friend and minor party.
   (c) Trustee and cestui que trust.
   (d) Counsel and client.
   (e) Parent and child.
   (f) Guardian and ward.
   (g) Principal and agent.
4. Mental incapacity.
   (a) General.
   (b) Ignorant persons.
   (c) Fear of punishment.
5. Unfair advantage.
6. Inadequacy of consideration.
7. Unconscionable bargains.
8. High rate of interest.
9. Persons entitled to raise plea of undue influence.
10. Pleadings.
11. Proof of undue influence.
    (a) General.
    (b) Presumption.
    (c) Burden of proof.
12. Transactions of purdanashin ladies.

1. **Undue influence — General.**— (1) Influence will be deemed "undue" when a

(3) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.

Nothing in this sub-section shall affect the provisions of Section 111 of the Indian Evidence Act, 1872.

Illustrations

(a) A having advanced money to his son, B, during his minority, upon B's coming of age obtains, by misuse of parental influence, a bond from B for a greater amount than the sum due in respect of the advance. A employs undue influence.

Section 16 — Note 1 (contd.)

person, in a dominant position uses that position to obtain unfair advantage for himself at the cost of a person relying upon his authority or aid. A 1950 Nag 71 (75) ** A 1961 All 295 (297).

(2) According to the definition of undue influence in Section 16 there are three ingredients : (1) that the relation subsisting between the parties should be such that one of the parties is in a position to dominate the will of the other; (2) that the dominant party obtains an unfair advantage over the other and (3) that the dominant party uses his dominant position to obtain that unfair advantage. A 1963 SC 1279 (1290) ** 1979 Jab LJ 314 (323) (DB) ** ILR (1973) 2 Cal 508 ** (1970) 74 Cal WN 680.

(3) To constitute undue influence there must be either confidence reposed in the person charged or dominating influence with him over the other such as to render the latter to stand in some respect, in awe or fear of the former. A 1921 Mad 394 (397) (DB).

(4) Undue influence means the domination of a weak mind by a strong mind to an extent which causes the behaviour of the weaker person to assume an unnatural character. A 1937 Pat 362 (363) (DB) ** A 1961 Punj 383 (386) (DB).

(5) Undue influence is any influence brought to bear upon a person entering into an agreement or consenting to a disposal of property which in the circumstances of the case appears to have been such as to preclude the exercise of free and deliberate judgment. A 1956 Hyd 114 (117) (DB) ** A 1947 Oudh 89 (91).

(6) The essence of "undue influence" is that a person is constrained to do against his will, but for the influence he would have refused to do if left to exercise his own judgment. A 1961 Punj 383 (386) (DB).

(7) Undue influence does not connote excessive, inordinate or disproportionate influence but something wrongful. It is an influence which acts to the injury of a person who is swayed by it and which compels that person to do something which he would not have done if he had been a free agent. A 1958 Punj 190 (203) (DB) ** (1890) 13 Mad 214 (223, 224) (DB) ** A 1961 Punj 383 (386) (DB).

(8) A friendly advice or influence arising from gratitude or esteem is not undue influence unless thereby the functioning of a free mind is destroyed. Mere suggestions or appeals cannot have such an effect. An influence which exists from attachment or respect or which results from arguments or appeals to the reason and judgment is not undue. A 1961 Punj 383 (386) (DB).

(9) Although mere advice or persuasion is legitimate and would not constitute undue influence, pressure of whatever character, whether acting on the fears or hopes, so exerted as to overpower the volition of the person who is under domination, would fall within the definition of undue influence. A 1938 Bom 97 (107) ** A 1939 Pat 477 (482) (DB) ** 1908 Pun Re No. 51, p. 259 (261) ** 1901 Pun Re No. 36 p. 107 (110) (DB) ** A 1978 Mad 361 (365) (DB).

(10) Undue influence is clearly distinguishable from fraud and like fraud it assumes myriad forms. A 1947 All 180 (181) ** A 1932 Pat 105 (117) (DB).

(11) Acts of undue influence must range themselves under either coercion or fraud. A 1934 PC 130 (133, 134) ** A 1929 Oudh 44 (49) (DB) ** A 1922 Oudh 59 (63) (DB) ** (1908) 32 Bom 37 (44) ** A 1962 Pat 168 (173, 174) (DB) ** A 1964 Raj 250 (252).

(12) Undue influence is a species of fraud whereby mastery is obtained over the mind of the victim by insidious approaches and seductive artifices. Sometimes the result is brought about by fear, coercion importunity or other domination calculated to prevent expression of the victim's true mind. A 1958 Punj 190 (203, 204) ** A 1964 Raj 250 (252).

(13) Undue influence consists in some coercion almost amounting to fraud, whereby the will of one party was dominated by the other, so that the resulting transaction cannot be regarded as expressing the real, intention of the party coerced. A 1928 Pat 441 (444) (DB).

(14) Undue influence and incapacity to enter into a contract are totally different things. A 1927 Cal 889 (896) (DB) ** A 1965 Ker 189 (194) (DB).

(15) Undue influence may be exercised by a party to the contract in conspiracy with or through the agency of others. But such a conspiracy must be clearly established by evidence. A 1920 PC 65 (66, 67).

(16) The fact that a party enters into a contract for the purpose of satisfying the demands of a third party to whose undue influence he is amenable cannot defeat the rights of the other party to the contract when there is neither an allegation of undue influence against him nor are the

(b) A, a man enfeebled by disease or age, is induced, by B's influence over him as his medical attendant, to agree to pay B an unreasonable sum for his professional services. B employs undue influence.

(c) A, being in debt to B, the money-lender of his village, contracts a fresh loan on terms which appear to be unconscionable. It lies on B to prove that the contract was not induced by undue influence.

(d) A applies to a banker for a loan at a time when there is stringency in the money market. The banker declines to make the loan except at an unusually high rate of interest. A accepts the loan on these terms. This is a transaction in the ordinary course of business, and the contract is not induced by undue influence.]

[Malaysian Contract Act 1950, S. 16.]

[a] Substituted for the original Section 16, by the Indian Contract (Amendment) Act, 1899 (6 of 1899), S. 2.

Section 16 — Note 1 (contd.)

terms of the contract exhorbitant. A 1925 Lah 430 (431) (DB).

(17) When a third party who benefits by a transaction has notice of the facts which raise the presumption of undue influence, he is in no better position than the person who exercises the influence. ILR (1955) 2 Cal 214 (220) ** A 1945 PC 8 (9, 10) ** A 1940 Mad 285 (289) (DB) ** A 1938 Bom 97 (106) (DB).

(18) A plea of undue influence is totally different from a plea that the transaction is fictitious. A 1937 Lah 437 (439) (DB).

(19) Questions as to undue influence must be decided under the Contract Act, principles of English equity do not apply. A 1918 PC 249 (250) ** (1906) 28 All 570 (583) (PC) ** A 1925 Oudh 535 (535) ** (1911) 34 Mad 7 (10) (DB).

(20) In a suit for cancellation of a sale-deed on the ground that it was obtained by undue influence, the circumstances such as long silence of the plaintiffs, indebtedness of the transferor or failure to examine competent witnesses clearly go against the plea that the alienation was the outcome of exercise of undue influence. A 1976 Orissa 163 (170).

(21) A partition is not a contract between the parties where there is offer, acceptance and passing of consideration to invoke the provisions of the Contract Act while judging the genuineness or otherwise of the registered deed of partition. A 1975 Orissa 97 (99).

(22) It is not necessary that person in position to dominate must himself be benefited. Thus, where as a result of exercise of undue influence by a President and a Secretary of a Society, unfair advantage is received by the Society and not by its office-bearers personally, Section 16 is attracted. A 1973 Mys 338 (349, 350).

(23) Sales in canteen for workers in compliance with factory legislation are sales — There is no compulsion, coercion or undue influence in such sales. 1972 Tax LR 1641 (Andh Pra).

(24) Undue influence may arise where parties stand to one another in a relation of confidence which puts one of them in a position to exercise over the other an influence which may be perfectly natural and proper in itself but is capable of being unfairly used. ILR (1974) Andh Pra 1102.

2. Position to dominate — (a) General.— (1) The question whether a party was in a position to dominate the will of the other is largely a question of fact. A 1927 All 44 (45) (DB).

(2) Owing to the complexities of human nature relations between parties to a transaction which would place one of them in a position of dominance over the other may arise in various ways and therefore it is impossible to lay down any general law regarding the same. (1908) 11 Oudh Cas 295 (299).

(3) Any person who holds real or apparent authority over another or who stands in a fiduciary relation to the other would be deemed to be in a position to dominate his will. A 1958 Punj 190 (201) (DB) ** A 1937 Cal 492 (494) (DB).

(4) No strict or technical fiduciary relationship is needed to establish that one person is in a position to dominate the will of the other. 1949 Trav-Co LR 172 (176) (DB).

(5) The position of a person to dominate the will of another may arise not merely because of his personal relationship with him but also as a result of the circumstances in which the contract was entered into. (1911) 34 Mad 7 (10) (DB) ** A 1945 Cal 218 (239).

(6) Where the donor is not only an old lady of feeble health but is also entirely dependant upon the donee her nephew, even for food and clothes, there is sufficient relation between them to presume undue influence being responsible for bringing about the gift. A 1929 PC 3 (5, 6).

(7) A donee who was intimate with the donor, a very old man of 100 years of age, and had lent him money was held to be in a position to dominate the donor. A 1930 Sind 25 (29).

(8) The mere fact that the transferee was a near relation of the transferor's husband is not sufficient to hold that the former was in a position to dominate the will of the transferor when the finding is that there was no association between them and that they knew each other by appearance. A 1935 Cal 234 (237).

(9) The mere fact that the relationship between the parties is such that one of them relies upon the other for advice would not suffice to show that the latter is

Section 16 — Note 2 (a) (contd.)
in a position to dominate the former exercising his influence unduly. A 1938 Mad 426 (428) (DB).

(10) Mere fact that bequest is in favour of persons who were looking after testator at or about time of will does not by itself indicate that will was executed under undue influence. ILR (1966) 1 Cal 408 (413) (DB).

(11) A mere allegation of relationship between the parties without any suggestion even that one of them was in a position to dominate the other will not justify the Court in assuming that undue influence must have been exercised in the case. A 1956 Bom 569 (571) ** A 1973 Mad 302.

(12) The relationship which gives the position of dominance must have commenced anterior to the transaction that is claimed to be tainted by undue influence. (1908) 11 Oudh Cas 295 (299).

(13) A partner cannot be said to be in a position to dominate the will of the other partners merely on the fact that, he had got receiver appointed in a suit filed by him for dissolution of partnership firm and for recovery of his share in profits. (1971) 1 Mys LJ 258.

(14) The question of dominating will of another to enter into a contract arises only when the transaction is unconscionable and the person with whom the contract is entered into is in a dominating position to influence the other person. In a case where a mortgage was executed by a woman who was looking after her affairs personally and the consideration was adequate and transaction was not unconscionable question of undue influence has no relevance. A 1976 Him Pra 41 (48).

2 (b). Husband and wife.— (1) There is no presumption of undue influence in every case where a wife confers benefit on her husband without consideration. **A 1945 PC 8 (9, 10) ** A 1934 PC 210 (212) **** ILR (1955) 2 Cal 214 (221) (DB).

(2) Where the wife is very much younger than the husband, there is no legal presumption that she is in a position to dominate the will of her husband. A 1930 All 169 (171) (DB).

(3) The fact that the grantee is a second wife and she is in the habit of remonstrating with her husband in a loud voice do not necessarily indicate that she has her husband in her grip. A 1944 All 104 (110) (DB).

(4) General assertion of wife's commanding character and husband's weakness is not enough. Mere fact that testator preferred one heir to another will not establish undue influence. A 1979 (NOC) 46 (Cal).

2 (c). Master and servant.— (1) An ordinary servant dependant on his master, cannot, in the usual course of things be in a position to dominate the will of his master and hence it follows that unless there is evidence to the contrary it cannot be found that he has exercised undue influence over his master. A 1921 Mad 394 (397) (DB) ** A 1925 Nag 369 (370) ** A 1918 Oudh 313 (314).

(2) The mere fact that a person had been doing odd and sundry job to another for a few years would hardly suffice to reach a conclusion that he would have gained a position to dominate the will of the other who though an illiterate woman is found to be quite capable of managing her business. A 1952 Him Pra & B 20 (22).

(3) An official superior is in a position to dominate the will of his subordinate. If he obtains by the use of that position an undertaking from the subordinate it must be held that the undertaking was given under inducement by undue influence. A 1956 All 439 (443, 444) (DB).

(4) An agent looking after litigations and also securing loans for his employer can justifiably be inferred to be in a position to dominate the will of the employer especially when he is in embarrassed circumstances. A 1946 Oudh 129 (138) (DB).

2 (d). Uncle and nephew.— (1) Where a Buddhist lady made a gift of some land to her nephew who was also acting as her agent, it was held that although there was, what may be called, a fiduciary relationship between the parties, it was not such as to lead the Court to infer undue influence. A 1918 Low Bur 67 (68) (DB).

(2) Where a niece living with her uncle executed a conveyance of her property to him for an apparent consideration of one dollar under an arrangement between them to the effect that the uncle should manage the property during her lifetime paying her only the rent and thereafter convey it back to her heirs their Lordships of the Privy Council expressed the opinion that the transaction was probably avoidable in a Court of equity when the relationship between the parties is taken into consideration. **A 1915 PC 168 (169).**

2 (e). Creditor and debtor.— (1) The relation between a debtor and a creditor is not necessarily one in which the former is to be taken as being situated in a position in which his will is bound to be dominated by the latter. A 1926 Cal 455 (457) (DB).

(2) The mere fact that a person is previously indebted to the creditor is not by itself sufficient to say that he is in the position of a person dominated by the creditor. (1910) 7 Ind Cas 286 (287) (DB) (All) ** A 1927 All 315 (316) (DB) ** A 1924 Oudh 118 (119) ** A 1922 Nag 219 (220) ** A 1914 Lah 63 (64) (DB).

(3) Urgent need of money on the part of the borrower is not, in itself, sufficient to place the lender in a position to dominate the will of the borrower. **(1907) 34 Cal 150 (156) (PC) ** A 1927 PC 84 (86) ** A 1927** All 315 (316) (DB) ** A 1925 Pat 326 (328) (DB) ** A 1922 Pat 491 (492) (DB) ** A 1919 Cal 414 (416) (DB) ** 42 Cal 652 (DB) ** (1912) 16 Ind Cas 119 (120) (Lah) ** (1911) 34 Mad 7 (10) (DB) ** (1908) 32 Bom 37 (43) (DB).

(4) Plaintiff lending money at an unusually high rate of interest to the defendant who was imbecile and spendthrift to the knowledge of the plaintiff was held to be in a position to dominate the will of the latter. (1910) 5 Ind Cas 486 (486) (Cal).

(5) Creditor lending money to expectant heir on the strength of that expectancy is in a position to dominate the debtor's will. **A 1918 PC 249 (254).**

(6) A money lender who has knowledge that the person who requires money is help-

Section 16 — Note 2 (e) (contd.)

less because his estate is under the Court of wards must be taken to be prima facie in a position to dominate will of the borrower within the meaning of this section. **(1909) 31 All 386 (393) (PC) ** (1906) 28 All 570 (576) (PC).**

(7) Where the lender is in a position to dominate the will of the borrower and the transaction on the face of it appears to be unconscionable a presumption arises that the transaction was induced by undue influence. (1910) 32 All 589 (593) (DB) ** A 1931 Nag 63 (65) ** (1910) 32 All 590n (593n) ** (1909) 36 Cal 493 (502) ** (1909) 4 Ind Cas 1143 (1146) (DB) (Lah) ** (1902) 5 Oudh Cas 256 (264) ** 1959 Raj LW 540.

(8) When a person, who is already indebted to a money-lender, contracts a fresh debt, on unconscionable terms, undue influence must be presumed. A 1927 Lah 536 (537) (DB) ** A 1925 Pat 326 (329) (DB) ** (1911) 11 Ind Cas 198 (199) (DB) (Lah).

(9) Where a money-lender has admittedly lent money to a dissolute young minor and supplied him with large quantities of jewellery in presence of his touts and dependants and obviously gave a false colour to the transaction, undue influence is clearly to be presumed. 1902 Pun Re No. 2, p. 2 (4) (DB).

(10) Where an immoral young man, some of whose properties were already under mortgage, appointed the mortgagee to manage his property and liquidate the debts and gave possession of all his properties to the mortgagee and the mortgagee did not render any account and did not also discharge the debts but ultimately sold the properties on behalf of the mortagagor and bought them himself it was held that these circumstances showed that the mortgagor was completely under the control of the mortgagee and that the latter had used his influence unscrupulously to his own advantage. **A 1920 PC 8 (11).**

(11) The fact that in accounts between money-lenders and agriculturists balances are struck or bonds are executed periodically adding each time the interest due to the principal no doubt amounts to the charging of compound interest on the loan but that would not necessarily mean that undue influence is brought to bear upon the debtor. A 1914 Lah 63 (64) (DB).

(12) The mere fact that a man is indebted to another's brother does not put the other in a position to dominate the will of the debtor. A 1925 Oudh 535 (536) (DB).

(13) The Court has to consider whether the person was in a position to dominate the will of the other person, whether in fact he dominated the mind of other person, whether the person was of such a weak mind as would make him helpless, whether he could have had no independent advice and whether the transaction was unconscionable. The fact that the defendant has been indebted to the plaintiff or the plaintiff advised him at some stage in the best interest of the defendant are not in themselves circumstances to prove that the plaintiff has exercised undue influence. A 1971 Mys 330 (333, 334).

2 (f). Landlord and tenant.— (1) Where a harsh unconscionable agreement is entered into by a tenant the presumption is that undue influence was brought to bear upon him by the landlord as he is in a position to exercise it. A 1916 Pat 107 (108) (DB).

[But see (1909) 4 Ind Cas 495 (499) (DB) (Cal).]

2 (g). Other relationship.— (1) The elder brother who is also the manager of the joint Hindu family is in a very strong fiduciary relation to his weakwitted younger brother and hence in a position to dominate his will. A 1931 Oudh 34 (37) (DB).

(2) Relationship of grandson to his grandfather — No presumption of undue influence on that count. A 1965 Ker 189 (193) (DB).

(3) The fact that a person has for over twenty years illicit connection with a woman as her paramour justifies the conclusion that he is in a position to dominate the will of that woman. (1955) 21 Cut LT 364 (368).

(4) Where the donee, the paramour of the only surviving daughter of the donor, gave up both his house and people and lived with the donor it was held that both he and the daughter were in a position to dominate the will of the donor. A 1948 Pat 130 (133) (DB).

(5) Where the father who was in the prime of his life and in full possession of his faculties executed, while living with his first wife's daughters, a deed settling some properties on them it was held that the fact that merely because he was found to be amenable to persuasion could not lead to the inference that the deed was obtained by the daughters by undue influence. A 1946 Mad 391 (2) (394) (DB).

(6) The mere fact that the plaintiff was at the time of executing a lease deed the subject of the Ruler does not lead to inference that the defendant, who is a daughter-in-law of the Ruler, was in a position to dominate over the will of the plaintiff. A 1953 Sau 53 (55).

3. Fiduciary relationship — (a) General.— (1) A fiduciary relationship arises between two parties when one of them stands in a position of trust to the other. A 1946 Oudh 129 (138) (DB).

(2) Where one of two persons stands in fiduciary relationship to another confidence is naturally reposed in him by the other and the influence which grows out of that confidence is possessed by him. If he abuses that confidence and exercises his influence to gain an advantage at the expense of the other that constitutes fraud of the gravest character. A 1947 Oudh 89 (91).

(3) A fiduciary relationship can exist regardless of the origin of the confidence and the source of influence. It is not necessary to constitute a fiduciary relationship between two that one of them should be in loco parentis to the other. It is enough if the one places his trust in the other and relies upon him even though the relation between the two cannot be classified under the category of technical fiduciary relations. A 1958 Punj 190 (202) (DB) ** A 1938 Bom 304 (306, 307) (DB) ** A 1928 Mad 6 (13) ** (1961) 2 Mad LJ 367. (Gift of com-

Section 16 — Note 3 (a) (contd.)
plete property by brother to his sister who had brought him up from childhood and managed his property during his minority — Presumption that gift is not result of free will arises.)

(4) Relationship such as that which exists between a guardian and his ward, father and son, patient and his medical adviser, the solicitor and his client, trustee and the cestui que trust and like other persons would plainly fall within the ambit of sub-sec. (1) of the section. (1908) 32 Bom 37 (44) (DB) ** A 1961 All 295 (297) **** A 1967 SC 878 (881).**

(5) A trustee, an executor, a partner, an agent, a director of a company, legal advisers are all instances of persons occupying a fiduciary character. 1956 Andh WR 911 (914).

(6) The existence of a fiduciary relationship does not necessarily preclude a transaction in which some advantage is given to the person holding the fiduciary position. All that the equity requires is that if he wants to hold the benefit he must make it clear that the intention on the part of the transferor was not the result of his influence. **A 1927 PC 148 (150).**

(7) The defendant obtained a release deed from his sister who was in his care and control immediately after her attaining majority. The girl was not educated, was unmarried and had no independent advice. She signed the deed without knowing its contents. On these facts held the document was vitiated by exercise of undue influence. A 1974 Mad 36 (38).

(8) Executant found to be of advanced age in state of senility and suffering from diabetes and other ailments — Facts and circumstances leading to execution of deed raising grave suspicion as to genuineness of execution — Grandson, the settlee, failing to discharge the burden of establishing that deed was executed by executant voluntarily and without any external pressure or influence while he was not of infirm mind and was fully aware of dispositions — **Held**, that settlement deed was invalid. **A 1970 SC 1367 (1369, 1371).**

3 (b). Next friend and minor party.— (1) The relationship between the next friend and the minor is a fiduciary one. Where he, even before the suit land was delivered to the minor, obtained from the guardian of the minor, who was his own dependant daughter, the sale of the land in lieu of the amount claimed to have been spent by him for the litigation and there was no independent advice to the guardian it was held that the next friend had used his fiduciary position to derive an advantage to himself. 1956 Andh WR 911 (913, 914).

3 (c). Trustee and cestui que trust.— (1) The fact that two persons stand to each other in the relation of trustee and cestui que trust does not affect a dealing between them which is unconnected with the subject of the trust. (1906) 30 Bom 578 (582, 589) (DB).

3 (d). Counsel and client.— (1) The relationship between an attorney and his client being one of confidence in which the attorney is in the position of a dominating party the law has always regarded that relationship as being unusually susceptible to undue influence and prone to breed unconscionable transactions. **A 1955 Cal 319 (328) ** A 1962 Punj 325 (329, 330): 1962 (2) Cri LJ 92 (SB).**

(2) Presumption of solicitor's influence over his client, making gift to the solicitor, is rebuttable. A 1969 Cal 111 (124) (DB).

(3) A pleader who has no permanent professional relationship with a party does not fill in a position of active confidence with him merely because he had appeared for him in one or two cases. A 1929 Oudh 67 (69).

(4) Spontaneous and voluntary gift by client to his counsel's wife is not void. A 1969 Cal 111 (117) (DB).

3 (e). Parent and child.— (1) In considering what is or is not a "dominating position" the well known equitable principles which are applicable to the same relationship in England between the parties in question, cannot be ignored. It is well established under the English law that a special relationship of confidence exists between a parent and child notwithstanding that the latter is actually of age at the time the transaction takes place. A 1939 Rang 278 (283) (DB) ** A 1961 Mad 190 (193) (DB).

(2) In ascertaining whether at the time of the transaction the child was independent from the influence of the father it is not its being of full age at that time that matters. That will on the other hand depend on whether the child was on that day completely emancipated from the special relationship of confidence which exists between a parent and child. A 1928 Mad 6 (13).

(3) The adoptive mother with whom the adopted son lives and upon whom he is entirely dependent for his maintenance and education is in a position to dominate the will of the adopted son. **A 1938 Bom 97 (106) (DB).**

(4) The mere relation of daughter to mother in itself suggests nothing in the way of special influence or control. **(1906) 33 Cal 773 (784) (PC)** ** A 1956 Bom 404 (407) (DB).**

3 (f). Guardian and ward.— (1) From the mere fact that a person ratified a debt incurred by his guardian immediately on attaining majority cannot raise the presumption that the ratification was due to the undue influence of the guardian. A 1937 Oudh 56 (57) (DB).

3 (g). Principal and agent.— (1) A person who is in charge of the estate of a purdanshin lady as her am-mukhtear and looks after her property and litigations including certain criminal proceedings between her and her husband is in some sort of fiduciary relationship with her and is in a position to dominate her will. A 1956 Cal 584 (586) (DB).

(2) There is nothing in law to prevent a gift being made to an agent and therefore where the agent is able to show that the gift was made in his favour by his principal exercising his free and unfettered judgment and with full knowledge of what he was doing the gift will be upheld. **A 1923** Oudh 254 (263) (DB).

Section 16 (contd.)

4. Mental incapacity.— (a) General — (1) The law stated in Section 16 (2) (b) is based on the principle of equity that where a purchase is made from a poor and ignorant man at considerable undervalue the vendor having no independent advice, a Court of Equity would relieve against the transaction. (1935) 158 Ind Cas 973 (974) (Nag).

(2) Mere physical infirmity does not necessarily carry with it mental incapacity. A 1938 Nag 391 (393) (DB) ** A 1946 All 85 (86) (DB) ** A 1935 Rang 174 (177) (DB) ** A 1923 Pat 187 (194) (DB).

(3) The facts that the mortgagor is a simpleton besides being an opium eater and the mortgagee is the father of the pleader who had assisted him on many occasions and who may be useful to him in future are not sufficient to find that there was undue influence at work inducing the execution of the mortgage. A 1928 Lah 601 (603) (DB).

(4) Incapacity to manage an estate for the purpose of declaring its proprietor unfit and placing the estate under the control of the Court of Wards is not sufficient for presuming for the purposes of this section a weakness or impairment of his intelligence sufficient to assume that he had been imposed upon. (1905) 8 Oudh Cas 210 (216) (DB).

(5) Where a young widow in recent bereavement and ill at the time consented to an agreement of partition the terms of which were unfair and prejudicial to her minor sons and there was no independent advice to her and the other party was her step-son who was dominating and keeping her under restraint it was held that undue influence was to be presumed. A 1956 Sau 89 (93) (DB).

(6) Where a lady during the pendency of the proceedings for the appointment of a guardian for her entered into an agreement with the applicant, without competent advice, and which was favourable to him it was held that the agreement was obviously induced by undue influence. (1910) 6 Ind Cas 1005 (1006) (DB) (Lah).

(7) The mere distressed state of the mind of the party to a contract cannot raise a presumption of undue influence unless the opposite party had taken opportunity to use it to gain an unfair advantage to himself. (1909) 4 Ind Cas 359 (360, 361) (DB) (Sind) ** A 1924 Lah 337 (339) (DB).

4 (b). Ignorant persons.— (1) In transactions between an ignorant and illiterate villager and a shrewd businessman of town the latter is in a position to dominate the will of the former. A 1953 Madh B 32 (34).

(2) Where a gift of his entire property is made by a person of weak intelligence and incapable of understanding the nature of the transaction to a person who is presumably in a position to dominate him, the gift must be held to be obtained by undue influence by the donee. A 1931 Oudh 34 (38, 39) (DB).

(3) A strong presumption of undue influence arises where a gift of her entire property is made by an old and illiterate woman to her only relative. A 1951 Him Pra 54 (54, 55).

(4) Where a congenital cripple, weak in intellect, entered into a compromise, the terms of which were unfavourable to him, and his maternal uncle who was representing his interest was himself interested in the terms, it was held that the agreement was vitiated by undue influence. A 1927 Lah 546 (2) (549) (DB).

(5) A petition writer is not incapable of understanding the legal consequences of his acts on the true import of a transaction and is not a person upon whom undue influence can be exercised. A 1914 Oudh 299 (301) (DB).

(6) Mere illiteracy without ignorance will not be sufficient to consider the person as being likely to be dominated by another. A 1953 Madh B 32 (34).

4 (c). Fear of punishment.— (1) A state of fear caused by a threat of criminal prosecution by itself does not constitute undue influence. Assuming a state of fear amounts to mental distress which enfeebles the mind. still, there must be further action of some kind, the employment of pressure or influence by or on behalf of the other party to the agreement. (1900) 22 All 224 (229) (DB) ** A 1945 Cal 218 (239) ** A 1940 Pat 573 (576) (DB) ** A 1919 Nag 181 (184) ** A 1916 Cal 74 (74) (DB) ** 1959 Ker LT 777 (DB).

(2) Where a person in fiduciary relation with another induced the latter, by falsely putting him in fear of criminal prosecution by a third party, to enter into an agreement divesting his estate in favour of a certain person and increasing the monthly allowances to another it was held that the agreement was brought by undue influence and fraud. A 1929 Oudh 44 (53) (DB).

(3) The fact that the prosecutor was ready to compound offence and withdraw charge if a kabuliyat was executed and the accused executed the kabuliyat on condition of the withdrawal of the charge would not lead to the inference that the prosecution was in a position to dominate the will of the executant and used that position to obtain unfair advantage. A 1915 All 174 (175) ** 1882 Pun Re No. 135 p. 398 (400) (DB).

[But see (1904) 28 Bom 639 (643) (DB).]

5. Unfair advantage.— (1) The expression "unfair advantage" is used as meaning an advantage obtained by unrighteous means. (1908) 32 Bom 37 (45) (DB).

(2) Under Section 16 one person being in a position to dominate another's will is not enough. Use of such position must be proved and bargain must be in favour of influencer and unfair to the other. A 1920 PC 65 (66) ** A 1937 Oudh 254 (256) (DB) ** A 1931 Nag 63 (65) ** A 1926 Cal 171 (172) ** A 1925 Nag 369 (369).

(3) In the absence of a finding that promisee was in a position to dominate the will of promisor, a finding that promisee had obtained an unfair advantage over promisor is not sufficient to establish a case of undue influence. A 1935 PC 146 (148) ** A 1959 Mys 102 (105) (DB) (Reversed on another point in A 1969 SC 671.

(4) Where landlord agrees not to eject tenant for one more year on payment of enhanced rate and after expiry of that

Section 16 — Note 5 (contd.)
period seeks ejectment, it cannot be said that he obtains unfair advantage over the tenant. A 1961 All 295 (297).

(5) Where it was shown that the vendor who was old, poor and ignorant and in mental distress at the time of sale owing to the bereavement of his son and the consideration for the sale was so absurdly low it was held that the case clearly came within the requirements of the section. (1938) 158 Ind Cas 973 (974) (Nag).

(6) There can be no undue influence unless position of authority is shown to have been used for obtaining unfair advantage.

Thus, where a Trustee uses his position to compel the Manager of the Trust fund to partly make good trust amount embezzled by the Trust Manager, it was held that the Trustee could not be said to have obtained any unfair advantage though property tranferred by the Trust Manager with the expectation of avoiding prosecution was much more in value than the amount to be made good. ILR (1970) 2 All 94.

6. Inadequacy of consideration.— (1) Inadequacy of consideration alone is not a ground to hold that a contract was influenced by undue influence. A 1938 Mad 426 (428) (DB) ** ILR (1955) 2 Cal 214 (219) ** A 1919 Cal 414 (416) (DB) ** A 1915 Mad 561 (563) (DB).

(2) In deciding the question whether a transaction is unconscionable inadequacy of consideration is necessarily an ingredient which must weigh with Courts. 1946 Marwar LR (Civ) 11 (14, 15).

(3) Inadequacy of consideration in conjunction with circumstances of indebtedness and ignorance of plaintiff are facts from which Courts may infer undue influence. (1901) 25 Bom 126 (128) (DB).

(4) Inadequacy of consideration where it fs very gross is sufficient to raise a presumption that the party either did not understand what he was doing or was the victim of some imposition. A 1938 Mad 426 (428) (DB) ** A 1937 PC 14 (18) ** A 1955 Cal 17 (21) (DB) ** 1946 Marwar LR (Civil) 11 (14, 15) ** A 1926 Pat 539 (541) (DB) ** 1882 Pun Re No. 148 p. 449 (452) (DB).

(5) Where an immature young man whose mental faculties were clouded owing to hemp-smoking had parted with his property to his guru who had a great control over him for a very inadequate consideration it was held that the transfer could be set aside on the ground of undue influence. A 1936 All 672 (673).

(6) A sale by an illiterate woman of her property for an inadequate consideration should be set aside when not only she did not have any independent advice but the vendee was also one who had some influence over her. (1880) 5 Bom 450 (458).

(7) The entirety of a transaction must be taken into consideration and the necessity for the sale are all factors which should necessarily be borne in mind before a transaction could be set aside on the ground that the price paid is so low that it could be said to have been tainted by undue influence. A 1978 Mad 361 (369) (DB).

7. Unconscionable bargains.— (1) In considering whether an unconscionable bargain should be relieved against, only the terms of Section 16 must be considered. English equitable doctrine cannot be applied. (1906) 28 All 570 (573) (PC) ** A 1920 Cal 334 (335) (DB) ** (1911) 10 Ind Cas 249 (250) (DB) (All) ** (1910) 32 All 589 (592) (DB).

(2) In the absence of undue influence the Court has no power to give relief under Section 16 even if the bargain is hard and unconscionable. A 1918 PC 48 (49) ** A 1930 Cal 547 (552) (DB) ** A 1915 Cal 383 (384) (DB) ** (1913) 20 Ind Cas 812 (814) (DB) (Lah) ** (1912) 15 Ind Cas 377 (377) (DB) (Mad) ** (1911) 34 Mad 7 (11) (DB).

(3) Whether a transaction was unconscionable or not depends upon the facts of each case. (1909) 3 Ind Cas 818 (818, 819) (DB) (Mad) ** A 1946 Oudh 129 (139) (DB). [See also (1950) 54 Cal WN 878 (880) (PC).]

(4) A transaction may be unconscionable in many ways and Court should see in each case according to its sense of justice if it is really so. (1913) 18 Ind Cas 965 (967) (DB) (Cal).

(5) The nature of the bargain, namely whether it is an unconscionable one or not, will depend upon the answers to the question, whether it is righteous one, whether it is improvident, whether it is one which required legal advice to the party entering into it and whether the intention to enter into it originated with the party himself. 1949 Trav-Co LR 172 (176).

(6) In order to see whether a bargain is unconscionable the state of affairs at the time when the bargain was struck should be considered and not the ultimate claim made. A 1918 PC 249 (251) ** A 1935 Cal 234 (238) ** A 1927 Lah 748 (751) (DB) ** A 1920 Lah 123 (125) (DB) ** (1913) 20 Ind Cas 812 (814) (DB) (Lah).

(7) Something unconscionable either in original dealing or in subsequent transaction is necessary to establish undue influence. A 1919 Pat 566 (567) (DB) ** A 1936 All 611 (613) (DB).

(8) A gift by which the donor not only disinherited his wife but also stripped himself bare of his property was held to be an unconscionable transaction. A 1930 Sind 25 (29) (DB).

(9) An alleged gift by a young widow with still many more years to live of all her husband's property is highly improbable and apparently an unconscionable transaction. (1949) 54 Mys SCR 451 (478) (DB).

(10) Where the creditor with the knowledge that the debtor is seeking to raise money to pay off the revenue due to the Government and for the non-payment of which he was under arrest but temporarily released, made him agree to pay compound interest at an enormous rate in spite of the security of the family property given to him, it was held that the creditor was in a position to dominate and the transaction itself was unconscionable. (1910) 7 All LJ 591 (596).

(11) Where a Government servant facing the risk of summary dismissal from service because a warrant of attachment on his pay has issued, and therefore, in grievous necessity for money, executed a promissory

Section 16 — Note 7 (contd.)
note carrying a high rate of interest and it was also found that the consideration he had received was actually very much below the amount for which the note was executed and that the creditor was one to whom he was already indebted it was held that the bargain was an oppressive and unconscionable one. 1908 Pun Re No. 115, p. 522 (526).

(12) Where the tenants executed an agreement to their landlord by which they gave up their status of inamdars and bound themselves to pay as rent double the amount they were until then paying and there was no consideration for the transaction it was held that the transaction was apparently an unconscionable one. (1909) 4 Ind Cas 1114 (1115) (DB) (Mad).

(13) Kabuliyat providing that in case of acquisition of leasehold land lessor to get entire compensation — Transaction is not unconscionable. **A 1960 Pat 194 (195) (FB).**

(14) Where an old and uneducated woman who knew only to sign her name and was suffering from cancer executed a gift of whole of her estate in favour of a society so that she had to depend upon the society for her maintenance and medical treatment till she died, held that the transaction of gift was of an unconscionable nature and came under S. 16 (2) (b). Hence the burden to prove that the transaction was not induced by undue influence lay upon the donee. A 1973 Mys 338 (349).

8. High rate of interest.— (1) A debtor in order to obtain relief against high rate of interest charged to him must bring his case within the provisions of Section 16. A 1924 Pat 71 (74) (DB) ** A 1917 Pat 536 (537) (DB) ** (1910) 4 Sind LR 276 (277) (DB).

(2) The penal and excessive nature of the rate of interest charged to a borrower would not by itself attract the provisions of Section 16 so as to enable the Court to reduce the contractual rate agreed to by the parties. A 1950 Pat 379 (382) ** A 1927 All 538 (538) (DB).

(3) Mere fact that the rate of interest is high is not sufficient to justify Court in holding that the bargain is unconscionable one, and relieving the parties who entered into it from the liability incurred. (1911) 10 Ind Cas 14 (14) (DB) (All) ** A 1936 All 611 (612) (DB) ** A 1929 Lah 242 (244) ** A 1927 Mad 620 (620) (DB).

[See also A 1928 PC 80 (82) ** (1908) 32 Bom 208 (211).]

(4) In order to obtain relief against the high rate of interest contracted for, the party seeking relief must show that he had to consent to the rate either under coercion or undue influence. A 1920 Cal 334 (335) (DB) ** A 1928 Oudh 330 (333) (DB) ** A 1927 Lah 536 (537) ** A 1921 Cal 199 (201) (DB) ** A 1920 Cal 863 (863) (DB)** A 1920 Cal 314 (315) (DB) ** A 1919 Cal 994 (995) (DB).

(5) Where a contract expressly provides for interest the Court can reduce interest only if exercise of undue influence is positively pleaded or proved or if circumstances raise the presumption of undue influence. A 1914 Lah 344 (345) (DB).

(6) To enable the Court to give relief against excessive interest it must be shown that the creditor was in a position to dominate the will of the borrower and that he had unduly used the influence arising out of his dominating position to his own advantage. A 1950 Pat 379 (382) ** A 1936 All 611 (612) (DB) ** A 1931 Nag 91 (92) ** A 1928 Lah 949 (950, 951) (DB) ** A 1927 All 315 (316) (DB) ** A 1925 Cal 722 (723) (DB) ** A 1920 Cal 529 (529) (DB) ** A 1919 Cal 1033 (1033) (DB) ** (1911) 10 Ind Cas 249 (250) (DB) (All) ** (1911) 10 Ind Cas 37 (38) (Lah) ** (1908) 32 Bom 208 (211) ** (1907) 31 Bom 348 (352) ** 1901 Pun Re No. 96 p. 324 (326).

[But see A 1925 Nag 211 (215) ** (1913) 18 IC 965 (967) (DB) (Cal).]

(7) Even when there is ample security, the exaction of excessive and usurious interest does not arise a presumption of undue influence unless it is shown that the lender was in a position to dominate the borrower's will. **A 1924 PC 60 (65).** (A 1915 Cal 383 (DB), **Overruled.**) ** A 1928 Oudh 330 (333) (DB) ** A 1915 Cal 796 (800) (DB).

(8) Excessive interest in itself may not be ground for relief, but it may be evidence of the very helpless condition of the borrower and of the unfair advantage obtained over him if the circumstances show that the debtor would not otherwise have accepted those terms. A 1914 Mad 131 (135) (DB).

(9) Where a creditor, who had already lent money to another, exacted harsher terms from him in regard to the further loans made to him it was held that in regard to the later transactions the creditor was in a position to dominate the will of the borrower and hence the harsh terms could be interfered with by the Court. A 1934 All 938 (939) (DB).

(10) High rate of interest in cases of mortgages which stipulate against redemption for a long period of years is unconscionable. (1911) 11 Ind Cas 519 (521) (DB) (Lah).

(11) Charging higher rate of interest under a mortgage executed for a larger amount than advanced with the object to ensure the prompt execution of a mortgage deed is unconscionable. (1909) 3 Ind Cas 818 (819) (DB) (Mad).

(12) A contract of debt under which the debtor not only agrees to pay a very high rate of interest but also to pay the interest for a stipulated period even if he repaid the debt before the expiry of that period is an unconscionable bargain. (1907) 29 All 303 (305) (DB).

(13) A transaction is not unconscionable merely because it is in lieu of earlier loans carrying very high rate of interest. A 1927 All 44 (45) (DB).

(14) Prior dealings of short duration, resulting in a small indebtedness at the time

Section 16 — Note 8 (contd.)
the suit debt was incurred cannot by themselves raise any inference of undue influence on the ground of which relief can be given against the stipulated rate of interest. A 1930 Lah 65 (67) (DB).

(15) Debtor consenting freely and willingly to pay high rate of interest — There can be no question of undue influence. A 1926 Bom 65 (66) (DB).

Compound interest.

(16) The question whether the charging of compound interest renders the transaction unconscionable would depend on the circumstances of the case. (1906) 28 All 570 (573) (PC) ** A 1946 Mad 56 (56) (DB) ** A 1926 Oudh 273 (275) (DB) ** A 1925 All 31 (32) ** (1911) 34 Mad 188 (196) (DB) ** (1911) 10 Ind Cas 37 (38) (Lah).

(17) The conditions and terms of lending must be looked at when the loan carries compound interest with frequent rests. Compound interest at a moderate rate may not necessarily be oppressive and similarly compound interest with infrequent rests may not be oppressive. A 1928 PC 64 (67) ** (1911) 34 Mad 7 (10) (DB).

(18) Agreement to pay interest at stipulated rate does not become unconscionable merely because there is stipulation to pay compound interest at same rate in default of payment of simple interest. A 1920 Lah 238 (239) (DB).

9. Persons entitled to raise plea of undue influence.— (1) A legal representative of the executant of a document can bring a suit to set it aside on the ground that it had been obtained by the practice of fraud or undue influence. A 1927 Bom 384 (387) (DB).

(2) Where two sisters who were being brought up by their uncle executed a sale deed in his favour for an inadequate consideration and they were influenced by the uncle to do so it was held that the surviving sister was entitled to sue to set aside the sale in the exercise of her own right in regard to a moiety and as the heir of the deceased sister in regard to other half. A 1918 Bom 93 (94) (DB).

(3) Transferee of a bond is invested with all the rights of the transferor in respect of the bond, including the right to avoid it under Section 19-A on the ground of undue influence. A 1936 Oudh 105 (106) (DB).

(4) A defendant may raise plea of undue influence by way of defence and it is not necessary for him to take steps to set aside the agreement. A 1936 All 672 (674).

[See also A 1934 Cal 762 (763) (DB).]

(5) Plea of undue influence can be raised only by executant of document or his representative in estate, but not by a third party, claiming adversely to such executant. A 1931 Sind 78 (80) (DB).

(6) Where a widow executed a mortgage of her right to future maintenance under circumstances which justified the inference that the mortgagee was in a position to dominate her will she is not precluded from pleading undue influence by the fact that she acted under legal advice when she executed the same. (1911) 34 Mad 7 (10) (DB).

(7) Donee from mortgagor's widow cannot plead that the mortgage is bad for undue influence as he is not entitled to the equities which exist in favour of the mortgagor. A 1923 Lah 634 (635) (DB).

(8) A third party to a deed of gift cannot plead that the deed of gift should not be given effect to as it was obtained by fraud or undue influence. A 1956 Andhra 195 (197) ** A 1949 East Punj 277 (280) (DB).

(9) Transferees of some portions of the mortgaged property cannot plead undue influence to avoid the mortgage when the mortgagor himself did not seek to do either before or in the suit on the mortgage. A 1925 Cal 94 (96) (DB).

(10) Whether transaction is unfair and unconscionable bargain for inadequate price is a question entirely between assignor and the assignee. (1909) 2 Ind Cas 385 (390) (DB) (Cal).

(11) Party claiming adversely to assignor and assignee cannot plead Section 16 to defeat assignment. A 1929 Lah 295 (304) (DB).

(12) Speculator, who purchases equity of redemption on the chance of getting redemption on easy terms cannot be allowed to set up plea of undue influence. 1913 Pun LR No. 305 page 1027 (1031) (DB).

10. Pleadings.— (1) To avoid a transaction as being unfair, specific plea to that effect ought to be made in the plaint. A 1935 Cal 234 (238) ** A 1976 SC 163 (165). (Reversing A. F. A. D. No. 779 of 1967 D/- 9-11-67 (Patna).)

(2) It is incumbent on a party, be he plaintiff or defendant, who seeks to set aside a contract on the ground of undue influence to give in his pleadings full particulars of the circumstances on which he relies as the basis of his plea. It is not enough to baldly assert that undue influence has vitiated the transaction. (1905) 8 Oudh Cas 210 (222) (DB) ** A 1928 Oudh 330 (333) (DB) ** A 1965 Ker 189 (DB) ** A 1973 Orissa 76 (79).

(3) Court must scrutinise pleadings to find out that a plea of undue influence has been made out and full particulars thereof have been given before examining whether undue influence was exercised or not. A 1967 SC 878 (881) ** A 1978 Mad 361 (367) (DB) ** 1977 All LJ 900 (905).

(4) If facts, on record, justify the inference of undue influence, the Court can administer relief though pleadings are inartistic. A 1931 Nag 63 (64) ** A 1958 Punj 190 (201) (DB) ** A 1928 Nag 322 (324).

(5) In the absence of any plea of the contract having been brought about by the exercise of undue influence, the Court has no jurisdiction to interfere with the contract and substitute a new one in lieu thereof. A 1936 All 712 (715) (DB).

(6) Undue influence cannot be inferred merely by taking plea of relationship. Facts must be pleaded and proved mere general allegations are not enough. (1977) 2 Mad LJ 170 (184) ** ILR (1973) 2 Cal 508.

(7) Gift-deed impeached on ground of undue influence — Precise nature of the influence exercised, manner of use of the influence, and the unfair advantage obtained by the other has to be pleaded. A 1972 Him Pra 33.

Section 16 (contd.)

11. Proof of undue influence — (a) General.— (1) Courts in dealing with cases of undue influence has to consider four different questions connected with each other, namely (1) whether it is a transaction which a right minded person could be expected to enter into; (2) whether it shows so much improvidence as to suggest that the donor was not in a state of mind to weigh what he was doing; (3) whether it was a matter which required legal advice and (4) whether the intention of making the transfer originated with the transferor. **(1888) 15 Cal 684 (698, 701) (PC)** ** A 1951 Trav-Co 42 (43) (DB) ** 1949 Trav-Co LR 172 (179) (DB) ** A 1937 Cal 492 (494) (DB) ** A 1966 Andh Pra 104 (106).

(2) The question whether a document was executed under undue influence is a question of fact. A 1927 Mad 255 (256) ** A 1958 Punj 190 (199) (DB) ** A 1950 Nag 71 (75) ** A 1963 Andh Pra 72 (74) (DB).

(3) A finding of undue influence cannot be based on mere conjecture, but must be supported by evidence. **A 1932 PC 202 (207) ** (1896) 23 Cal 15 (25, 26) (PC)** A 1950 Pat 379 (382) ** A 1938 Lah 333 (334) ** A 1935 Lah 479 (480) (DB).**

[See also (1914) 36 All 81 (91) (PC) ** A 1938 Mad 426 (428) (DB).]

(4) Not only should there be evidence of general undue influence but there should be specific evidence that undue influence was exercised. A 1927 Mad 255 (259)

(5) When there is evidence of overpowering influence, and the transaction brought about is immoderate and irrational proof of undue influence is complete. **A 1940 Mad 285 (289) (DB).**

(6) No admissions of plaintiff made while under undue influence, could be taken as proof that he had full knowledge of facts. **A 1931 Oudh 34 (38) (DB).**

(7) In a case of undue influence, the mere fact that on one or two matters, the Court does not accept a party's evidence will not disentitle him to relief. **A 1935** Mad 726 (729) (DB).

(8) A charge of undue influence must be substantially proved as laid. **A 1928** Oudh 330 (333) (DB).

(9) In cases where a person suffers from an infirmity or backwardness then the standard of proof regarding undue influence or coercion may be slightly different. In a case where the challenging litigant is capable and literate and the parties are parent and child the Court must demand strict proof of misuse of confidence and undue influence. A 1978 Mad 361 (366) (DB).

11 (b). Presumption.— (1) It is open to a Court to presume the exercise of undue influence in any case where the facts and circumstances can justify the presumption. **A 1958 Punj 190 (206) (DB) ** A 1927 Mad 255 (257).**

(2) Undue influence is not a matter always capable of direct proof and must depend on conclusion to be drawn from the nature of the transaction itself and the circumstances in which it had its origin. 1946 Marwar LR (Civ) 11 (14, 15) **** A 1925 PC 101 (102) ** A 1921 PC 43 (45) ** (1955) 21 Cut LT 364 (370, 371) ** A 1943 All 184 (185) (DB) ** A 1933 Lah 885 (888) (DB) ** A 1927 Mad 255 (257) ** A 1919 All 1 (4) (DB) ** A 1918 Mad 194 (195) (DB) ** (1967) 2 Andh WR 80.** (A having money dealing with C — Dispute about exact amount due — Reference to Panchayat — Panchayat holding that A owed Rs. 1,400 to C — On A's request B executing 'ankada' in favour of C — A executing agreement bond in this regard — Agreement, held not vitiated by coercion or undue influence — Illegality of loan transaction between A and C held not material B having no knowledge about it.) **A 1963** Andh Pra 72 (74, 76) (DB).

(3) Relationship, which renders fraud possible when it exists between the parties to a deed would justify the presumption that the deed had been obtained through undue influence. **A 1951 Him Pra 54 (54, 55).**

(4) Where the person setting up the plea of undue influence proves the facts of the other party's dominant position and the unfair advantage secured to him by the transaction a presumption that the other party had by use of his dominant position exercised undue influence will be made. A 1952 Him Pra 20 (21) ** A 1947 Oudh 89 (91).

(5) A presumption of undue influence will arise in every case where the facts are such that they will fairly lead to an inference of such influence even though the parties do not fall within any particular category of relationship such as parent and infant child, solicitor and client or spiritual adviser and the penitent. The only significance of the existence of such relationship is that in these cases undue influence may be more easily established and even assumed. **A 1945 PC 8 (9) ** A 1966 Andh Pra** 104 (106). (Gift of whole property while under mental distress — Transaction appearing unconscionable on its face — Presumption under Section 16 (3) arises.)

(6) The mere existence of the fiduciary relationship between the donee and the donor raises a presumption of undue influence and it is on the donee to rebut the presumption. A 1961 Mad 190 (194) (DB).

(7) There is no presumption of undue influence in India as well as in England in the case of a gift to a son, grandson or son-in-law made during the donor's last illness a few days before his death. A 1914 Low Bur 278 (280) **** A 1967 SC 878 (881).**

(8) Merely because the parties were nearly related to each other or merely because the donor was old or of weak character, no presumption of undue influence can arise **A 1967 SC 878 (880)** (A. F. O. D. No. 193 of 1954, dated 12-8-1960 (Cal). **Reversed.)** ** (1980) 50 Cut LT 222 (227) (DB).

(9) A presumption that the general influence and dominance which one party possesses over another had been used would be applied to every transaction between them until the relationship of confidence continues to subsist and for that purpose the dominance will be deemed to continue until the contrary is shown. **A 1958 Punj** 190 (204).

(10) The Court will not presume "undue influence" where it is not pleaded by the parties. **(1910) 7 All LJ 591 (595) (DB) ** A**

Section 16 — Note 11 (b) contd.)
1925 Lah 430 (431) (DB) ** A 1965 Ker 189 (193, 194) (DB). (Particulars of undue influence must be set forth in plaint in sufficient detail.)

(11) A presumption of undue influence will not arise unless party pleading it establishes by evidence that the party obtaining the benefit of the transaction was in a position to dominate the will of the other and the transaction is unconscionable. If these two conditions are not established burden of proof will not shift to other side. 1971 Mer LR 5 (Andh Pra)

(12) Merely because the parties were nearly related to each other or merely because, the one was old or of weak character, no presumption of undue influence can arise. Generally speaking the relations of Solicitor and client, trustee and cestui que trust, spiritual adviser and devotee, medical attendant and patient, parent and child are those in which such a presumption can arise. ILR (1973) 2 Cal 508.

(13) Gift alleged to be caused by undue influence — No plea in written statement — Presumption as to undue influence and its rebuttal depends on facts of each case. ILR (1971) Raj 581.

(14) There seems to be two situations in which 'undue influence' will be held to be present. The first category relates to cases where the party charged has exercised undue influence in the sense of de facto domination over the party. Evidence of express influence must be adduced in these cases. The influence must be proved, it is not presumed. The second category relates to cases where there has been an abuse of the duties of care and confidence imposed on one party towards another as a result of the peculiar relationship emerging from certain defined patterns of association. In these cases undue influence is presumed and the party charged with it is under an obligation to displace the presumption of law. This distinction, however is of limited value. Ansons' Law of Contracts (22nd Edn.), Rel. on. ILR (1974) Andh Pra 1102.

11 (c). Burden of proof.— (1) The onus of proving undue influence ordinarily rests on the party who sets up that plea, but the circumstances of a case may make it an exception to the general rule. **A 1937 PC 50 (50, 51)** ** A 1956 Bom 404 (407) (DB) ** A 1946 All 121 (124) (DB) ** A 1945 Cal 218 (238) ** A 1939 Pat 477 (479) (DB) ** A 1927 All 44 (44, 45) (DB) ** A 1927 Mad 255 (258) ** 1882 Pun Re No. 148, page 449 (452) (DB) ** A 1960 Bom 404 (407) (DB).

(2) Before the question of onus probandi can arise in any case, two matters have got to be determined namely whether the relations between the parties were such that one is in a position to dominate the will of the other and then whether the contract had been induced by undue influence. These questions have to be approached in the above order only, as to change the order would surely result in error. **A 1924 PC 60 (63)** ** A 1958 Punj 190 (201) (DB) ** 1949 Trav-Co LR 172 (177) (DB) ** A 1938 Mad 426 (428) (DB) **A 1967 SC 878 (880).** (A. F. O. D. No. 193 of 1954, D/- 12-8-1960 (Cal), **Reversed.)** **A 1963 SC 1279 (1290)** ** A 1965 Ker 189 (193) (DB) ** A 1963 Andh Pra 72 (74, 76) (DB).

(3) Even though a bargain is unconscionable a remedy under the Contract Act does not come into view until the initial fact of a position to dominate the will has been established. **A 1924 PC 60 (64, 65)** ** A 1932 PC 202 (206) ** A 1956 Hyd 114 (117) ** A 1952 Him Pra 20 (22) ** 1946 Marwar LR (Civ) 11 (14) ** A 1933 Lah 682 (684) (DB) ** A 1921 Oudh 207 (208) ** A 1965 Ker 189 (193) (DB) ** 1964 Ker LT 497 (DB) ** (1969) 1 Mys LJ 507.

(4) In some cases the question of domination and the question of unconscionableness of the bargain may so overlap each other that it may be necessary to consider them together and not separately. A 1952 Him Pra 20 (22).

(5) The burden of proving, that the relationship between the parties was such that one of them was in a position to dominate the will of the other and that the transaction secured unfair advantage to him is on the party who pleads undue influence and on proof of these two facts exercise of undue influence will be presumed. A 1952 Him Pra 20 (21) ** A 1920 PC 65 (66) ** A 1948 Pat 130 (133) (DB) ** A 1938 Nag 470 (472) ** A 1938 Nag 391 (392) ** A 1920 Mad 982 (982) (DB) ** A 1963 SC 1279 (1290) (A 1958 Punj 190, Reversed.) ** A 1962 Pat 168 (171, 172, 173) (DB) ** A 1963 Andh Pra 72 (74, 76) (DB) ** A 1959 Mys 102 (105) (DB).

(6) It is necessary to prove the existence of both a dominating position and the unconscionable nature of the bargain. Proof of one without the other will not be sufficient. 1946 Marwar LR (Civ) 11 (14) ** A 1931 Sind 78 (80) (DB) ** A 1928 Lah 224 (229) (DB) A 1925 Oudh 535 (536) (DB) ** A 1925 Pat 326 (329) (DB) ** A 1963 Andh Pra 72 (74, 76) (DB) ** A 1959 Mys 102 (105) (DB).

(7) Where circumstances which would warrant a presumption of undue influence being made, are shown to exist the burden of proving that the contract was not induced by such influence lies, in view of the combined effect of this section and Sec. 111 of the Evidence Act, on the party against whom the presumption has arisen. A 1958 Punj 190 (203) (DB) ** A 1937 PC 50 (51, 52) ** A 1937 PC 14 (17, 18) ** A 1930 PC 139 (139) ** A 1927 PC 148 (150) ** A 1924 PC 60 (63) ** A 1920 PC 65 (66) ** (1907) 30 Mad 169 (174) (FB) ** A 1918 Pat 680 (682) (SB) ** A 1956 Hyd 114 (117) (DB) ** A 1951 Him Pra 54 (54, 55) ** ILR (1951) Mys 158 (160) (DB) ** A 1950 Nag 71 (75) ** A 1937 Cal 492 (494) (DB) ** A 1936 Pat 78 (78) (DB) ** A 1934 All 507 (509) (DB) ** A 1931 Nag 63 (65) ** A 1930 Cal 547 (552) (DB) ** A 1928 Mad 8 (11) ** A 1927 Mad 255 (257, 258, 259) ** A 1925 Nag 211 (215) ** (1911) 34 Mad 7 (10) (DB) ** (1909) 4 Ind Cas 1114 (1115) (DB) (Mad) ** (1902) 5 Oudh Cas 307 (311, 312) ** 1901 Pun Re No. 36, page 107 (110) (DB) ** (1890) 12 All 523 (529, 530) (DB) ** (1888) 10 All 535 (550) (DB) ** A 1966 All 438 (439, 440) ** A 1964 Raj 250 (253).

(8) Even though the person accepting a promise which is for the benefit of another

Section 16 — Note 11 (c) (contd.)
has not exercised any undue influence yet when he is aware that the person benefited is in a position of active confidence with the promisor he must prove that no undue influence had been used by the person benefited on the promisor. A 1935 Mad 726 (731) (DB) ** A 1928 Mad 6 (11).

(9) Onus lies heavily on a person in a dominating position to prove affirmatively that no domination was practised and that the other party was separately advised in the independence of a free agent. **A 1920 PC 63 (66): (1907) 30 Mad 169 (174) (FB)** ** A 1958 Punj 190 (206) (DB) ** 1956 Andh WR 911 (914) ** A 1950 Nag 71 (75) ** A 1946 All 121 (124) ** A 1938 Mad 919 (920) (DB) ** (1906) 30 Bom 578 (589) (DB) ** A 1966 All 438 (439) ** A 1962 Pat 168 (171, 172, 173) (DB) ** A 1961 Mad 190 (193) (DB) ** A 1959 Mys 102 (105) (DB) ** (1959) 1 Orissa JD 458.**

(10) Where a gift is challenged on the ground of undue influence, the donee has to prove that the deed was the result of free exercise of independent will. The most obvious way to prove it is by establishing that the gift was made after the nature and effect of the transaction had been fully explained to the donor by some independent and qualified person. A 1954 Trav-Co 407 (413, 414, 415) (DB) ** A 1964 Raj 250 (253).

(11) Where a transaction was finished through an attorney and the borrower had also another advice. held that undue influence was not proved. A 1930 Cal 547 (552) (DB).

(12) The independent legal advice which would suffice to rebut a presumption of undue influence must be one given with a a knowledge of all relevant circumstances and must be such as a competent and honest adviser would give if acting solely in the interests of the party who is in need of it. **A 1929 PC 3 (7).**

(13) Proof of independent legal advice is not the only way by which a person, who is in a dominant position and on whom the burden of proof lies, could rebut the presumption of undue influence which arises out of his relation with the other party. **A 1929 PC 3 (7)** ** A 1969 Cal 111 (117) (DB) ** A 1964 Raj 250 (253) ** A 1961 Mad 190 (193) (DB) ** A 1960 Mad 447 (449) (DB).**

(14) In the absence of a permanent professional relationship between a pleader and a party the pleader cannot be considered to stand in a position of active confidence with the party merely because he appeared for him in one or two cases. A 1929 Oudh 67 (69)

(15) The fact that the mortgagor was indebted in a small sum of Rs. 134 while the amount borrowed at the time of the mortgage was Rs. 2000 does not shift the burden of proving undue influence from mortgagor to the mortgagee. A 1924 Oudh 118 (119).

(16) Where both parties have adduced evidence the question of onus loses its significance. 54 Mys HCR 451 (479) (DB).

(17) Where a document is in a foreign or alien language unknown to the executant, the onus is on the person, who wants to rely on and derive advantage out of such a document, to prove that it was in fact read over and properly explained to the executant the contents of it so as to make him understand the real import of it, and if it is not done, the deed is not binding by mere affixture of signature by the executant. Where a party to a document is illiterate or ignorant of the language in which such contract was written and the contract is found to be different from the one he was given to understand by misreading or misinterpreting the deed the signature of the executant on the document is of no force. (1970) 2 Andh WR 75.

(18) Where the defendants were in a position to dominate the will of the plaintiff it was, for the defendants to establish to the satisfaction of the court that the gift deed had been obtained without exercising undue influence. The law did not require the plaintiff to establish positively that in fact the deed had been obtained by exercising undue influence and in that view of the matter the plaintiff could not be expected to set out in detail the elements of undue influence in the plaint. It was enough to point out that the defendants were in a position to dominate his will and they obtained an unfair advantage by using that position. A 1975 All 259 (261, 262).

(19) Where there are strong proofs of the power and influence of one party over the other and a deed which is irrational or immoderate in its effect is made and the deed confers a benefit on the party that is in a position to dominate, the burden lies on the party benefited to make out that the transaction is free from taint of undue influence. Case law reviewed.

Where the parties do not stand towards each other in the peculiar relationship emerging from well-defined categories like parent and child, legal adviser and client etc., it is necessary to ascertain whether the evidence warrants the view that there is a strong proof of plaintiff's (settlee's) power and influence over the settlor and whether the plaintiff was in such a situation in which dominion could be exercised by him over the will of settlor. The mere fact that dominion was exercised is sufficient and there is no need for proof of the abuse of confidence. A presumption can be drawn in any case in which the facts show that the circumstances are such that influence can fairly be inferred. ILR (1974) Andh Pra 1102

(20) Document executed by mentally infirm person set up as a defence to plaintiff's claim — Burden of proving that the document was obtained voluntarily lies heavily on the defendant. **(1970) UJ (SC) 51.**

(21) Gift-deed impeached on ground of undue influence — Burden of proving absence of undue influence rests upon the defendant if it is established by the evidence that the defendant was in a position to dominate his will and that the transaction was unconscionable. A 1972 Him Pra 33.

(22) Sale deed challenged as having been induced by undue influence — Person taking the deed in a position to dominate the will of the vendor — Burden of proving that the sale transaction was not so induced is on the vendee. **A 1973 Orissa 18 (20).**

Section 16 — Note 11 (c) (contd.)

(23) Where it was established that the defendants, who were near relatives of the donor, were in a position to dominate the will of the donor who was an illiterate and old lady and the transaction was also found to be unconscionable the burden of proving that the gift was not influenced by undue influence would lie on the defendants. (1975) 1 Cut WR 512.

(24) Donor a rich rustic widow — Donee taking her to Madras from her village and soon after getting deed of settlement in his favour — Donee must prove that the deed was voluntary and without any undue influence. A 1972 Mad 413.

(25) When a person such as an illiterate woman is in a fiduciary relation with another and the latter is in a position of active confidence, the burden of proving absence of undue influence is upon the person in the dominating position. He has to prove that there was fair play in the transaction and that the apparent is the real A 1975 Gauhati 30 (33).

12. Transaction of purdanashin ladies.— (1) In the case of transaction of pardanashin ladies the principles which are applied to determine the question whether these transactions are to be supported or discharged are not merely deductions from the law as to undue influence found in Section 16 of the Contract Act but are founded upon the wider basis of equity and good conscience which guide the Courts in the administration of justice in India. **A 1931 PC 303 (305)**

(2) The law gives to "pardanashin" ladies protection which is anologous to that always given by Courts to persons who are weak, ignorant and infirm and hence incapable of protecting themselves and presumes, unlike in the case of others, that they are incapable of protecting themselves. A 1933 Pat 306 (331) (DB) **** A 1963 SC 1203 (1205).** (F. A. No. 791 of 1963 D/- 2-12-1957 (Pat), **Reversed.**) ****** ILR (1965) Cut 695.

(3) The ground on which protection is given to a pardanashin lady is that she can be easily influenced and is very likely to be over-reached in her dealings. A 1939 Lah 439 (450) (DB)

(4) In case of pardanashin lady it is necessary to satisfy the Court that she executed the document with full understanding of execution and of the nature and effect of the transaction, and even in cases where she had independent advice, Court will scrutinise the transaction very closely to see that it is a fair one. A 1960 Madh Pra 60 (62). (Where the document is not in her mother language the law requires that she understood and not merely heard what was read.)

(5) In cases of gratuitous transfers of property by a pardanashin lady to a person standing in a fiduciary relation to her there is a presumption of undue influence and hence the burden of substantiating the bona fides of the transaction would lie on the party who relies on the transfer. A 1916 Oudh 10 (13) (DB) ** A 1956 Cal 584 (586) (DB) ** A 1946 All 121 (124) ** A 1931 Oudh 146 (155) (DB) ** (1912) 39 Cal 933 (937) ** ILR (1965) Cut 695 ** A 1958 Orissa 62 (63, 64) (DB). (Ordinarily the Courts insist on proof that the lady had independent legal advice.)

(6) Even when intelligent understanding by a pardanashin lady has been established it is possible to presume undue influence where the relationship of the donee to her is such as to justify the presumption. A A 1948 Cal 84 (87) (DB).

(7) In the case of a document executed by a pardanashin lady, the question is not whether the lady knew what she was doing had done, or proposed to do, but how her intention to act was produced, whether all that care and providence was placed round her as against those who advised her which from their situation and relation to her, they were bound to exert on her behalf. **A 1916 PC 172 (179) ** A 1960 Mad 447** (449) (DB) ** A 1958 Orissa 62 (63, 64) (DB).

(8) The rule that person who rely upon a deed executed by a pardanashin woman should prove that the deed had been explained to and understood by her applies with greater force where a power of attorney had been executed by a pardanashin lady to her brother and who by reason of her illiteracy, youth and inexperience was more likely to have been influenced by him. A 1936 Cal 721 (722) (DB).

[See also A 1963 SC 1203 (1206).]

(9) The rule of strict proof which generally applies where claim is made under a sale or gift by a pardanashin lady does not apply where the lady in question is one capable of carrying out monetary transactions and has no hesitation to appear before comparative strangers. A 1925 Lah 196 (198) (DB) ** A 1960 Mad 447 (449, 450) (DB) (Muslim lady of advanced age in Tamil district — Rule of strict proof does not apply.)

(10) Where there is nothing on the record to show that the pardanashin lady who executed the mortgage bond was weak-minded, ignorant or incapable of understanding her affairs, though she lived in seclusion and observed pardah from outsiders, the mortgage-deed executed by her is not void. 1962 BLJR 68 (DB).

(11) Where in a case of pardanashin lady undue influence is alleged it would require to consider the questions (1) whether the transaction was one which any right minded person would contract, (2) whether the nature of the transaction suggests that the lady was not in a state of mind to weigh what she was doing, (3) whether it required a legal adviser for her and (4) whether the idea relating to it originated with her. A 1948 Cal 84 (93) (DB) ** (1888) 15 Cal 684 (698, 701) (DB).

(12) The mere fact that person had enjoyed the confidence of the deceased husband of a pardanashin lady is not sufficient to say that he is also in a position of confidence with her or in a position to exercise undue influence. (1932) 15 Nag LJ 101 (103).

(13) Exercise of advice by a close friend or relative of the beneficiary under the will executed by a pardanashin lady cannot amount to an exercise of undue influence by him. A 1937 Pat 362 (363) (DB).

(14) Bargain with pardanashin lady cannot be divided into parts or otherwise re-

17. "Fraud" defined.— "Fraud" means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract :—

(1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;

Section 16 — Note 12 (contd.)

formed by Courts so as to uphold certain portions while rejecting others. **A 1940 PC 134 (136)** ** A 1939 Nag 159 (160) (DB) ** A 1966 Pat 342 (345). (Person executing a deed of gift of some property in favour of widow of his predeceased son, believing that he was solely entitled to the property, while in law widow was entitled to a share only — Widow, a pardanashin lady not aware of her rights — The fact that the deed was read over to her and accepted by her, will not make it binding on her — Deed of gift will not curtail her rights which she had in law.)

(15) Every case has to be fairly judged on its own facts and no undue stress should be laid either on the fact that the executant complaining is a paradanashin lady or on the mere circumstance that the transaction apparently benefited persons other than the executant. A similar cautious approach is necessary when dealing with the theory of undue influence also. ILR (1955) 2 Cal 214 (225).

(16) Whilst it is the duty of the Courts to see that pardanashin women are not imposed upon they must at the same time be careful not to apply the rules intended for their protection so strictly as to deprive them of freedom of contract and reduce them on a level with persons like minors who because of their mental deficiency are incapable of contracting. A 1946 All 127 (131) (DB).

(17) Where it is proved that the pardanashin lady knew the implication and effect of the documents that she was executing and she was scrupulously kept separately advised in the independence of a free agent, the document executed by her is not void. (1965) 7 OJD 42.

[**See also** A 1954 Pat 284 (285, 286). (Disposition is valid when it was substantially understood by pardanashin lady and it was as much her mental act as physical act.)]

(18) The protection offered to pardanashin ladies in respect of their transactions can be claimed only by them or persons claiming through their title to any property affected by the transaction and not by third parties. A 1939 Pat 477 (487) (DB) ** A 1930 Oudh 131 (140) (DB).

(19) Protection given by law to pardanashin ladies cannot be withheld from other women on the ground that the person concerned is not a pardanashin in the technical sense of the term. A 1955 Cal 17 (19) (DB) ** A 1948 Cal 84 (87) (DB) ** A 1930 Cal 591 (592) (DB) ** 1965 All LJ 1080. (Protection equally extends to illiterate and ignorant woman though she may not be pardanashin.) ** A 1976 Him-Pra 41 (44) ** A 1972 Him Pra 117 (120).

(20) The rule giving protection to pardanashin lady is not strictly applicable to cases where the pardanashin lady is not a contracting party and the case is one of fraud and not of undue influence. A 1932 Pat 105 (117) (DB).

(21) A woman who is herself not a pardanashin woman is not entitled to a like amount of protection which the law gives to pardanashin lady merely because she is close in kinship and habits to them and is similarly secluded from ordinary social intercourse. **(1901) 23 All 137 (140) (PC).**

(22) The principles of law applicable to a pardanashin lady will not be extended to a man on the ground that he is old and not in robust health. A 1923 Oudh 254 (263) (DB) ** (1962) 66 Cal WN 254.

(23) It is only when the document executed by a pardanashin lady is prima facie valid, proof having been given of intelligent execution that the question of undue influence arises. A 1941 Oudh 172 (177) (DB).

(24) Extracting harsher terms than first agreed to from a pardanashin lady just before impending sale of her property is covered by Section 16. A 1924 Oudh 423 (424) (DB).

(25) Applicability — Mortgage by Purdanashin lady — Transaction found to be her spontaneous and well understood act — Cannot be disregarded even if she had no independent advice from lawyer. **A 1970 Cal 200.**

(26) See also Notes under Section 13.

SECTION 17 — SYNOPSIS

1. Scope.
2. Constructive fraud.
3. False representation of facts — Clause (1).
4. Active concealment — Clause (2).
5. Promise without intention to perform — Clause (3).
6. Other acts intended to deceive — Cl. (4).
7. Act or omission declared by law to be fraudulent — Clause (5).
8. Silence amounting to fraud — Explanation.
9. Pleading and proof.

1. Scope.— (1) The Illustrations to Ss. 17 and 19 indicate that their principle is meant to extend to contracts which include an element of transfer, such as sales or mortgages. A 1940 Lah 505 (508) (DB).

(2) "Fraud" in equity has a far wider meaning than it has been given by the definition in this section and when the Court is called upon to exercise its jurisdiction in equity to set aside a decree on the ground of fraud or collusion it will not be limited by the narrow definition contained in this section in considering the question whether there is fraud sufficient for it to act. A 1914 Sind 28 (30) (DB).

(3) There are certain essential elements which must necessarily exist before a party can be said to have been defrauded. Firstly it is essential that means used should be successful in deceiving. However false and dishonest the arti-

(2) the active concealment of a fact by one having knowledge or belief of the fact;

(3) a promise made without any intention of performing it;

(4) any other act fitted to deceive;

(5) any such act or omission as the law specially declares to be fraudulent.

Explanation.— Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech.

Illustrations

(a) A sells, by auction, to B, a horse which A knows to be unsound. A says nothing to B about the horse's unsoundness. This is not fraud in A.

Section 17 — Note 1 (contd.)

fices and contrivances may be by which one may attempt to induce another to contract, they do not constitute a fraud if that other one knows the truth and sees through the artifices or devices, secondly there can be no fraud without an intention to deceive though the motive is immaterial. ILR (1973) 2 Cal 508.

(4) The distinction between fraud and misrepresentation is that in the case of the former the person making the suggestion does not believe it to be true while in the other case he believes it to be true — But in both cases it is the misrepresentation of fact which misleads the promisor. A 1931 All 154 (156) (DB) ** A 1976 Punj 200 (202).

(5) Considerations of Section 17 of the Contract Act which defines "fraud", will not be available to the parties to the Hindu Marriage. A fraud said to have been practised at the time of an agreement to marry, which would include also a betrothal or an engagement, would not ipso facto be a ground available to an aggrieved party to avoid a marriage. ILR (1967) Guj 822 (850, 851) ** A 1972 Bom 132.

(6) The term "fraud" in Section 12 (1) (c) of the Hindu Marriage Act (25 of 1955) cannot be attributed the same meaning as it has under Section 17 of the Contract Act. A 1979 Madh Pra 45 (DB). (A 1959 Madh Pra 8, Overruled.) ** A 1975 Madh Pra 174.

(7) The word 'fraud' as a ground for annulment of marriage under Hindu Law is limited only to those cases where consent of any of the spouses at time of solemnization of marriage was obtained by some sort of the deception. On every misrepresentation or concealment, marriage cannot be dissolved. A 1964 Punj 359 (362) ** A 1968 Pat 190 (192). (Misrepresentation as to age of the bridegroom made to mother acting as agent —Consent by daughter believing it — Consent is vitiated by fraud.)

(8) Concealed unchastity of a spouse before marriage, is not, and cannot be fraud within the meaning of Section 12 (1) (c) of Hindu Marriage Act, 1955. Fraud, spoken of as a ground for avoiding a marriage, does not include such fraud as induces a concert but is limited to such fraud as procures the appearance without the reality of consent. The simplest instance is persuasion. (1969) 73 Cal WN 751 (780, 782) (DB).

(9) Under Article 226, writ of certiorari being discretionary High Court will refuse relief to petitioner who has not come with clean hands and whose conduct smacks of collusion and fraud. A 1971 All 241.

(10) Suit for rectification on ground of fraud or mistake — Period of limitation does not begin to run until the plaintiff has discovered the fraud or could with reasonable diligence have discovered it. See Limitation Act (1963), Article 113 read with Section 17. 1975 MPLJ 780 (DB) ** ILR (1971) 1 Punj 704.

2. Constructive fraud.— (1) Merely from the fact of an exproprietary tenant executing a deed of relinquishment to the landlord, it cannot be said that there is constructive fraud on the part of the landlord where there is not even the slighest evidence of any fraud either direct or indirect, practised by him upon the tenant. A 1923 All 113 (114).

(2) Where a party discovering that a document already executed by him does not take effect according to his rights, executes another document in respect of the same property it cannot be said that he had thereby acted fraudulently. A 1954 Mad 681 (685) (DB).

(3) Fraud does not mean deceit or circumvention it means an unconscientious use of the power arising out of circumstances and conditions where in respect of one contract presumption of foul play arises from position of parties, the contract can be rescinded. 1969 MPWR 485.

3. False representation of facts — Cl. (1).— (1) Where for securing the policy the insured gives wilfully untrue answers, he commits fraud. A 1942 Cal 412 (414) (DB).

(2) Fraudulent and wilful suppression of material facts by assured — Insurer could avoid policy. A 1974 Mys 51 ** A 1977 Mad 381.

(3) In order to constitute fraud the person making the statement must be aware of the falsity of the statement. A 1964 Ker 109 (112, 113).

(4) Where a public concern invites tenders for construction of work and the notice of tender also mentions the estimated cost of work, the same is binding on it even though it is not obligatory to mention any estimated cost of work. A 1973 Guj 34 (46).

(5) Where a person makes a representation which he intends another person to act on, the person making such representation should be presumed to be aware of the fact that the person to whom it is made will at least understand that he, the representor, believes it to be true. Therefore if the representor does not, in fact entertain any such belief in the truth of his representation he is as much guilty of fraud as if he had made any other representation which he knew to be false or did not believe to be true. A 1973 Guj 34 (53, 54).

(b) B is A's daughter and has just come of age. Here, the relation between the parties would make it A's duty to tell B if the horse is unsound.

(c) B says to A — "If you do not deny it, I shall assume that the horse is sound." A says nothing. Here A's silence is equivalent to speech.

(d) A and B, being traders, enter upon a contract. A has private information of a change in prices which would affect B's willingness to proceed with the contract. A is not bound to inform B.

[Malaysian Contract Act 1950, S. 17.]

Section 17 — Note 3 (contd.)

(6) Ingredients of fraud as contemplated by Section 17 (1) are as follows :

(1) There should be a suggestion as to a fact.
(2) The fact suggested should not be true.
(3) The suggestion should have been made by person who does not believe it to be true, and
(4) The suggestion should be found to have been made with intent either to deceive or to induce the other party to enter into the contract in question. A 1973 Guj 34 (44).

(7) To constitute the falsity of a representation it should be found false in substance as well as in fact. A 1973 Guj 34 (44).

(8) Deliberately giving false replies by withholding material information, in answering questions of the insurance company during its enquiry into one's proposal amounts to fraud. A 1939 Sind 254 (255, 256) (DB) ** A 1959 Pat 102 (106) (DB).

(9) If in one's honest judgment there was no illness or any change of health but only an ordinary disorder the mere non-communication of that event to the company cannot be ground for the insurer to avoid the policy. A 1959 Pat 413 (415, 416, 417) (DB).

(10) Insurance policy — Declaration made by proponent in the form of proposal — Proposer can be said to have made a wilfully untrue statement only if he knew that what he was stating was untrue — He can be said to have fraudulently concealed any circumstance or fact only if he knew the existence of the same. (1967) 1 Mys LJ 563 (565).

(11) Contract of life insurance — Proof of deliberate fraud and not merely of constructive fraud or misstatement has to be shown. 1970 Lab IC 598 (Guj).

(12) A vendor who makes reckless or grossly negligent representations regarding his title in the property commits fraud. A 1958 Ker 322 (324).

(13) The motive of the person making false representation is irrelevant while deciding whether he committed fraud within meaning of Section 17 (1). A 1973 Guj 34 (53).

(14) Settlement of a partner's claim in profits of partnership firm cannot be said to have been entered into on misrepresentation made by that partner, when both the parties knew their respective rights and obligations and the other partners had the custody of account books. Moreover under Exception to Section 19 a contract cannot be avoided on the ground of misrepresentation if the party whose consent was so caused had the means of knowing the truth. (1971) 1 Mys LJ 258.

(15) A firm of architects who had entered into a contract with a firm of Property Developers terminated their contract and claimed payment for partial services. The contract provided that the terms and conditions of engagement shall be in accordance with the Singapore Institute of Architects' Conditions of Engagement and Scale of Professional Charges. Clause 3 thereof provides that the architect is entitled to payment in stages and also provides that where "for any reason" including if the service of Architect is terminated, the Architect performs only partial services, he is nevertheless entitled to payment according to the above scale. Whether or not the work done by Architect is useful or beneficial to the other party has no bearing on the question of payment for services rendered. **Held** that the plaintiffs (Architects) were entitled to recover payment for the work done, from the defendants. **Held** further that plaintiffs' breach of contract however entitled the defendants at common law to claim damages from the plaintiffs. The defendants could have counterclaimed for damages but they failed to do so. (1979) 1 Malayan LJ 212.

4. Active concealment — Clause (2).— (1) The concealment of the true nature and effect of an arbitration agreement by the person who stands in a fiduciary position to another for obtaining the consent of the latter to it amounts to fraud and renders the award given in the arbitration a nullity. **A 1916 PC 172 (179).**

(2) Deliberate concealment of fact that proposer had been treated by doctor few months before policy was taken for serious ailment vitiates the policy. **A 1962 SC 814 (820).**

(3) When the statements made in proposal by an insured were found to be false to the knowledge of the deceased insured, it was held that there was a fraudulent suppression of facts. A 1954 Mys 134 (137) ** A 1971 Andh Pra 41.

(4) A person who in his proposal for insurance states against truth of which he has knowledge that none of his near relatives had died of consumption is guilty of fraudulent concealment. A 1939 Cal 8 (12) (DB).

(5) Where a minor whose period of minority has been extended to 21 years states that he is of 20 years of age, his suppression of the fact that a guardian was appointed amounts to fraudulent representation as to his age. A 1929 Lah 880 (881, 882) (DB).

(6) A person who under his contract of employment has no liberty to engage in business either by himself or in association with any other firm commits fraud if he joins another in business and induces his employer to enter into contracts with that other by concealing

Section 17 — Note 4 (contd.)
from him the fact that he is associated, in contravention of his contract, with that other person. (1922) 66 Ind Cas 441 (442) (DB) (Lah).

(7) Where a person, although he knew that a certain decree belonging to an insolvent was secured, represented to the official assignee that it was unsecured and persuaded the official assignee to assign it to him at a very much reduced value it was held that there was active concealment of a fact which amounted to a fraud within the meaning of Sec. 17. A 1931 Mad 603 (605) (DB).

(8) Where the seller of a property who knowing full well that he has no title to dispose it of induces a purchaser to buy it from him by concealment of the fact from him, it is a case of fraud covered by Section 17. A 1927 All 693 (694) (DB).

(9) Agreement of sale — Liabilities of vendor — Non-discloure of material defects in property and title — Amounts to fraud and misrepresentation — Vendee's right to rescind contract. ILR (1974) 1 Delhi 689.

(10) If a vendor has been guilty of fraud by actively concealing a fact which it was material for the purchaser to know, and the vendee was induced thereby to purchase, the fact that the purchaser by exercise of any diligence might have ascertained the truth is no defence to a suit to recover purchase money. (1888) 11 Mad 419 (436) (DB).

(11) Where a person on whom fraud is committed is in a position to discover the truth by due diligence fraud is not proved. It is neither a case of suggestio falsi or suppressio veri. A 1976 SC 376 (381).

(12) False statement per se is not fraud. In order to constitute fraud, the person making the statement must have been aware ot the falsity of the statement and the party defrauded remains ignorant of the correct situation. But if the party defrauded has the facts before it or has the means to know the facts, the party cannot be said to have been defrauded even if a false statement has been made. A 1976 Raj 79.

(13) Where a sale deed bound the vendor to remove any claim or dispute about the property it was held that the mere concealment by the vendor of the existence of a mortgage on the property was not sufficient to draw an inference of fraud. (1896) 20 Bom 522 (534) (DB).

(14) It is the duty of every adult person dealing with the minor through his guardian to take care that the transaction is a fair one and does not prejudice the minor in any way by his act or omission. A 1923 Mad 96 (102, 103).

(15) Omission to disclose facts which are known to exist, cannot furnish a ground for an action on the basis of fraud. A 1962 Punj 543 (547).

5. Promise without intention to perform — Clause (3).— (1) Every breach of contract does not amount to a fraud within the meaning of Section 17. A 1949 Assam 6 (7) (DB) ** A 1918 Low Bur 142 (143) ** A 1916 Bom 239 (244).

(2) To bring case within S. 17 (3) promiser must be shown to have no intention of performing promise, at time of making it. (1911) 35 Bom 93 (96) (DB).

(3) The initial intention not to perform the promise that is being made is a necessary element to constitute fraud and the existence of such an intention cannot be inferred. A 1953 Hyd 179 (180) (DB) ** A 1918 Low Bur 142 (143).

(4) The fraud that is contemplated by the sub-section is a fraud which is at the very inception a fraud vitiating the transaction itself and not any subsequent conduct or representation on the part of the party or his representative. A 1952 Bom 425 (433, 434) (DB).

(5) Where a man and a woman went through a ceremony of marriage without the former ever having an intention to regard it as a real marriage it was held that the consent of the woman had been obtained by fraud. A 1952 Punj 277 (279, 280).

(6) Where person orders and obtains possession of goods with intention of not paying for them he commits fraud. He must then be considered as agent of vendor and his possession is that of vendor. If vendee tries to dispose of goods before payment by transfer of invoices to third party's name, third party gets no title to goods. A 1917 Lah 421 (423) (DB).

(7) Mere delay in the payment or the retention of money which should have been paid out by itself does not constitute fraud. A 1963 Mys 39 (47).

6. Other acts intended to deceive — Cl. (4). — (1) A party who by false personation induces another to enter into a contract with him under the belief that he is somebody else commits fraud. 1886 Pun Re No. 21 p. 37 (38).

(2) Where the owner of a horse, in order to sell it, concealed cleverly by artificial means a crack in its hoof and rendered it difficult for any one, except an expert, to discover the defect on ordinary inspection it was held that there was fraud which entitled the purchaser to repudiate his bargain. 1904 Pun Re No. 49, p. 149 (151).

(3) Abuse of confidence resulting from fiduciary relationship by unconscionable use of it to gain an advantage over the confiding party constitutes fraud of gravest character. A 1947 Oudh 89 (91).

(4) It is a fraud on the part of a plaintiff to claim beneficial title under a deed in respect of which he was merely a benamidar. A 1941 Bom 274 (275) (FB). (31 Bom 405, Overruled.)

7. Act or omission declared by law to be fraudulent — Clause (5).— (1) Omissions to make disclosures mentioned in Section 55, para (1) (a) and para (5) (a) of the Transfer of Property Act by the seller and buyer respectively are declared to be fraudulent by last para of that section. (1896) 20 Bom 522 (534) (DB).

8. Silence amounting to fraud — Explanation.— (1) The duty referred to in the Explanation to the section is a legal duty and not merely a moral duty to speak. A 1937 Lah 598 (598) ** A 1923 Sind 25 (27).

(2) In certain defined types of transactions and relation known as contracts uberrima fides there is a legal and equitable duty on the parties, not merely to state truly whatever is stated but also to divulge with candour and completeness facts regarding which there is no obligation to disclose at all in transactions which do not fall within the recognised class. A con-

Section 17 — Note 8 (contd.)
tract to marry is one of such transactions. A 1937 Nag 270 (272).

(3) Purchaser occupies no fiduciary position and is under no obligation to disclose facts. There is in such case no duty to speak and silence does not amount to fraud. Intentional misleading communication would be fraudulent. Equal means of knowledge is immaterial where there is a misrepresentation of anything lulling suspicion. A 1931 Mad 603 (605) (DB).

(4) M/s. U entered into an agreement with the State Trading Corporation for the supply of certain goods at a certain rate but with a "fall clause" containing a promise to reduce the price if business would be concluded by the S. T. C. with another reputable dealer at a lower price. A little earlier the S. T. C. had also got a lower price offer from an Italian firm. When dispute arose between the parties regarding the applicability of the "fall clause" Messrs U alleged that the agreement was obtained from them by fraud without telling them about the lower price offer received by the S. T. C. from Italian firm. An application was made by the S. T. C. for reference to arbitration in terms of the contract. **Held**, that under Section 17 an act or omission including silence when there is duty to speak, has to be proved on the part of the S. T. C. with intent to deceive M/s. U or to induce them to enter into a contract with the S. T. C. M/s. U of their own accord chose to be bound by the "fall clause" and there was no duty on the part of S. T. C. to tell them to withdraw the "fall clause", because an Italian firm had already offered the same goods to the S. T. C. at a lower price and the S. T. C. had decided to accept the offer. ILR (1978) 2 Delhi 203.

(5) The Explanation does not apply to the cases wherein there is a positive case of an active fraudulent representation which has been responsible for bringing about the contract between the parties. A 1973 Guj 34 (43).

(6) The word "fraudulent" in Exception to Section 19 qualifies 'silence' and not misrepresentation. If the consent has been obtained by misrepresentation or by silence, which is fraudulent within the meaning of Sec 17, then only the Exception comes into play. It shall not apply to misrepresentations which are fraudulent within the meaning of S. 17. A 1978 Pat 334 (337) (DB).

9. Pleading and proof.— (1) The party alleging fraud must furnish specific details. **A 1937 PC 146 (148) ** A 1952 Bom 425 (433) ** A 1933 Cal 366 (371) ** (1841) 2 Moo Ind App 181 (244) (PC).**

(2) When fraud is pleaded, material particulars must be given — Mere expression of opinion does not constitute fraud. (1969) 73 Cal WN 1001.

(3) A party who relies upon fraud can succeed only upon proof of fraud as alleged by him. (1911) 10 Ind Cas 922 (923) (Low Bur) ** A 1925 Cal 555 (556) ** (1841) 2 Moo Ind App 181 (244) (PC).**

(4) Challenge against judgment as vitiated by fraud — When raised to overcome res judicata plea, challenger must clearly prove the fraud by cogent evidence and he should not have neglected to question that judgment earlier. ILR (1969) 1 Delhi 587.

(5) Pleas such as misrepresentation and fraud must be examined with the utmost rigour. A 1923 Sind 25 (28).

(6) A charge of fraud whether made in civil or criminal proceedings must be established beyond reasonable doubt. **A 1941 PC 93 (95).**

(7) To prove fraud it must be proved that representations made were false to the knowledge of party making them, or were such, that the party could have no reasonable belief that they were true: that they were made for the purpose of being acted upon and that they were believed and acted upon and caused the actual damage alleged. A 1924 All 17 (19) (DB) ** A 1962 Punj 543 (547). (The absence of any one of these elements is fatal to an action based on fraud.)

(8) Fraud cannot be directly proved but has to be inferred from the surrounding circumstances and the conduct of the parties. A 1946 Nag 419 (423) (DB) ** A 1958 Madh Pra 417 (422) ** A 1957 Mad 194 (197) ** A 1939 Lah 439 (451) (DB) ** A 1926 Cal 73 (77) (DB).

[See also A 1955 Assam 177 (181).]

(9) Fraud or collusion — Collusion is a deceitful agreement or contract between two or more persons to do some act in order to prejudice a third person or for some improper purpose. It is undoubtedly a secret arrangement for which it is indeed difficult to get direct evidence. The charge of collusion, though easy to make, it is difficult to substantiate it. 1971 Raj LW 287.

(10) An inference of fraud cannot be based on mere speculation or surmises. There must be some positive materials on record to draw an inference of fraud. A 1958 Madh Pra 417 (422) ** A 1954 Assam 94 (95).

(11) Circumstances of mere suspicion should not be taken as proof of fraud, but the evidence must be sufficient to overcome the natural presumption of honesty and fair dealing. Fraud is not to be presumed or inferred lightly. A 1926 Cal 73 (77) (DB) ** A 1971 Mys 330 (331 to 333).

(12) Evidence of unfairness of transaction may be taken to assist the Court to come to a conclusion whether there was fraud or not. But that evidence alone is not sufficient to find fraud, where the direct evidence on the question of fraud is unreliable. A 1941 Pat 83 (90) (DB).

(13) When the parties to a transaction do not stand upon an equal footing the law raises in a suitable case a presumption of fraud. A 1947 Oudh 89 (91).

(14) Transaction with an illiterate lady — Challenged by her on ground of undue influence or fraud — Normally when undue influence or fraud is alleged by a party, burden lies on him to prove such undue influence or fraud. But in case of an illiterate lady who is in a fiduciary relationship with another and the latter is in a position of active confidence, the burden of proving absence of fraud or undue influence is upon the person in the dominating position. He has to prove that the transaction was genuine and bona fide. A 1975 Gauhati 30.

18. "Misrepresentation" defined.— "Misrepresentation" means and includes—

(1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;

(2) any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him, by misleading another to his prejudice or to the prejudice of any one claiming under him;

SECTION 18 — SYNOPSIS

1. Sub-section (1).
2. Sub-section (2).
3. Sub-section (3).
4. Onus.

1. Sub-section (1).— (1) The principal difference between fraud and misrepresentation is that, in the one case, the person, making the suggestion, does not believe it to be true, and in the other he believes it to be true, though in both cases it is a misstatement of fact which misleads the promisor. A 1931 All 154 (156) (DB) ** A 1976 Punj 200 (202).

(2) Where one party induces the other to contract on the faith of representations made to him any one of which is untrue, the whole contract is in a Court of Equity, considered as having been obtained fraudulently. (1890) 17 Cal 291 (297) (PC).

(3) To constitute the falsity of a representation it should be found false in substance as well as in fact. A 1973 Guj 34 (44).

(4) The statement of a Petroleum Company as to potential through put of a Petrol Station was a factual statement on a crucial matter made by a party who professed to have special knowledge and skill with the intention of inducing the other party to enter into a contract of tenancy which it did. The company was therefore liable in damages for breach of warranty. In any event the statement was a negligent representation by a party having special knowledge and expertise in circumstances which gave rise to the duty to take reasonable care to see that the representation was correct and that such duty of care existed during precontractual negotiation and survived the making of the written contract. Therefore the company was also liable for damages for the tort of negligence. (1976) 2 WLR 583.

(5) Where a person induced another, by making a representation which was not true and which was not warranted by any information he had at the time, that the ship was of a particular size, to enter into a charter-party, it was held that the party so induced was entitled to avoid the contract on the ground of misrepresentation. (1890) 14 Bom 241 (248).

(6) A representation as to title made recklessly or with gross negligence amounts to fraudulent misrepresentation. A 1958 Ker 322 (324) (DB).

(7) Agreement of sale — Liabilities of vendor — Non-disclosure of material defects in property and title — Amounts to fraud and misrepresentation — Vendee's right to rescind contract. ILR (1974) 1 Delhi 689.

(8) Sellor professing to be owner, though merely lease-holder, is guilty of misrepresentation. A 1929 All 837 (839) (DB).

(9) Where a Hindu father agrees to sell family property without necessity, alleging that he is the only owner thereof he is guilty of misrepresentation. A 1927 Sind 219 (222) (DB).

(10) False information given by the vendor, whether upon enquiry or otherwise, about the income or rental of the property amounts to misrepresentation. A 1932 Nag 148 (149).

(11) A positive assertion by the sellor of a horse, made in the absence of information which would warrant it, that the horse is sound and free from vice would, in spite of a recommendation added by the seller to the purchasers to get himself satisfied on the point, amounts to a misrepresentation where the horse is in fact otherwise. 1886 Pun Re No. 41, p. 73 (79, 80) (DB).

(12) Misrepresentation made by a salesman of one of the contracting parties is misrepresentation made by one contracting party to other. A 1940 Oudh 35 (41) (DB).

(13) Where a person deliberately made a false statement to his sister to the effect, that their father while he was alive, had created a wakf to persuade her to execute a deed accepting a partition made during her minority it was held that his action amounted to both fraud and misrepresentation. A 1938 Rang 264 (266, 267) (DB).

(14) An endorsement containing an acknowledgement of full satisfaction of the mortgage, when it is not so satisfied, amounts in law to misrepresentation. A 1934 Nag 29 (30, 31).

(15) Where B, an agent of a company, relying upon information given to him by C, that a certain person would be a director of the company, induced certain persons to buy shares — Held that, B was not warranted in making the positive assertion relying upon the second hand information given to him and, therefore, there was misrepresentation within Sec. 18 (1). (1900) 4 Cal WN 369 (388) (DB).

(16) Where the landlord who had been informed by the prospective tenant that he required only a house which had a certain number of bed-rooms sent the plan of a house in which it was marked contrary to the truth that it had the required number of bed-rooms it was held that the tenant who entered into the contract on the faith of the plan was entitled to plead misrepresentation and avoid it on that ground. A 1917 Lah 173 (174).

(17) If a blind, or an illiterate man signs a document on the representation that it contains something, which it does not contain in reality, then he can plead that, there was no consent as contemplated by the Contract Act. If that plea fails, it is still open to him to plead misrepresentation and ask for relief. A 1925 Pat 140 (141) (DB).

(18) Where a person in whom a widow had implicit confidence induced her to sign a deed of gift on the representation that it was a

(3) causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.

[Malaysian Contract Act 1950, S. 18.]

Section 18 — Note 1 (contd.)
power of attorney it was held that the execution of the deed was obtained by misrepresentation. (1949) 54 Mys HCR 451 (479).

(19) Where at the time an agreement for a mining lease was executed the Government insisted on being paid a higher rate of royalty on the ground that it was their intention to increase the rates and the fact that such was their intention was evident from the draft rules which they had already published the subsequent relinquishment by the Government of their idea to increase will not entitle the lessee to repudiate his liability to pay the higher rate on the ground of any misrepresentation of a material fact. **A 1965 SC 470 (472).** (A 1957 Madh Pra 135 (138), Affirmed.)

(20) Statements in a company prospectus which are in the nature of puffing do not amount to misrepresentations of fact. A 1950 All 508 (512) (DB).

(21) Plaintiff was induced to enter into partnership agreement by false representation — **Held**, that the assent given by the plaintiff on such false representation was not binding on the plaintiff. (1965) 2 Mad LJ 65.

2. Sub-section (2).— (1) The second clause of Section 18 is probably intended to meet all those cases which are called in the Courts of Equity, cases of 'constructive fraud' in which there is no intention to deceive, but where the circumstances are such as to make the party, who derives a benefit from the transaction, equally answerable in effect as if he had been actuated by motives of fraud or deceit. (1879) 3 Bom 242 (267).

(2) A concealment of any material fact is just as serious as a misrepresentation of it. **A 1938 PC 103 (109).**

(3) Where vendor of leasehold property is informed by vendee of object of his purchase and knows that the lease contains covenants, which will defeat that object, and yet remains silent such silence will in equity be equivalent to misrepresentation. A 1914 Cal 661 (662) (DB).

(4) At the time of an auction of liquor shops in a district a statement was circulated among the proposed bidders showing the names of the places of the liquor shops and the average quantity sold therein. Plaintiff was a purchaser of one of such shops. Near the place of the plaintiff, there was another shop which prior to the auction was allowed to be brought still nearer but no mention was made of this change in the statement. In a suit by the plaintiff for a declaration that the Secretary of State had no right to make a demand on the plaintiffs for money until the loss which the plaintiff had suffered owing to the neglect of the defendant was made good **Held**, there was an omission to state material fact and the plaintiff could proceed under Section 19, on the ground of misrepresentation. A 1928 Bom 17 (17) (DB).

(5) A contract of life insurance is one uberrima fides which entitles the insurer to be put in possession by the insured of all material facts regarding himself. A 1954 Mad 636 (637) (DB).

(6) In the case of insurance contracts it is the duty of the assured to disclose to the insurer, before the contract is concluded, every material circumstance known to him, and which in the ordinary course of business ought to be known to him. If the assured fails to make such a disclosure the insurer may avoid the contract. A 1954 Bom 347 (350) ** A 1977 Mad 381 ** A 1975 Mad 162. (A 1972 Mad 196, **Reversed.**)

3. Sub-section (3).— (1) Where the company, by their Directors, acting within their authority, and in perfect assurance, sold a bill to the bank on behalf of the company as a bill upon which the company was liable, which, however, turned out to be one, upon which the company was not liable. **Held**, there was misrepresentation within the meaning of Clause (3) of S. 18. (1881) 5 Bom 92 (97, 98).

(2) Where a party executes a document under a mistake as to the subject of the contract on an innocent misrepresentation by the other party that the document contained all the terms agreed upon, while in fact it did not contain all the terms, held that the mistake was sufficient to justify repudiation of the contract. A 1932 Bom 151 (153) (DB).

(3) A sale in execution cannot be set aside in a suit by the auction-purchaser on the ground of a mistake in the sale proclamation as to the extent of the judgment-debtor's share in the property where it is not proved that any misrepresentation was intentionally made by or on behalf of the decree-holders. A 1921 All 223 (224) (DB).

(4) Although the vendor of land makes a wrong statement as to the nature of the tenure upon which the land was held innocently and out of a mistaken impression it would amount to a misrepresentation. (1954) 20 Cut LT 591 (593).

(5) Guarantee obtained by misrepresentation is invalid. See S. 142.

(6) Misrepresentation may be innocent and not wilful but such innocent misrepresentation does not cause avoiding a contract unless it is made without reasonable ground. A 1968 Orissa 217 (220).

(7) Where the misrepresentation is merely in respect of the contents of the document, the transaction become voidable. But where it relates also to the character of the transaction then the transaction is rendered void. A 1977 Madh Pra 108 (110).

4. Onus.— (1) A alleging that deed executed by him was vitiated by misrepresentation — Onus is upon A to establish plea of misrepresentation. **A 1967 SC 1395 (1396)** ** A 1968 All 224 (228).

19. Voidability of agreements without free consent.— When consent to an agreement is caused by coercion, [a][* * *] fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true.

Exception.— If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of Section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

SECTION 19 — SYNOPSIS

1. Scope.
2. "Consent caused by coercion, fraud or misrepresentation".
3. Inadequacy of consideration.
4. Exception.
5. Explanation.
6. Person entitled to avoid contract.
7. Remedies under the section.
8. Rescission of contract — Effect.
9. Plea of fraud.

1. Scope.— (1) Section 17 read with Sec. 19 extends to contracts, which include an element of transfer, such as sales and mortgages. A 1940 Lah 505 (508) (DB).

(2) Section 17, read with Sec. 19, permits a contract to be avoided, when based on representations known to be false by the person making them. A 1940 Lah 505 (508) (DB).

(3) Where there was a misrepresentation as to the nature of the document and not merely as to its contents, there was no real execution and the document was void ab initio and not merely voidable. A 1940 Pat 201 (203) (DB) ** A 1956 Cal 575 (577) (DB) ** A 1968 SC 956 (958).

(4) Where there is no consent at all within the meaning of Section 19 the document is ab initio void and need not be set aside. A 1922 Pat 514 (525) (DB).

(5) Person induced to execute deed under belief that he is signing deed of different nature by promisee's fraud — Contract is void ab initio. A 1921 Cal 786 (788) (DB).

(6) Section 19 of the Contract Act cannot apply to the case, where the contract itself contains a defeasance clause. A 1942 Cal 412 (417) (DB).

(7) A contract, which is neither illegal nor fraudulent as between the parties, cannot be refused enforcement merely because a third person has a right to refuse to give effect to that contract, as regards himself. 1913 Pun LR No. 48, p. 182 (189) (DB).

(8) As to consequences of rescission of voidable contract, see Section 64. As to pledge by person in possession under voidable contract, see Section 178A. As to sale by person in possession under voidable contract, see Sec. 29, Sale of Goods Act, 1930.

2. "Consent caused by coercion, fraud or misrepresentation".— (1) Under Ss. 19 and 19A of the Contract Act, an agreement entered into as a result of coercion, fraud, or undue influence is not void but only voidable at the option of the aggrieved party. A 1952 Punj 224 (225) (DB) ** A 1952 Cal 78 (74) ** (1910) 37 Cal 81 (89) (DB) ** (1904) 28 Bom 639 (642) (DB) ** A 1962 SC 1893 (1907) ** A 1967 Ker 15 (16) ** 1964 Ker LJ 275 ** A 1962 Cal 48 (52) (DB) ** A 1960 J & K 132 (134) ** A 1978 All 266 (267).

(2) Plea of undue influence cannot normally be established at the same time as a plea of misrepresentation — But they may relate to two different and distinct aspects or stages. ILR (1974) Andh Pra 1102 ** 1973 Lab IC 1267 (1272) (All).

(3) Allegations in plaint showing contract only voidable and not void — Plaintiff must make a prayer for its avoidance. ILR (1973) 2 Cal 508.

(4) After the S. T. C. had received a lower price offer from an Italian firm, it also received an offer from another firm 'U' at a slightly higher price but with a "fall clause" containing a promise that the said higher price would be reduced if business would be concluded by the S. T. C. with another reputable manufacturer for the same goods. Held: that the "fall clause" was a part of the offer made by "U" to the S. T. C. voluntarily and without any inducement from the S. T. C. The S. T. C. was under no duty to speak to "U" about the offer received by the S. T. C. from the Italian firm. Hence the agreement between the S. T. C. and "U" cannot be avoided at the instance of "U" since its consent was not "caused" by fraud or misrepresentation on the part of S. T. C. within the meaning of S. 19. ILR (1978) 2 Delhi 203.

(5) Fraud referred to in Section 19 is fraud as defined in Section 17 and does not include the infringement of a condition in a contract to transfer a tenancy, requiring previous consent of a third party to the transfer of tenancy. 1913 Pun LR No. 48, p. 182 (188) : 1913 Pun Re No. 58 (DB).

(6) Secrecy prima facie implies fraud. (1909) 32 Mad 242 (253) (SB) ** ILR (1965) 44 Pat 917 (DB).

[See also (1946) 36 Trav LJ 516 (523, 524) (DB).]

(7) A contract to purchase shares, if it had been induced by any misrepresentation in the prospectus, becomes only voidable and not void. But the shareholder must rescind the contract promptly, that is within a reasonable time of his becoming aware of the fraud. A 1950 All 508 (513) (DB).

(8) Where a creditor obtained in lieu of a time-barred debt a pronote from his debtor's widow by misrepresenting to her that it was in renewal of a pronote which never existed

Explanation.—A fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable.

Illustrations

(a) A, intending to deceive B, falsely represents that five hundred maunds of indigo are made annually at A's factory, and thereby induces B to buy the factory. The contract is viodable at the option of B.

(b) A, by a misrepresentation, leads B erroneously to believe that five hundred maunds of indigo are made annually at A's factory. B examines the accounts of the factory, which show that only four hundred maunds of indigo have been made. After this B buys the factory. The contract is not voidable on account of A's misrepresentation.

Section 19 — Note 2 (contd.)
it was held that the widow was not liable. A 1935 Oudh 12 (13).

(9) Where a person, against whom a decree with costs for possession was made, and whose right of appeal was time barred, made an offer to decree-holder that he would not file an appeal from decree if costs were given up and the decree-holder accepted it, it was held that the agreement was void under Section 20, if the judgment-debtor had honestly believed that he had right to appeal when he made the representation as both the parties were under mistake of fact. but if the judgment-debtor had acted dishonestly, the agreement was voidable under Section 19 as brought about by misrepresentation. A 1939 Lah 511 (512).

(10) Even a mistake induced by innocent misrepresentation is sufficient to justify repudiation of the contract. A 1932 Bom 151 (153) (DB) •• A 1963 Orissa 217 (220).

(11) The vendor was an illiterate woman belonging to scheduled tribe. There was no convincing proof about (i) independent advice (ii) pavment of sale consideration to her (iii) urgency to sell the suit property and (iv) reading over the sale-deed to vendor. The suit property constituted her entire property on which her livelihood depended. In the circumstances, the sale-deed was set aside on the ground of undue influence and fraud. A 1973 Madh Pre 252 (254, 255).

(12) The petitioner who was a Class I Military Officer in Emergency Cadre was given to understand by the Govt. that the emergency cadre would be wound up by 31-3-1952 and in consequence of this representation the petitioner accepted a Class II post of Income-tax Officer. Actually however the emergency cadre was not wound up even by 31-3-1972.

Held, that the representation made by Govt. was a "misrepresentation" within the meaning of Section 18 (1) and the consent of the petitioner to accept a Class II appointment was "caused by misrepresentation" within the meaning of Section 19. 1979 Lab IC 1294 (1301) : ILR (1979) 2 Delhi 1 (FB).

(13) Where the agreement between the insurer and the insured is that the truth of the statements made by the latter in the proposal shall be foundational to the enforceability of the contract the insurer can avoid the contract on the ground of any inaccuracy whether it was a material one which would influence his decision in accepting the risk or fixing the amount of premium or was otherwise. A 1958 Mys 53 (60) (DB) •• A 1968 J & K 39 (45) •• A 1975 Mad 162 (163, 164) : (1975) 1 Mad LJ 28 •• A 1974 Mys 51.

(14) Insurance Policy — Non-disclosure of material facts rendering the original policy of Insurance void would automatically render void the reinsurance policy also. A 1973 Mad 147 (148).

(15) Where one of the contracting parties says : "I am well known to the National Bank in your city," it is not a statement of fact, but only his own opinion as to the state of his credit, though it may be false; such statement is not one of fact, and even if false, does not avoid the contract under Section 19. A 1916 Mad 830 (831) (DB).

(16) Mortgage brought about by concealing, fraudulently from mortgagee the existence of prior mortgage is voidable at option of mortgagee. A 1915 Mad 1059 (1059) (DB).

(17) In entering into a contract or inducing another person to act, if one should misrepresent a fact, then the contract between him and the person so deceived shall be based in law upon the ground that the fact so misrepresented must be made good by the party misrepresenting it. A 1915 Bom 124 (128).

(18) Where both the plaintiff and the defendant are parties to the fraud, and the fraud has been successfully committed, the plaintiff is not entitled to any relief from the Court on the maxim in pari delicto potior est conditio possidentis. A 1933 Oudh 124 (127) (DB).

(19) Misrepresentation inducing consent to marry cannot upset a marriage. The position in law is that the party imposed upon must be deceived to such an extent that there is in reality, no consent at all to the marriage. A 1933 All 122 (126, 127).

(20) One party to agreement in strong bargaining position — Inference of coercion, fraud or misrepresentation not warranted — Contract cannot be avoided. A 1959 All 639 (642).

(21) In a case where a party seeking to avoid a bond on the ground of misrepresentation, fraud and deceipt practised by the other party, failed to prove either the existence of a fiduciary relationship or that he was ignorant of the accounts, it was held that the same could not be avoided. This is so notwithstanding the fact that the fraud in equity has a broader meaning than at law. (1966) 68 Pun LR 955 (DB).

(22) Acceptance to pay bonus in pursuance of demand of workers is not rendered unenforceable merely because the demand was backed by threat of strike. A 1966 Assam 115 (118) (DB).

3. **Inadequacy of consideration.**— (1) Inadequate consideration may lead to an inference

(c) A fraudulently informs B that A's estate is free from incumbrance. B thereupon buys the estate. The estate is subject to a mortgage. B may either avoid the contract, or may insist on its being carried out and the mortgage debt redeemed.

(d) B, having discovered a vein of ore on the estate of A, adopts means to conceal, and does conceal, the existence of the ore from A. Through A's ignorance B is enabled to buy the estate at an under-value. The contract is voidable at the option of A.

(e) A is entitled to succeed to an estate at the death of B; B dies: C, having received intelligence of B's death, prevents the intelligence reaching A, and thus induces A to sell him his interest in the estate. The sale is voidable at the option of A.

[Malaysian Contract Act 1950, S. 19.]

[a] Words "undue influence" were repealed by the Indian Contract (Amendment) Act, 1899 (6 of 1899), S. 3.

Section 19 — Note 3 (contd.)

of fraud or undue influence. But the inadequacy must be apparent and not merely inferential. A 1926 Pat 539 (542) (DB) °° A 1940 Lah 505 (508) (DB).

4. Exception.— (1) Exception to S. 19 applies when contracting party might, with due diligence, have discovered misrepresentation before he entered into contract. A 1917 Lah 173 (174).

(2) The exception to Section 19, Contract Act, applies to all cases of misrepresentation as distinguished from fraud and should not be restricted to misrepresentation, which is "fraudulent within the meaning of S. 17." A 1939 Cal 473 (475) (DB) °° (1888) 11 Mad 419 (439) (DB).

(3) If the executants had not the means of discovering truth with ordinary diligence, the exception to Section 19 is not applicable. (1879) 4 Bom 242 (269).

(4) There is no misrepresentation, if there are means of discovering truth with ordinary diligence. A 1916 Lah 151 (153) °° A 1958 Andh Pra 533 (539) (DB).

(5) A person, who had the means of discovering the truth, with ordinary diligence, cannot avoid the contract on the ground that he was deceived by the misrepresentation. A 1932 Nag 148 (151) °° A 1958 Andh Pra 533 (539) (DB) °° A 1918 Lah 94 (95) °° (1900) 4 Cal WN 369 (382) (DB) °° 1886 Pun Re No. 41 P 73 (77) (DB) °° (1879) 4 Cal 801 (807) (DB) °° A 1963 Orissa 217 (220).

(6) Where the claim in respect of an illiterate assured was repudiated by the Insurer for suppression of the fact that the assured had hydrocele, it was held that as the assured was medically examined by the medical officer of the Insurer Company, the consent of the Insurer cannot be said to have been caused by misrepresentation since the Insurer had the means of discovering the truth with ordinary diligence. Hence even if the assured had concealed the fact of his having hydrocele the contract of insurance cannot be avoided by the Insurer on account of the operation of Exception to S. 19. A 1975 Orissa 116 (120).

(7) Failure to make such inquiries, as an ordinary prudent man would make, may be evidence that the person, to whom misrepresentation was made, was not actually deceived. **A 1973 Sind 5 (14) (FB).**

(8) There can be no estoppel where the truth of the matter is known to both parties. **(1903) 30 Cal 539 (546) : 30 Ind App 114 (PC).**

(9) Where there is no reason to suspect the representation as untrue, but the statement turns out to be such, the party who makes the misrepresentation cannot be heard to plead that the right to relief is gone, because the other party had the means to discover the truth by due diligence. (1900) 4 Cal WN 369 (381) (DB).

(10) Cases of fraud by active misrepresentation as defined in Section 17, Clause 3 will not be covered by the exception. A 1956 Orissa 81 (83) (DB) °° A 1939 Cal 473 (476) (DB) °° 1886 Pun Re No. 41, p. 73 (77) (DB) °° A 1962 Madh Pra 144 (145) (DB).

(11) In the case of active misrepresentation, to get relief under Section 19, party defrauded, need not establish that he had no means of discovering truth with ordinary diligence. A 1939 Cal 473 (476) (DB) °° A 1940 Mad 560 (561) (DB) °° A 1931 All 154 (157) (DB) °° (1888) 11 Mad 419 (430) (DB) °° A 1963 Orissa 217 (220).

(12) The phrase "fraudulent within the meaning of Section 17" in the Exception applies to word "Silence" exclusively and not to the word "Misrepresentation". A 1939 Cal 473 (475) (DB) °° A 1956 Orissa 81 (83) (DB) °° A 1931 All 154 (157) (DB) °° (1900) 4 Cal WN 369 (384) (DB) °° A 1978 Pat 334 (337) (DB).

(13) Where execution sale is sought to be set aside on ground of misrepresentation by the officer conducting sale, exception to Section 19 does not apply. **(1909) 36 Cal 323 (333) : 36 Ind App 32 (PC).**

5. Explanation.— (1) Misrepresentation or fraud must have in fact materially induced contract, in order to give the right of avoidance, and such plea ought to be specifically taken in the plaint. **A 1920 Cal 908 (909) (FB) °° A** 1932 Nag 148 (150) : 28 Nag LR 184 °° A 1915 Mad 1152 (1154) (DB).

(2) Section 19, Explanation — The insurer cannot avoid a contract of insurance containing misrepresentations not about material facts. A 1971 Cal 285 (287, 288) : ILR (1974) 2 Cal 496.

(3) Whether a particular misrepresentation was of such a nature, that it did cause the consent of the person, to whom it was made, or whether it was of such a nature that his consent was, in no way, affected by the misrepresen-

Section 19 — Note 5 (contd.)
tation is a question of fact. A 1921 Mad 198 (198) (DB).

(4) Illustration (b) to Section 19 is not exhaustive of the class of cases which could come under that explanation. A 1921 Mad 198 (198) (DB).

(5) Where the fact of minority of one of the parties to a contract is known to the other, the misrepresentation by the minor as to his age is not such a fraud as would vitiate the contract, and the explanation would cover such a case, irrespective of the consideration whether the principles of estoppel as laid down in Sec. 115, Evidence Act, would apply to minors or not. (1903) 30 Cal 539 (546) : 30 Ind App 114 (PC).

(6) Explanation to the section must not be taken as meaning that any subsequent fraud will not affect the validity of the original contract as it deals with fraud only so far as it affects the free will of the parties at the time of entering into contract. A 1915 Mad 1152 (1154) (DB) ** (1913) 37 Bom 158 (169).

(7) Where the terms of policy show that the averments made as to the state of health of the insured in the proposal form were the basis of the issue of policy, the insured person, who deliberately concealed the fact that he had been treated for serious illness few months before the policy was taken, cannot take advantage of Explanation to Section 19 in view of Section 45 of Insurance Act (1938). A 1962 SC 814 (820).

(8) See also Notes on Section 17.

6. Person entitled to avoid contract.— (1) If a transaction which is voidable is admitted by the person, who is entitled to avoid it, it cannot be questioned by a third party. A 1916 Cal 924 (925) (DB) ** A 1956 Andhra 195 (197) ** A 1949 East Punj 277 (280) (DB) ** (1912) 36 Bom 37 (41) (DB) ** (1904) 28 Bom 639 (642) (DB).

[See also A 1929 Nag 254 (257) : 25 Nag LR 187 (FB).]

(2) Where the misrepresentation is merely in respect of the contents of the document, the transaction becomes voidable. But where it relates also to the character of the transaction then the transaction is rendered void. A 1977 Madh Pra 108 (110).

(3) The right to avoid a transfer or conveyance is not a mere personal right but can be exercised by heirs or legal representatives of person unduly influenced or defrauded, unless the person has indicated his election to stand by transaction. A 1918 Bom 93 (94) (DB) ** A 1977 Him Pra 94 (95).

[See also A 1955 Tripura 23 (25).]

(4) The person who claims a right in the property transferred, only as the successor of the transferor cannot challenge the transfer on any other ground except fraud committed on the transferor. A 1954 Ajmer 64 (65).

7. Remedies under the section.— (1) There are only two remedies open to the party to a contract under the section. They are (i) to avoid the contract before the expiry of its term and (ii) to enforce it as represented. A 1928 Bom 17 (18) (DB) ** A 1929 Nag 254 (257) (FB) ** A 1957 Raj 167 (170) (DB) ** A 1941 Nag 111 (113, 114) (DB) ** A 1932 Nag 148 (150, 151) ** A 1918 All 74 (76) (DB) ** A 1917 Lah 173 (175) ** (1881) 5 Bom 92 (98) ** A 1963 All 459 (463) (FB). (It is only when the deceived party insists on the performance of the contract by the defrauding party that the latter can insist on its rights in the contract and not otherwise.)

[See also A 1958 Andh Pra 605 (606, 607) (DB).]

(2) Where a party to a contract treats it as voidable and exercises his option, he cannot go back to the agreement to enforce it. When he not only states that he treats the document incorporating the agreement in suit as void but proceeds on that footing to make his demands on the other party, though the latter does not admit that the former could do so and the former party does not, at any time, give up the attitude taken by him, he cannot afterwards be permitted to enforce the agreement as a subsisting contract. A 1943 Sind 197 (212) (DB) ** A 1962 Cal 12 (19) (DB).

(3) Section 19 does not entitle a party to insist on the performance of different contract from the one entered into by him. A 1929 Nag 254 (257) (FB).

(4) Where a person is induced by the false representations of others to become a partner with them, the Court will rescind the contract of partnership at his instance and will reimburse him with amount paid. A 1921 Lah 130 (131) (DB).

[See also ILR (1964) 1 Mad 872 (880, 894). (The assent of the plaintiff to the partnership was not binding on him as it was obtained by false representation.)]

(5) Relief cannot be granted when fraudulent or illegal object has been carried out and both parties are in pari delicto. (1911) 15 Cal WN 408 (409) (DB).

(6) Where the parties have made an agreement and one party records it erroneously, the other party, if he knows at the time that there is an error, acts fraudulently, if he seeks to take advantage of that error, and cannot be allowed to enforce it. A 1934 Cal 778 (779).

(7) After commencement of winding up proceedings of a company, a share-holder cannot have his contract to take shares set aside on the ground of fraud or misrepresentation unless he has not only repudiated his shares, but also taken proceedings to have his name removed or asserted his right to repudiate them in an action by company to enforce calls upon him before liquidation. Even if the contract was voidable on the ground of fraud or misrepresentation if the applicant had ratified it he was debarred from questioning it. A 1918 Lah 94 (95).

(8) A person induced by fraud to enter into a contract can obtain remedy by rescission only when restoration of the parties to status quo is possible. Otherwise he has a remedy by way of a suit for damages. (1910) 37 Cal 81 (88, 89) (DB).

(9) Agreement of sale — Non-disclosure of material defects in property and title — Amounts to fraud and misrepresentation — Vendee's right to rescind contract. ILR (1974) 1 Delhi 689.

(10) Misrepresentation about subject-matter of contract made not in the contract but collaterally

[a][19A. Power to set aside contract induced by undue influence.— When consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused.

Any such contract may be set aside either absolutely or, if the party who was entitled to avoid it has received any benefit thereunder, upon such terms and conditions as to the Court may seem just.

Illustrations

(a) A's son has forged B's name to a promissory note. B, under threat of prosecuting A's son, obtains a bond from A for the amount of the forged note. If B sues on this bond, the Court may set the bond aside.

Section 19 — Note 7 (contd.)

— Remedy is claim for damages for breach of the collateral contract, if any. **A 1915 PC 113 (114).**

(11) Avoidance of contract based on fraud — Defrauded party can avoid contract by alleging fraud in his written statement if suit is filed by the other party to the contract. A 1978 Cal 235 (238).

(12) Where both the parties to a sale and purchase of car was under a bona fide mistake that the price which was then paid was the correct controlled price, there is no question of the purchaser having been induced to buy the car by any misrepresentation. Hence, it is not necessary for the purchaser to avoid the contract, return the car and claim back the entire amount. The case would be covered by Section 72 and he can get back the excess paid. A 1952 Mad 779 (780, 781).

(13) The law has made a distinction between voidable transactions and void transactions based on the reason, that while in the case of the former a decree of Court rescinding the contract on the ground of fraud, coercion or undue influence is necessary to revest the title to the properties which passes to the transferee on the execution of the deed, such a procedure is not necessary in the case of void transactions because they do not vest any title at all in the transferee. A 1953 Mad 611 (612) (DB).

8. Rescission of contract — Effect.— (1) When a voidable transaction is avoided, the avoidance is effective not from that date but from the date of the original transaction itself. One effect of the avoidance is to get rid of the transaction, with the result that in law it is as if the transaction had never taken place. A 1957 Mad 451 (452) (DB) ** **A 1963 All 459 (463) (FB).**

(2) Section 19 does not require that an agreement shall be rescinded in a particular form. Notice of rescission of a contract by the defrauded party to a bank, acting as the agent of the defrauding party, in course of its business is notice to defrauding party. **A 1963 All 459 (462) (FB).**

(3) See also under Section 64.

9. Plea of fraud.— (1) In cases of accomplished fraud if only one party acts fraudulently, he cannot be allowed, as plaintiff or defendant, to plead his own fraud. **A 1941 Bom 274 (278) (FB)** ** A 1941 Nag 357 (361) (DB) ** A 1936 Mad 630 (631) ** A 1926 Mad 631 (632) ** (1871) 15 Suth WR 273 (274) (DB).

[But see A 1959 Pat 505 (507, 508) : 1959 Pat LR 171.]

(2) Where both parties are equally fraudulent, the Courts will refuse to enforce the fraudulent transaction, with the result that — (a) where the plaintiff seeks relief on the allegation and on the basis of joint fraud, his suit will be dismissed; and (b) where he seeks relief by suppressing the fraud, the defendant can plead and prove the common fraud to defeat the plaintiff's claim. **A 1941 Bom 274 (278) (FB)** ** A 1940 Pat 379 (380) (DB) ** A 1935 All 799 (801) ** A 1926 Nag 259 (260).

(3) A fraud cannot be pleaded successfully against an innocent person. It is only where the attempted fraud has been wholly or partially carried into effect that the Court will give effect to the fraudulent transaction as between transferor and transferee. A 1923 All 164 (164) ** A 1960 Madh Pra 323 (329) (DB).

(4) A person whose consent has been brought about by fraud is entitled to resist the claim under the contract by pleading fraud even though he may not have himself sued to set aside the transaction, and is not precluded from urging the plea in defence by the lapse of time. (1904) 28 Bom 639 (642) (DB).

(5) In cases of fraud as in cases of undue influence and coercion the parties' pleadings must set forth full particulars and the cases can be decided only on the particulars as laid. There can be no departure from them in evidence. A 1955 Tripura 23 (24) ** A 1969 SC 552 (554). (Plea under Section 19 cannot be raised as new plea in appeal filed under Article 133.)

(6) Although the plaintiff fails to substantiate his plea of misrepresentation, still that will not disentitle him from getting such relief as under the circumstances proved, he is entitled to. The suit need not be dismissed on account of such failure. A 1931 Nag 63 (65).

(7) If an illiterate person who is otherwise worldly-wise proves that the deed was not at all read out to him in case where he is acquainted with the language of the deed or was not properly explained to him when he is unacquainted with the language of the deed and as such alleges that he did not know what the deed was about then the onus shifts to the person who procures the execution of the deed to prove that the executant knew of the contents of the deed or were explained to him. (1962) 66 Cal WN 254 (260).

SECTION 19A — SYNOPSIS

1. Scope.
2. C. P. and Berar Amendment — Champertous agreements.

1. Scope.— (1) Court has power to interfere and relieve a defendant against unconscionable transactions under this section. ('07) 31 Bom 348 (352).

(2) Plea of undue influence cannot normally be established at the same time as a plea of misrepresentation — But they may relate to

(b) A, a money-lender, advances Rs. 100 to B, an agriculturist, and, by undue influence, induces B to execute a bond for Rs. 200 with interest at 6 per cent. per month. The Court may set the bond aside, ordering B to repay the Rs. 100 with such interest as may seem just.]

[Malaysian Contract Act 1950, S. 20.]

[a] Inserted by Indian Contract Act (Amendment) Act, 1899, S. 3.

STATE AMENDMENT

Section 19-B

Madhya Pradesh :

After Section 19A of the Indian Contract Act, 1872 (9 of 1872), insert the following sections :—

Section 19A — Note 1 (contd.)

two different and distinct aspects or stages. ILR (1974) AP 1102.

(3) No contract can be avoided merely on the ground that it embodies an unconscionable bargain unless undue influence can be proved by the plaintiff. 1913 Punj LR No. 305, p. 1027 (1031) (DB).

(4) Rights and liabilities of lessor and lessee — Conditional transfer by lessee — Acceptance of part payment by lessor from transferee in discharge of lessee's liabilities — Failure of transferee to discharge debt of lessee within stipulated time entitles lessee to recover possession according to agreement in absence of privity of contract between lessor and transferee. A 1973 SC 2065.

(5) Allegations in plaint showing contract only voidable and not void — Plaintiff must make a prayer for its avoidance. ILR (1973) 2 Cal 508.

(6) Where a transaction is made between two parties under circumstances, giving an unfair advantage to the dominating party, that transaction cannot be upheld in a Court of law. A 1931 Nag 63 (65). (Sale.) ** A 1956 All 439 (443, 444) (DB) ** A 1947 Oudh 89 (91) ** A 1938 Rang 264 (266, 267) (DB) ** (1902) 5 Oudh Cas 256 (264, 265) ** A 1966 Andh Pra 104 (107) ** A 1961 Mad 190 (194) ** A 1973 Madh Pra 252.

(7) Acknowledgment of liability to pay certain sum is not binding, when the executant signed it under intimidation. A 1921 Lah 362 (363).

(8) The Court interferes to set aside gifts both where undue influence had been expressly used and also where a presumption of such influence arises from the relations between the parties but on the ground of different principles. A 1954 Trav-Co 407 (413) (DB).

(9) Gift-deed impeached on ground of undue influence — Precise nature of the influence exercised, manner of use of the influence, and the unfair advantage obtained by the other has to be pleaded. A 1972 Him Pra 33.

(10) Any person who has derived from another an interest which had been obtained by the other person by undue influence cannot retain it. But where he is a transferee for value without notice he will not be affected by the rule. A 1948 Cal 84 (95) ** A 1961 Mad 190 (194).

(11) In the proceeding under Order 23, Rule 3 of the Civil P. C. for recording the compromise of the suit the Court cannot set aside the agreement on the ground of undue influence raised by a party to it, his remedy is to file a regular suit. A 1953 Hyd 62 (63) (DB).

(12) It is not open to a lessor to contend in the proceeding under the Land Acquisition Act for the apportionment of the compensation between him and the lessee that the lease having been executed by him under undue influence is not valid. He must avoid the lease by separate proceeding. A 1958 Cal 56 (64).

(13) A plea under the second clause of Section 19-A may be allowed to be raised in second appeal and second appellate Court may impose such terms and conditions as may seem just to any order for the contract being set aside. A 1925 All 783 (784) (DB).

(14) 'Undue influence, though separately treated in Contract Act, is only a branch of a fraud in equity and invites same relief as fraud. A 1916 Bom 275 (277) (DB).

(15) Transfer of immovable property without consideration, by a widow having absolute interest in the property — Donee getting settlement deed executed after taking the widow from her village to Madras — Settlement deed challenged by heirs of donor on ground of undue influence — Donee must prove that the deed was voluntary and without undue influence — Evidence showing that widow never had any independent advice in executing the deed — Settlement deed, held, vitiated by undue influence. A 1972 Mad 413.

(16) Contract procured by undue influence is only a voidable one and only gives the person under undue influence, a right of choice or election. A 1943 Cal 162 (165).

(17) Where the donor and the donee both affirm the gift as valid and with free consent of parties, it is difficult to hold that, nevertheless, the transaction is void owing to exercise of undue influence by one on the other. A third party has no locus standi to assail the gift on basis of undue influence as under Section 19-A a transaction can be avoided on basis of undue influence only at the option of the party whose consent was secured by undue influence. 1977 Pun LJ 358 (360).

(18) The right which a party to a bond has under Section 19-A of the Contract Act to avoid it on the ground of undue influence is also transferred under Section 130, Transfer of Property Act to a transferee of the bond from him. A 1936 Oudh 105 (106) (DB).

(19) Section 19-A lays down the general law and even though a party may be a Muhammadan, he can avoid the contract on the ground of undue influence. A 1964 Raj 250 (254).

(20) Question of validity of lease on ground of undue influence — Cannot be raised in land acquisition proceedings. A 1958 Cal 56 (64).

"19-B. **Definitions of maintainer and champertous agreement.**— (a) "Maintainer" means a person who gives assistance or encouragement to one of the parties to a suit or proceeding and who has neither an interest in such suit or proceeding nor any other motive recognized by law as justifying his interference.

(b) 'Champertous agreement' means an agreement whereby the nominal plaintiff agrees with the maintainer to share with or give to him a part of whatever is gained as the result of the suit maintained.

19-C. Power to set aside champertous agreement.— A champertous agreement may be set aside upon such terms and conditions as the Court may deem fit to impose".

—C. P. and Berar Indian Contract (Amendment) Act (15 of 1938), Sec. 2. (Note: This Act has been extended to the whole State of M. P. by M. P. Act 23 of 1958. In its application to Vidarbha region of Maharashtra State, it has been repealed by Maharashtra Repealing and Amending Act (26 of 1963), S. 2 and First Sch. (4-6-1963).)

20. Agreement void where both parties are under mistake as to matter of fact.— Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.

Section 19A — Note 1 (contd.)

(21) See also under Section 16.

Limitation.

(22) Suits under Section 19-A to avoid contracts on the ground of undue influence are governed by Article 91 of the Limitation Act. A 1934 All 507 (511) (DB) ** A 1952 Punj 224 (226).

(23) Suit to set aside an instrument obtained by undue influence — Instrument is voidable and suit to set it aside must be brought within three years from its date. A 1974 Mad 36.

(24) A gift deed executed by an old and illiterate widow on the representation of the only near relation who has been living with her that it is only a deed of management in his favour is void and need not be set aside by her. A 1951 Him Pra 54 (54, 55).

(25) Where the suit is really one for avoiding a contract on the ground of undue influence, the plaintiff cannot evade the provisions of the law of limitation by framing the suit as one for possession alone. A 1934 All 507 (511) (DB).

(26) Suit in ejectment by donees — Defence that gift was not valid and did not pass any title to the donees — Held, S. 19-A of the Contract Act or Article 91 of the Limitation Act did not apply to the defence. A 1962 Pat 168 (176) (DB).

2. C. P. and Berar Amendment — Champertous agreements.— (1) A champertous agreement unless it can be avoided on the ground of public policy because it is extortionate or unconscionable or inequitable is not void under the laws in India. A 1952 Nag 195 (196).

(2) After Sections 19-B and 19-C were added to the Act in Central Provinces and Berar by the C. P. and Berar Indian Contract (Amendment) Act of 1938 the Courts in those Provinces got the power to set aside a champertous agreement on such terms and conditions as it may deem fit to impose. A 1952 Nag 195 (196).

(3) Section 19-C does not render the champertous agreements void or voidable. It only confers a power on the Courts to be judicially exercised to set aside such agreements. A 1952 Nag 195 (197).

[But see A 1958 Madh Pra 417 (422).]

(4) Where a money-lender enters into an agreement to render assistance not because he has any common interest with the party nor because he is related to the party but only with the object of monetary gain the agreement is only a champertous agreement. A 1952 Nag 195 (197) ** A 1958 Madh Pra 417 (422).

SECTION 20 — SYNOPSIS

1. Applicability and scope.
2. Mutual mistake of fact renders contract void.
3. Mistake must be of material fact.
4. Mistake must be about existing fact.
5. Mistake of fact.

1. Applicability and scope.— (1) A plaintiff seeking the equitable remedy of rectification or cancellation or a defendant against whom an equitable remedy is sought can plead mutual mistake. A 1931 Mad 785 (786) (DB).

(2) Mistake of fact should be pleaded in the written statement and in the absence of any plea the question cannot be allowed to be raised. A 1943 Pat 327 (337) (DB).

(3) A plea of mutual mistake cannot be raised for the first time in appeal. A 1940 Pat 516 (533) (DB) ** A 1963 Orissa 217 (219).

(4) When there has been a conveyance, the plea is not available to a vendee, bound by the rule of caveat emptor, that the vendor was labouring under a mistake regarding the quantum of his rights over the property conveyed. 1963 Ker LJ 400 (DB).

(5) Where the subject-matter of the contract is substantially obtained, Section 20 will not apply. A 1927 Rang 90 (91).

(6) A compromise decree can be set aside under Section 20 if the agreement embodied therein was brought about by the mistake of both parties and the Court as regards its subject-matter. (1881) 6 Cal 687 (705, 706) (DB).

[But see A 1937 All 731 (735) (DB).]

(7) Mortgage suit — Compromise — Mortgagee agreeing to take 25 bighas of land — Commissioner by mistake induced by mortgagor giving only 10 bighas to mortgagee in partition — Suit by mortgagee to set aside decree — Decree held could be modified. A 1930 Pat 155 (157) (DB).

Explanation.— An erroneous opinion as to the value of the thing which forms the subject-matter of the agreement is not to be deemed a mistake as to a matter of fact.

Illustrations

(a) A agrees to sell to B a specific cargo of goods supposed to be on its way from England to Bombay. It turns out that, before the day of the bargain, the ship conveying the cargo had been cast away and the goods lost. Neither party was aware of the facts. The agreement is void.

(b) A agrees to buy from B a certain horse. It turns out that the horse was dead at the time of the bargain, though neither party was aware of the fact. The agreement is void.

(c) A, being entitled to an estate for the life of B, agrees to sell it to C. B was dead at the time of the agreement, but both parties were ignorant of the fact. The agreement is void.

[Malaysian Contract Act 1950, S. 21.]

Section 20 — Note 1 (contd.)

(8) The question whether a contract is void ab initio on the ground of mutual mistake as to a matter essential to the contract cannot be referred to arbitration by invoking an ordinary arbitration clause contained in the contract. ILR (1948) 2 Cal 171 (188).

(9) There are two types of mistakes in a contract (i) those which prevent there being a binding consent to a particular transaction; and (ii) those which consist in a failure to express correctly in a written document the intention of the parties with regard to a particular transaction. If the mistake is unilateral no relief can be granted. But in cases where one party has committed the error or mistake in reducing such terms and conditions in the written document itself, the defendant would be allowed to take the point of mutual mistake in the document in its written statement. Under such circumstances, the Courts have granted equitable relief by way of rectification of the written document without vitiating the whole contract. (1969) 1 Comp LJ 153 (Cal).

(10) A contract can certainly be avoided on the ground of mistake of fact but the same principle does not apply to a decree. A 1966 J & K 45 (51).

(11) Mistakes in the formation of contracts may be of three kinds, namely, unilateral mistake, mutual mistake and common mistake. In a case of unilateral mistake, the contract is void. In a case of mutual mistake, the contract is void. In a case of common mistake both the contracting parties make the same mistake. A 1960 All 420 (422, 423) (DB).

2. Mutual mistake of fact renders contract void.— (1) In order to make agreement void both parties must be under mistake of fact. A 1923 Sind 25 (28).

(2) To attract Section 20, the mistake must be mutual. A deliberate misrepresentation on part of the defendant is inconsistent with a case of the defendant being under some mistake. It is not, therefore, possible to reconcile a case of misrepresentation with a case of mutual mistake. 1977 All LJ 880 (882).

(3) Unilateral mistake does not enable party to avoid contract. ILR (1955) Mys 154 (158) ** A 1958 Andh Pra 533 (539) (DB) ** (1948) 52 Cal WN 858 (860) ** (1904) 28 Bom 421 (426) (DB) ** A 1966 J & K 45 (50) ** A 1958 Andh Pra 533 (539) (DB).

(4) Where the absence of knowledge is all on one side and the other party is aware of the true position but refrains from communicating his knowledge to the other that is not a case which would be covered by Section 20. A 1950 Lah 106 (116, 117) (DB) ** A 1936 Oudh 97 (100) (DB) ** A 1933 Rang 79 (81) (DB).

(5) Where both parties are aware of the true position no question of mistake can arise. 1893 Pun Re No. 62 p. 279 (283) (DB).

(6) Where the parties to a contract for sale with full knowledge of the right of the lessee to receive value of improvements deliberately omit to provide for the same in their contract it cannot be said that the contract is vitiated by the mistake of parties. A 1954 Trav-Co 10 (24) (DB).

(7) An agreement entered into under a mistake and misapprehension as to the relative and respective rights of the parties thereto is an agreement which has proceeded on a common mistake. A 1917 Cal 786 (789) (DB) ** A 1952 Nag 2 (3) ** A 1952 Pat 393 (402, 403) (DB). (**Reversed** in A 1954 SC 165 on another point.) ** A 1937 Pat 65 (71) (SB) ** A 1918 Mad 395 (395) (DB).

(8) Where a car was sold and purchased at a certain price both the seller and the purchaser believing that price to be the proper controlled price it was held that the purchaser could treat the transaction as void on the ground of mutual mistake, return the car and recover the money paid by him as its price. A 1955 Mad 662 (663) (DB). (A 1952 Mad 779, **Reversed.**)

(9) The party who complains that the price mentioned in the written agreement of sale does not represent the price which was agreed to by him may bring a suit under Section 20 to avoid the contract on the ground of mistake as to the price. A 1930 Rang 12 (12).

(10) Agreement whereby the lessee of a mining lease agreed to pay enhanced royalty on basis of market price is void when there was a mutual mistake in ascertaining the basis of the market price. 1960 BLJR 105.

(11) A compromise based on mutual mistake of facts between Government and government servant is clearly vitiated by mutual mistakes. A 1965 Mys 244 (248) (DB).

3. Mistake must be of material fact.— (1) Where there is a mutual mistake as to a fact, which goes to the root of the contract, and frustrates the object of the agreement, Sec. 20 will apply and the agreement is void. A 1933

Section 20 — Note 3 (contd.)
Rang 79 (81) (DB) ** A 1950 Lah 106 (116, 117) (DB) ** A 1950 Mad 146 (148) ** A 1936 Oudh 97 (100) (DB) ** A 1935 Mad 287 (287) ** A 1926 Nag 435 (439) ** A 1920 Oudh 31 (33) ** A 1918 Sind 41 (44) (DB) ** (1963) 65 Punj LR 307.

[But see A 1960 All 420 (422, 423).]

(2) Accord and satisfaction — Agreement by purchaser to receive a certain amount in full satisfaction of his claim against seller for non-delivery of goods — Both purchaser and seller under mistake of essential fact in calculating the said amount — Agreement is void — Purchaser entitled to receive balance. A 1979 Mad 267 (271, 272) : (1979) 2 Mad LJ 304.

(3) Where terms of contract are understood by parties in different sense, contract is void. A 1926 Nag 435 (439) ** A 1933 Pat 579 (581) ** (1904) 28 Bom 421 (425) (DB).

(4) A contract of sale and purchase of land for building purposes is void under Section 20 on the ground of mutual mistake on an essential matter where both the parties have proceeded in the belief that the land in point of its area satisfied the requirements of the municipal bye-laws while in fact it was not so. A 1947 All 332 (334) (DB).

(5) Where a person impersonating the real owner forged his signature to mortgage and also in the deed of transfer by mortgagee by a similar forgery covenanting good title, it was held that the transferee and mortgagee were under a mistake as to the essential fact that the real owner had executed the mortgage. A 1916 Bom 209 (210) (DB).

(6) Where parties agree to purchase or sell a specific article and it happens that at the time of the agreement the article is not in existence, there is a common mistake as to an essential fact and the agreement is void. A 1921 Bom 49 (51) (DB) ** A 1948 Pat 345 (348, 349) (DB).

(7) Where a lease is taken and granted on the wrong assumption that the land was at the disposal of the grantor it was held that lease attracted the provisions of Section 20, Contract Act. 1949 Bur LR (HC) 625 (631) (DB).

(8) Wrong assumption of the parties as to the character of the subject-matter leading them to enter into a contract by which one of them relinquishes his claim thereto is a common mistake as to an essential matter of the agreement. (1950) 8 J & K LR 204 (211, 212) (DB).

(9) Where the parties entered into a settlement under Bombay Act 7 of 1863 under the mistaken belief that one of them was a superior holder of all lands in the village the agreement is void on the ground of common mistake on a matter essential to the agreement. (1892) 17 Bom 407 (412, 413) (DB).

(10) For an agreement between two parties that one of them would not file an appeal if the other would give up his cost the existence of the right of appeal on the date of the agreement is matter essential to the agreement. Hence if the parties enter into such an agreement in ignorance of the fact that the right had become barred by limitation there is a mutual mistake of fact as to a matter essential to the agreement. A 1939 Lah 511 (512).

(11) A compromise entered into without knowing that the suit had already been decided in favour of one of the parties is void under Section 20. A 1919 Cal 330 (330) (DB).

(12) If the parties are at mistake as to the subject-matter which is dealt with by their contract they are not ad idem as to the subject-matter and hence there can be no real agreement between them. A 1930 Pat 155 (157) (DB).

(13) A mistake not as to the subject-matter of the contract but only as to its quality does not render the contract ab initio void. (1948) 52 Cal WN 858 (864).

(14) Where there is no mistake in the minds of the parties as to the identity of the subject-matter of the contract a mere misdescription of the same in the deed will not render the contract void. A 1924 Pat 359 (361) (DB).

(15) The subject-matter of a separate warranty in a contract is not an essential part of the contract. (1907) 30 Mad 284 (290) (DB).

(16) The existence of a notification for the acquisition of the land under the Town Improvement Act is not a material defect either in the property or the seller's title therein that the parties' ignorance of the same would in any way affect the enforceability of the contract of sale. A 1950 Lah 106 (115) (DB).

[But see A 1923 Cal 641 (643, 644).]

(17) In a lease of land for colliery purposes the exact extent of the land is not an essential element and therefore the fact that the parties relying on reputation wrongly assumed its extent to be greater than it really was cannot vitiate the contract. A 1929 Cal 547 (548) (DB).

(18) Where a loan was taken after a ship had sailed out on a voyage on the risk or security of the ship and its repayment was fixed on a date after the expiry of certain months from the date of its setting sail, it was held that the loss of the ship after a few days of its sailing and some time prior to the date of the transaction did not attract Section 20. (1902) 25 Mad 561 (566) (DB).

(19) The non-existence of the goods on the date of insurance would attract the provisions of this section only when the parties intend to cover the risk prospectively. A 1954 Bom 148 (151) (DB).

(20) Parties to a compromise cannot be said to be under a mistake of fact essential to the agreement because the muafi had been forfeited by the State before the compromise was arrived at and parties were unaware of it, when the existence or otherwise of the muafi was not a condition precedent to the execution of the compromise or otherwise essential to it. A 1957 Him Pra 11 (14).

(21) The essence of a compromise by which one party abandoning his plea of title agrees to hold the land as lessee from the other is the recognition of an antecedent title in the latter and the actual existence of such title in the other is not a fact essential to the agreement. Hence mistake in respect of the title would not make the agreement void. A 1927 Oudh 198 (199) (DB).

(22) Where the seller sold certain goods to the purchaser to be delivered at the latter's place and handed over to him a note ordering his agent at the purchaser's town to deliver the goods to the purchaser the fact that they were not aware then that the agent had already despatched all the goods back by rail to the seller was held would not amount to a mutual mistake which would entitle the seller to repudiate the contract. A 1927 Bom 514 (515) (DB).

21. Effect of mistakes as to law.— A contract is not voidable because it was caused by a mistake as to any law in force in [a][* * *] India; but a mistake as to a law not in force in [a][* * *] India has the same effect as a mistake of fact.

[b][* * * * * *]

Illustration

A and B make a contract grounded on the erroneous belief that a particular debt is barred by the Indian Law of Limitation: the contract is not voidable.

[c][* * * * * *]

[Malaysian Contract Act 1950, S. 22.]

[a] Words 'any province of' which were substituted for 'British', by A. C. A. O., 1948, omitted by A. L. O., 1950.

[b] Para. 2 which was inserted by the A. O., 1937 and amended by the A. C. A. O., 1948 was omitted by A. L. O., 1950.

[c] Second illustration was repealed by the Repealing and Amending Act, 1917 (24 of 1917), S. 3 and Sch. II.

Section 20 (contd.)

4. Mistake must be about existing fact.— (1) A contract will be rendered void only when the mistake is as to an existing fact and not if it is as to a future event. A 1948 Cal 257 (261) (DB) ** (1879) 3 Bom 154 (158) (DB).

(2) Grant by outgoing ruler after signing covenant of merger — Subsequent order making grant subject to ratification by successor Government — No such ratification by any successor Government — Grant held not valid — It could not pass title to grantee. ILR (1970) Madh Pra 186.

(3) Where on the representation made by the Government that it had the right to cancel an existing lease and grant a fresh lease to another a party entered into a contract with it the fact that subsequently it was judicially decided that the Government had no right to cancel the prior lease would not entitle the Government to plead that the contract was void on the ground of mistake and refuse to perform that which was possible still. **A 1954 SC 165 (168).** (A 1952 Pat 393, **Reversed.**)

(4) Where on the date of a compromise was effected between the parties on the assumption that a particular right belonged to one of them and there was every justification for that belief the compromise would not attract the provisions of Section 20. A 1934 Oudh 442 (444) ** A 1948 Oudh 54 (63) (DB) ** A 1927 Oudh 198 (199) (DB).

(5) Though Section 20 deals only with common mistake, as to a matter of fact essential to the agreement and does not cover cases of frustration yet the general principle of frustration may be imported into by construction so as to cover such cases also. A 1921 Cal 509 (514) (DB).

5. Mistake of fact.— (1) A mistake regarding the title of the contracting party is a mistake of fact. A 1952 Pat 393 (403) (DB). (**Reversed** on another point in A 1954 SC 165.)

(2) **Mistake as to matter of fact—**

The following are the four main types of operative mutual mistakes which make the agreement void :—

(1) Mistake regarding the existence of the subject-matter of the contract.

(2) Mistake as to the title.

(3) Mistake as to the substance of the thing contracted for and

(4) Mistake as to any false and fundamental assumption going to the root of the contract. ILR (1970) 1 Cal 459.

(3) Mistake of fact — Mistake going to root of contract — A contract for procurement and supply of rice at controlled price entered into on the assumption that the rice would be available at that price in particular areas of State would become invalid when rice is not available at that price in those areas. ILR (1970) 1 Ker 529 : 1970 Ker LT 523 (DB).

(4) The question whether a particular property is liable to pay cess or not is not a pure question of law but one of fact and law. A 1947 Cal 70 (73) (DB).

(5) An error arising upon the construction and meaning of a contract is a mistake of law and not fact. A 1943 Pat 327 (338) (DB).

(6) The mistake with regard to the effect of the law of registration upon the validity of an assignment deed would at the most be a mistake of law and not of a fact rendering the contract void under Section 20. **A 1954 SC 165 (168).** (A 1952 Pat 393, **Reversed** on another point.)

(7) Where the position is too notorious and well known to all concerned in the locality that the tenants are entitled, as a matter of law, to pluck, gather and sell the leaves of the Kendu trees standing on their tenanted lands to whomsoever they please, it cannot be said that either party to a lease of forest produce of that area was under a misconception as to the rights of the tenants in respect of those lands. A 1961 Orissa 75 (78) (DB).

(8) Mistake of law is not covered by S. 20. A 1959 Madh Pra 221 (222) (DB).

SECTION 21 — SYNOPSIS

1. Scope.
2. Mistake as to any law.
3. Mistake as to mutual rights.
4. Compromise made in ignorance of law.
5. Payment made under mistake of law — See S. 72.

1. Scope.— (1) Section deals only with mistakes of law which cause a contract or give birth to a contract. A 1946 Cal 245 (249).

Section 21 — Note 1 (contd.)

(2) Section 21 is not intended to give validity to any apparent agreement which does not satisfy the conditions of real consent as laid down in Sections 10 to 13, Contract Act. A 1952 Nag 2 (3).

(3) An innocent mistake of law also is governed by Section 21. 1907 All WN 197 (198) (DB).

(4) Section 72 applies even when there is mistake of law. A 1956 All 383 (384) (DB) ** A 1949 PC 297 (301) ** A 1957 Pat 112 (115) ** ILR (1977) 1 Cut 472.

(5) English common law rule that payment made under mistake of law is not recoverable does not apply to India. A 1946 Cal 245 (249). (39 Cal WN 174, Dissent.) ** A 1972 Cal 420 (425).

(6) Section 72 is not in conflict with Ss. 21 and 22. A 1972 Cal 420 (427).

2. Mistake as to any law.— (1) If a mistake of law leads to a formation of a contract, Section 21 enacts that the contract is not voidable for that reason. A 1949 PC 297 (302) ** A 1967 Cal 310 (313) ** A 1966 J & K 45 (54) ** A 1961 Orissa 75 (79) (DB) ** A 1976 SC 2243 (2250).

(2) Change in law is not mistake of law. ILR (1970) 1 Cal 459.

(3) The construction of a contract is a matter of law — If a party acts under a mistaken view of his rights under a contract, he is not entitled to any relief. A 1943 Pat 327 (338, 341) (DB).

(4) A mortgagee took a mortgage with notice of a previous but unregistered mortgage and got it registered, under the belief that the latter mortgage would get precedence over the first mortgage being registered first — Held that this was mistake as to law in force in British India, that Section 21, Contract Act, applied and that the contract was not voidable. A 1933 Lah 836 (838) (DB).

(5) The mistake with regard to the law of registration upon the validity of the assignment deed would be a mistake of law and under Section 21 the contract would not be void on that ground. A 1954 SC 165 (168).

(6) Mortgage for an indefinite period — Provision as to period contravening S. 8 (2), Punjab Alienation of Land Act — Whole mortgage held not void by reason of Section 21. A 1932 Lah 630 (632) (DB).

(7) Where by a contract a plaintiff agreed to sell certain quantity of meste to the defendant under the common assumption that Jute Price Control Order was applicable to meste, which was erroneous held that mistake was of law and could not make the contract voidable. ILR (1948) 2 Cal 171 (177).

(8) There is neither any provision of statutory law nor any principle of equity which furnishes a cause of action to a person who enters into a partition of family property under erroneous impression of law for getting rid of that agreement. A 1950 FC 142 (164).

(9) In certain cases, English Courts of Equity relieve against agreements induced by an error of law, but the Indian Contract Act specifically lays down that error of law does not vitiate the contract. (1887) 11 Bom 174 (176, 177) (DB).

(10) Where the mistake is so fundamental as to prevent any real agreement upon the same thing in the same sense from being formed, it is immaterial of what kind the mistake was or how it was brought about. A 1952 Nag 2 (3) ** (1950) 8 J & K LR 204 (211) (DB).

(11) Where a consumer of electricity pays the bill to the Electricity Supply Company under mistake that the Company had made rules, after all necessary legal preliminaries had been gone through, this is not a mistake as to any law in force in India and the consumer can recover the amount back. A 1939 Pesh 8 (9).

(12) If under a mutual mistake of law, one party suffered a detriment and the other derived a benefit, which would not have happened, but for the mistake, the latter cannot subsequently claim to dispel the mistake and claim a benefit thereby, unless he is prepared to surrender the benefit he already obtained under the mistake. A 1967 Kerala 190 (192).

(13) Lease of forest produce — Misconception as to whether tenants could be compelled to sell Kendu leaves from out of tenanted lands to lessee of forest produce — Position that they could not be so compelled too notorious and well known — Mistake is one of law. A 1961 Orissa 75 (78) (DB).

(14) If a law does not permit the alienation by a tenant of certain kind of his interest in the land, the same is not permissible on the ground that some one has paid full value for acquiring such a right under a mistake. A 1973 All 288 (290).

(15) Grant by outgoing ruler after signing covenant of merger — Subsequent order making grant subject to ratification by successor Government — No such ratification by any successor Government — Grant held not valid. — It could not pass title to grantee. ILR (1970) Madh Pra 136.

3. Mistake as to mutual rights.— (1) Where mutual mistake is one of law as to the legal rights of any party. Section 21 would apply. A 1921 Bom 93 (102).

(2) The existence of particular private rights is a matter of fact though depending on rules of law, and for most civil purposes ignorance of civil rights is ignorance of fact. (1950) 8 J & K LR 204 (211) (DB).

(3) Ignorance of particular rights however, excusable, is on the same footing as ignorance of general law — Money paid voluntarily with a full knowledge of all the facts, cannot be recovered. (1936) 164 Ind Cas 732 (739) (DB) (Cal).

(4) If the mistake of law which is common to both the parties to an agreement is of such a kind that it is mixed up with certain specific facts relating to a particular individual so much so that it may be said that as the combined effect of the parties' view of law and facts they made a mistake at the time of entering into the transaction as to the nature of their pre-existing private rights, it may be said that such a mistake is not a pure mistake of law and the agreement is liable to be set aside as having proceeded upon a common mistake. A 1950 Mad 146 (148, 149).

(5) Where certain property is included in a partition under a mistaken view that the co-sharers were entitled to inherent it and it is claimed by the lawful heir, the partition can be set aside and shares readjusted as private right of ownership is a matter of fact though it may be result of law and the parties were

22. Contract caused by mistake of one party as to matter of fact.— A contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact.

[Malaysian Contract Act 1950, S. 23.]

23. What considerations and objects are lawful and what not.— The consideration or object of an agreement is lawful, unless—

it is forbidden by law; or

is of such a nature that, if permitted, it would defeat the provisions of any law; or

is fraudulent; or

involves or implies injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy.

Section 21 — Note 3 (contd.)

under a mutual mistake and misapprehension as regards their respective and relative rights in effecting the partition. A 1952 Nag 2 (3, 4).

(6) Mistakes of parties about right of the defendant municipality to acquire land under Section 92, Bombay District Municipalities Act, is one of fact and not of law. A 1920 Sind 59 (60) (DB).

(7) Where widows in a joint Hindu family agreed to share estate equally on the basis of erroneous view of law, it was held that the agreement was liable to be set aside on the ground of common mistake. A 1918 All 74 (76) (DB).

4. Compromise made in ignorance of law.— (1) A compromise made by party cannot be set aside on the ground that he made it in ignorance of law in force in India. A 1936 Sind 99 (105) (DB).

(2) Though mistake in law is not a ground for setting aside a compromise, there must be an absence of all fraud and misrepresentation to make the compromise stand. (1909) 1 Ind Cas 573 (582) (DB) (Cal).

5. Payment made under mistake of law— See Section 72.

Section 22

(1) A mistake made by a party to a contract or by his counsel would be unilateral and would fall under Section 22 and cannot be used to avoid the contract. ILR (1955) Mys 154 (158) ** A 1970 Manipur 16 ** A 1967 Ker 15 (16) ** A 1963 Orissa 217 (220) ** 1970 Ker LT 763 ** A 1970 Manipur 16 (21).

(2) The mere circumstance that the contract was caused by one of the parties to it being under a mistake as to a matter of fact, will not make the contract voidable. (1885) 9 Bom 358 (361) (DB).

(3) Any proceeding or order cannot be re-opened on the ground of mistake of fact of one of the parties to it. A 1929 Cal 670 (672) (DB).

(4) The mistake due to negligence of one of the parties is not sufficient to relieve that party of his own agreement. A 1929 Cal 670 (672) (DB).

(5) When a written contract has been signed by the parties, the party alleging that it has been erroneously recorded and that he signed it under a mistake, must establish that fact beyond all doubt. A 1934 Cal 778 (779).

(6) If a person signed in blank an agreement which he knew would be completed by some other person, it was not open to the signatory to say that he did not consent to whatever figures the completed document contained. 1976 (2) WLR 64 (70).

(7) Contract cannot be avoided on the ground that it became more onerous than what the seller considered it to be, on account of an increase in duty. A 1925 Sind 80 (82) (DB).

(8) The plaintiffs required a steamer to sail from Jedda 'fifteen days after the Haj' to convey pilgrims to Bombay. They chartered steamer from the defendants. The defendants contracted only with respect to English date. The plaintiffs were under the belief that the date corresponded with fifteenth day after the Haj. On finding the mistake, the plaintiff brought a suit to rectify an alleged mistake — **Held** that as the mistake was on the plaintiff's part there could not be rectification. (1892) 16 Bom 561 (566).

(9) A kabuliat, at an enhanced rate of rent was executed under a mistake of fact as to the title of the executant. It was acted upon and on the basis of it a claim for ejectment was resisted successfully — **Held,** as there was no fraud or misrepresentation the kabuliat was binding upon the heir of the executant. (1911) 10 Ind Cas 343 (344) (All).

(10) Party signing a contract written in unknown language cannot plead ignorance of its terms. A 1928 Sind 97 (98).

(11) Where one of the parties to an agreement knows a fact which makes his bargain an advantageous one and that fact is unknown to the other party, the latter remains bound by the contract unless the former is obliged to disclose it. A 1933 Rang 79 (81) (DB).

(12) Where the party assailing the contract does not seriously suggest that it was vitiated by mutual mistake but alleges that he was labouring under mistake as to the nature of work to be done under the contract that would not under the section entitle him to avoid the contract. A 1958 Andh Pra 533 (539).

(13) Where weighing is required for fixing and ascertaining the price of goods, property in goods does not pass to the buyer until the weighing is done notwithstanding that the obligation to weigh the goods is on the buyer. 1971 Raj LW 19.

SECTION 23 — SYNOPSIS

1. Scope and applicability.
2. Unlawful consideration or object.
3. "Forbidden by law."
4. Excise Contracts.
5. "Defeat the provisions of any law."
6. Agreements opposed to personal law of parties.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

Illustrations

(a) A agrees to sell his house to B for 10,000 rupees. Here B's promise to pay the sum of 10,000 rupees is the consideration for A's promise to sell the house, and A's promise to sell the house is the consideration for B's promise to pay the 10,000 rupees. These are lawful considerations.

(b) A promises to pay B 1,000 rupees at the end of six months, if C, who owes that sùm to B, fails to pay it. B promises to grant time to C accordingly. Here the promise of each party is the consideration for the promise of the other party and they are lawful considerations.

(c) A promises, for a certain sum paid to him by B, to make good to B the value of his ship if it is wrecked on a certain voyage. Here A's promise is the

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Section 23 — Synopsis (contd.)

7. Fraudulent agreements.
8. Injury to the person or property.
9. Immoral agreements.
10. Past and future cohabitation.
11. Prostitution.
12. Public policy.
13. Champerty and maintenance.
14. Agreements to stifle prosecution.
15. Marriage Contracts.
16. Adoption Contracts.
17. Religious Contracts.
18. Agreement to indemnify surtey.
19. Office brokerage Contracts.
20. Interference with course of justice.
21. Agreements creating interest against duty.
22. Agreement between client and his pleader.
23. Benami transactions.
24. Agreement against bidding.
25. Monopoly.
26. Trade combines.
27. Service Contracts.
28. Contract of agency.
29. Partnership.
30. Void Contracts — Enforcement of.

1. Scope and applicability.— (1) The section would apply only if the consideration or object of the agreement is unlawful or is fraudulent or involves or implies injury to the person or property of another or in the opinion of the Court is immoral or opposed to public policy. 1958 Andh LT 960.

(2) The section imposes a restriction on the absolute freedom of the citizen in the matter of entering into contracts and subjects his rights to the overriding considerations of public policy and the others enunciated under it. A 1954 Bom 478 (483): 1954 Cri LJ 1531 (DB).

(3) Section 23, speaks of three matters: it speaks of consideration for the agreement, the object for the agreement and the agreement. A 1966 Mys 154 (162) (DB). (Sale for valid consideration could not be hit by that section.) ** A 1980 Pat 220 ** (1978) 3 All LR 1170.

(4) Section 23 deals with contracts which are illegal in the strict sense and which would be affected by the doctrine of ex turpi causa oritur non actio. 1957-2 Andh WR 226 (231).

(5) The section attaches itself only to an illegal contract and not to any illegal act outside a contract. (1977) 1 Mad LJ 107 (109).

(6) Lease for extraction of timber granted by Government — Term in lease that Lessee not to transfer leasehold rights to any one without Government sanction — Agreement by lessee transferring lease rights without Govt. sanction held not void as being against provisions of law or opposed to public policy. A 1976 J & K 9 (10, 11) (DB).

(7) Anything which is not lawful within Section 23 is unlawful for the purposes of an agreement or compromise and a decree incorporating such an agreement or compromise is a nullity. (1909) 2 Ind Cas 865 (873, 874) (All).

(8) The provisions of Section 23 would apply to all contracts, even to those entered into by a person in the sphere of professional activity governed by a special statute which has not expressly imported the provisions of this section into it. A 1954 Bom 478 (483): 1954 Cri LJ 1531 (DB).

(9) A voidable transaction does not fall within Section 23. A 1936 Nag 268 (269).

(10) Section does not apply to claims founded on tort. A 1931 All 83 (85) (DB).

(11) Where a statute prohibits a thing not merely for the purpose of revenue but also for protection of the public, a contract in contravention of such prohibition shall be void. A 1968 Cal 146 (150) (DB) ** A 1968 Andh Pra 315 (319) ** A 1960 Andh Pra 39 (42) (DB).

(12) If an agreement is merely collateral to another or constitutes an aid facilitating the carrying out of the object of the other agreement which, though void, is not in itself prohibited, within the meaning of Section 23 it may be enforced as a collateral agreement. If, on the other hand, it is part of a mechanism meant to carry out what the law has actually prohibited, courts will not countenance a claim based upon the agreement because it will be tainted with an illegality of the object sought to be achieved which is hit by Section 23. A 1975 SC 1223 (1228).

(13) The fact that a contract is not enforced by a court of equity on equitable ground does not make the contract illegal. A 1959 Cal 715 (728).

(14) A contract cannot be said to be opposed to law merely because the size of the stores in notice inviting tender was mentioned in inches and not in metric measures. A 1972 Delhi 234 (236).

consideration for B's payment and B's payment is the consideration for A's promise and these are lawful considerations.

(d) A promises to maintain B's child and B promises to pay A 1,000 rupees yearly for the purpose. Here the promise of each party is the consideration for the promise of the other party. They are lawful considerations.

(e) A, B and C enter into an agreement for the division among them of gains acquired, or to be acquired, by them by fraud. The agreement is void, as its object is unlawful.

(f) A promises to obtain for B an employment in the public service, and B promises to pay 1,000 rupees to A. The agreement is void, as the consideration for it is unlawful.

(g) A, being agent for a landed proprietor, agrees for money, without the knowledge of his principal, to obtain for B a lease of land belonging to his principal. The agreement between A and B is void, as it implies a fraud by concealment, by A, on his principal.

(h) A promises B to drop a prosecution which he has instituted against B for robbery, and B promises to restore the value of the things taken. The agreement is void, as its object is unlawful.

Section 23 — Note 1 (contd.)

(15) Section does not apply to a contract entered into by the Managing Director of a public company with another private company in which the said Director has interest. A 1959 Cal 715 (728).

(16) Where a statute seeks to control contractual obligations such a statute must always be strictly construed. Courts will not be astute to construe an Act so as to avoid a contract or to bring it within the prohibition of a statute. A 1959 Andh Pra 108 (110) (DB).

2. Unlawful consideration or object.— (1) To bring a case within the purview of Section 23, it is necessary to show that the object or consideration of the agreement is unlawful. A 1938 Cal 840 (850, 851) (DB) ** A 1960 Andh Pra 32 (34).

(2) Any contract can be said to be unlawful when the consideration thereof is of one of the categories enumerated under the Section. Mere failure to convey information to the landlord of entering into an agreement of sub-tenancy in terms of Sec. 10 of the Bombay Rents, Hotel Rates and Lodging House Rates (Control) Act (1944) does not directly or indirectly fall under any of these categories. Hence, such an agreement of sub-tenancy would be enforceable. (1973) 75 Bom LR 599 (602).

(3) The mere fact that the contract between plaintiff and defendants was entered into at Kurnool in the State of Andhra Pradesh would not make any difference in principle if the objects of the contract which were to be carried out at Bombay were of such a kind as to be hit by this Section. **A 1975 SC 1223 (1229).**

(4) The onus of establishing that a particular consideration is illegal as a matter of fact is on the person who asserts so. A 1925 Nag 111 (113) ** A 1950 Kutch 24 (27) ** A 1937 Mad 223 (226) (DB).

(5) The word "object" in Section 23 is distinct from "consideration" and means something aimed at. It means "purpose or design." A 1933 Bom 209 (212) (DB) ** (1906) 33 Cal 702 (710) ** A 1963 Him Pra 3 (5). ** (1972) 1 Mad LJ 244.

(6) Section 23 is not concerned with motive. It confines the Court to the object of the transaction and not to the reasons or motives which prompted it. **A 1940 Nag 305 (311, 312) (FB)** ** 1946 Jaipur LR 327 (329) (DB) ** A 1930 All 357 (360, 362) (DB) ** **A 1959 Madh Pra 151 (165) (FB)** ** 1960 Raj LW 23.

(7) In determining validity of contract the object of the agreement and not action actually taken under the agreement should be considered. A 1941 Pat 349 (350).

(8) Where the object of a contract is illegal, the whole contract is illegal, and no right of action exists in respect of it. A 1938 Oudh 24 (25).

(9) Object of agreement unlawful — Purchase of export licence contravening Export (Control) Order — Money spent in fulfilment of such object cannot be recovered. A 1973 Raj 271 (277).

(10) When plaintiff proves lawful object and consideration to the promisee, defendant cannot set up that he acted illegally by giving his promise in particular manner. (1910) 4 Sind LR 44 (47) (DB).

(11) Sale deed reciting a consideration less than the real consideration to avoid stamp duty — Consideration recited valid though not real — Sale deed cannot be said to be invalid or unenforceable — Object of the Stamp Act in imposing a penalty in such a case is only for the purpose of collecting revenue. Provision is not based upon public policy. (1974) 1 Mad LJ 146.

(12) The threat to bring a false suit is a form of blackmail and hence cannot be considered as good consideration for the contract. A 1936 Lah 6 (7).

(13) B, a Hindu, borrowing money from A and bribing certain officer therewith — To pay off A, B obtaining loan from C and executing mortgage in his favour — Purpose of mortgage loan held was not to effect illegal purpose. **A 1940 Nag 305 (312) (FB).**

(14) Preventing estate by legal means from being taken over by Court of Wards is not unlawful purpose. A 1941 Oudh 529 (555).

(i) A's estate is sold for arrears of revenue under the provisions of an Act of the Legislature, by which the defaulter is prohibited from purchasing the estate. B, upon an understanding with A, becomes the purchaser, and agrees to convey the estate to A upon receiving from him the price which B has paid. The agreement is void, as it renders the transaction, in effect, a purchase by the defaulter, and would so defeat the object of the law.

(j) A, who is B's mukhtar, promises to exercise his influence, as such, with B in favour of C, and C promises to pay 1,000 rupees to A. The agreement is void, because it is immoral.

(k) A agrees to let her daughter to hire to B for concubinage. The agreement is void, because it is immoral, though the letting may not be punishable under the Indian Penal Code.

[Malaysian Contract Act 1950, S. 24.]

Section 23 — Note 2 (contd.)

(15) Pronote executed by ward of Court though void is lawful consideration for bond executed by his son after his death and after estate had ceased to be under the Court of Wards. A 1923 All 590 (590) (DB).

(16) Where a cantonment board contracts to confer "old grant" tenure upon a person in the cantonment land the consideration or object of the agreement, even if it is in excess of the powers of the board under the Cantonment Act and the rules thereunder, cannot be said to be unlawful. A 1943 Oudh 99 (104) (DB).

(17) Where a judgment-debtor executed a bond in consideration of decree-holder refraining from executing decree for arrears of rent before passing of U. P. Stay of Proceedings (Revenue Courts) Act of 1937 and U. P. Stayed Arrears of Rent (Remission) Act 18 of 1939 it was held that neither consideration nor object of agreement was unlawful. A 1941 All 193 (194).

(18) A mortgage of lands granted Kabzadari without right of transfer is not transfer for unlawful object or consideration. (1911) 14 Oudh Cas 144 (146).

(19) A loan advanced for gambling does not necessarily become a loan advanced for an illegal purpose and irrecoverable. A 1927 Nag 155 (155).

(20) Where the consideration for a contract to pay enhanced rent by tenant to his landlord is the settlement of disputes as to rate of rent and abandonment of still higher claims on the part of landlord, the contract is valid and enforceable. 11 Ind Cas 699 (700) (DB) (Mad).

(21) Where a pronote is executed by a tenant in return for the withdrawal of the suit for ejectment by the landlord under compromise the consideration for the pronote is not an unlawful one. A 1914 All 533 (533).

(22) A's suit against B for possession of premises and arrears of rent decreed — In execution A obtaining order for attachment of B's movables — B agreeing not to appeal and A allowing B one month to pay decretal amount — Agreement is valid, consideration therein being lawful. A 1976 Kant 90 (91).

(23) Waiver of exemption benefit available to landlord under Sec. 1-A of U. P. (Temporary) Control of Rent and Eviction Act 3 of 1947 — Agreement to that effect not unlawful. A 1971 SC 2213.

(24) Permission to sue for eviction — Agreement in lease deed that parties will never claim benefit of Act and that the provision of Act will be inapplicable to lease deed — Tenant not precluded from contending that the suit for eviction without permission under Section 3 of U. P. (Temporary) Control of Rent and Eviction Act (1947) is not maintainable. A 1974 SC 1924.

(25) Promise of pension for giving up practice as a lawyer and payments to various persons to use their influence with Government in connection with private or quasi-political concerns are not illegal or immoral considerations. A 1917 Pat 92 (98) (DB).

(26) Where a deed of gift is executed with the motive of re-compensating the donee for past cohabitation which is not adulterous as well as other services rendered by her the object of donor cannot be said to be immoral or unlawful. A 1972 Raj 25 (28, 29,30).

(27) Contracts whose consideration becomes void have to be distinguished from other contracts where the consideration is unlawful or illegal. In the former class of contracts the mere fact that the earlier or the collateral contracts might be void cannot preclude a plaintiff from maintaining an action on a novated contract which is perfectly legal. But this principle would not apply to the latter class of contracts. A 1963 Madh Pra 323 (328, 329) (DB).

(28) The conditon in a laundry-receipt that only half value of garment is to be refunded in case garment is lost is unlawful. A 1966 Mad 13 (14).

(29) Contract that A, the registered dealer, should take delivery of goods ordered by B and sell them, on certain commission — Suit by A to recover certain balance of transaction — Defence that contract was unlawful because it was intended to evade payment of tax as B was not a registered dealer — B not carrying on any business during year preceding contract — Question of registration and of evasion of tax held did not arise — Contract held was not unlawful. 1964 BLJR 483.

(30) In proceeding under Section 488, Criminal P. C., A was ordered to pay to Mst.

Section 23 — Note 2 (contd.)

B Rs. 10 for maintenance of illegitimate child — During pendency of revision against the order A entered into an agreement with B to pay Rs. 8 instead of Rs. 10 and did not press revision — A's acceptance to pay Rs. 8 instead of Rs. 10 held constituted a valid consideration. A 1966 Raj 163 (164).

(31) The word "lawful" in Order 23, Rule 1, Civil P. C. means lawful within meaning of contract Act. A 1959 Pat 17 (20) (DB) ** A 1963 Raj 63 (68, 69) (DB).

(32) Though a wager is void and unenforceable it is not forbidden by law and therefore the object of a collateral agreement is not unlawful under Sec. 23. **A 1959 SC 781 (792).**

3. "Forbidden by law."— (1) The word "law" in Clause (1) of Sec. 23 means judicial law, that is, the law enacted by any competent Legislature. **A 1939 Rang 305 (312) (FB).**

(2) It is not permissible to any person to rely upon a contract, the making of which the law prohibits. **A 1959 SC 689 (692).**

[See also (1969) 2 Andh LT 8 (13) (Fact that parties ignorant of facts constituting illegality and do not intend to break law, is immaterial).]

(3) Where any agreement is forbidden by an order by a competent authority having the force of law, it shall be an agreement forbidden by law as contemplated by the Section. **A 1975 All 166 (170) (FB).**

(4) The question whether a particular transaction is forbidden by an Act or tends to defeat its provisions is always one of construction of the Act, the rule for which is that it should be construed according to the intention of the persons passing it and such intention should be gathered from what they have said in the Act. **(1902) 5 Oudh Cas 256 (260) (DB) ** A 1962 Madh Pra 117 (125) (FB).**

(5) It is always a question of construction whether the punishment is intended by the Legislature to make the act expensive or to prohibit it. If intention is to prohibit the act the contract to do it would be void. A 1960 Ker 276 (278) (DB).

(6) There is a clear distinction between an agreement which may be forbidden by law and which is merely declared to be void. In the former case the Legislature penalises it or prohibits it. In the latter case it merely refuses to give effect to it. **A 1930 All 1 (3) (FB).**

[See also A 1958 Cal 703 (706, 707) (DB).] (The word "forbidden by law" is not synonymous with the word void' and hence it is not necessary that whatever is void is also "forbidden by law.")]

(7) Where a statute prescribes no penalties, an agreement in breach of a condition imposed under powers given by it does not fall under Section 23, and when a condition is imposed under statute purely for administrative purposes, an agreement in violation thereof is not void. A 1943 Oudh 99 (104) (DB) ** A 1927 Lah 333 (334).

(8) It cannot be said that whenever a contract results in breach of some law and contracting party incurs punishment the contract is one which is necessarily forbidden by law and is therefore void. **1973 Tax LR 498 (504 to 506) (FB) (All).**

(9) A contract which is void as being forbidden by law cannot become valid even if the parties act according to the contract. A 1929 All 394 (395).

(10) A deed must appear on its face to be a transfer before it can be condemned as a transfer forbidden by law. A 1926 Mad 218 (221).

(11) A transfer which is not forbidden by law and which is not opposed to public policy is not void merely because it is prohibited by a term of the contract by which the right transferred has been conferred upon the transferor. A 1957 Him Pra 70 (71) ** A 1940 Bom 369 (372) (DB) ** 24 Bom 622 (625) (DB) ** **(1880) 2 All 411 (414, 415) (FB)** **. A 1967 Mad 449 (450) (DB) ** 1961 Raj LW 141.

(12) A contract which is ultra vires the powers of a company under its memorandum of association is not necessarily illegal. A 1930 Mad 512 (513) (DB).

(13) When persons enter into a contract which is declared invalid by statute, no party can recover any compensation for breach of it. (1911) 33 All 695 (701) (DB).

(14) Where a contract or transaction is illegal there need be no pleading of the parties raising the issue of illegality and the Court is bound to take judicial notice of it. **A 1965 SC 1364 (1370).**

(15) An amount deposited in furtherance of a contract contravening the provisions of Foodgrains (Futures and Options) (Prohibition) Order, 1942 cannot be recovered. ILR (1953) 3 Raj 45 (48).

(16) Where a contract is void as being forbidden by law every ancillary agreement connected with the contract would also be invalidated. A 1953 Cal 450 (453) (DB) ** **A 1962 SC 1810 (1814, 1820)** ** A 1960 Cal 90 (91, 92) (DB) ** (1962) 64 Bom LR 113. ** 1971 Ker LT 837.

Instances of contracts forbidden by law.

(17) A contract made in contravention of Section 75, C. P. Local Self-Government Act, is illegal and void and attracts the provisions of Section 23, Contract Act. A 1941 Nag 273 (276).

(18) Agreement of sale of land belonging to Janapad Sabha without prior resolution passed by Sabha — Agreement in violation of Section 66 of the C. P. and Berar Local Government Act (1948) read with Rule 2 of the Rules framed thereunder, and hence void. 1978 MP LJ 793 (796) (DB).

(19) A promissory note or hundi which is against the provisions of the Paper Currency Act of 1923 (Now repealed) is void. **A 1928 All 371 (376) (SB) ** A 1955 Hyd 69 (80) (FB)** ** A 1914 Upp Bur 3 (4) ** (1910) 5 Low Bur Rul 191 (191, 192) ** (1910) 5 Low Bur Rul 182 (183) (DB).**

[**But** see (1910) 4 Sind LR 44 (46, 47).]

(20) Mortgage by deposit of the title deeds — Mortgage in contravention of Rule 94-A (2) Defence of India Rules 1939 — Transaction is illegal and mortgagee cannot recover money from mortgagor. A 1969 Cal 578 (589) (DB).

(21) Transfers of subjects declared by Section 6 of the Transfer of Property Act as untransferable is void. A 1925 Oudh 16 (18) (DB) ** A 1931 All 589 (591) (DB) **

Section 23 — Note 3 (contd.)

A 1924 Oudh 234 (236, 237) ** A 1916 Mad 579 (579, 580) (DB).

[But see A 1927 Rang 157 (158) (DB).]

(22) Transfer of actionable claims in contravention of Section 136, T. P. Act, is void under Section 23, Contract Act. A 1936 Oudh 275 (276, 277) (DB).

(23) A lease by Municipality of its right of farming out slaughtering fees is void as being opposed to law. (1913) 36 Mad 113 (114, 115) (DB) ** A 1963 All 206 (208) (DB).

(24) 'Dowry' — 'Streedhan' is covered by the expression 'dowry' — Giving or receiving of the amount of dowry being opposed to law a suit for recovery of such amount is not maintainable — Hence interest on that amount cannot be decreed — Nor can costs be awarded. 1975 Ker LT 386.

(25) A contract involving the contravention of the provisions of the Motor Vehicles Act or the Rules made thereunder is illegal. A 1926 Nag 259 (259). (Contravention of Rules.) ** A 1957 Mad 620 (620) ** A 1964 Andh Pra 256 (260) (DB) ** A 1969 Raj 155 (158).

[See also A 1969 SC 493 (495). (A 1967 Mad 100, Reversed; A 1963 Mad 413 and A 1962 Andh Pra 14, Overruled.)]

(26) Where in temporarily settled estates Government has prohibited sub-letting at rate higher than that fixed by temporary settlement under Section 172 of Bengal Tenancy Act, contract to sublet at a higher rent cannot be enforced. A 1928 Cal 763 (765).

(27) Agreement to surrender cultivation of sir lands after partition is void as it is forbidden by law. 1886 All WN 88 (88) (DB).

(28) Transfer of land to Patwari in contravention of rules under Punjab Land Revenue Act is void. A 1927 Lah 18 (19) (DB).

(29) Agreement by Government tenant with his brother to share whatever might accrue to him with him is forbidden by Section 8, Punjab Government Tenants Act, 1893. A 1922 Lah 287 (289).

(30) Agreement that the tenant will not be able to make any improvements without the consent of the Zamindar, and that he will not be entitled to any compensation at the time of eviction is contrary to law (Section 90 of the Tenancy Act) and is void. (1911) 10 Ind Cas 465 (466) (All).

(31) Mortgage by one who was disqualified under Section 8 of the Jhansi Encumbered Estates Act, is void, being forbidden by law. (1908) 30 All 38 (39) (DB).

(32) Contract for possessory mortgage of occupancy holding being against Tenancy Law is void under Section 23 and covenant empowering mortgagee to recover money if possession was not delivered is also illegal. A 1931 All 461 (461) ** A 1937 Oudh 150 (151) (DB) ** A 1935 All 256 (257) ** A 1931 Oudh 309 (310) (DB) ** A 1924 All 668 (668).

(33) Where the mortgagee on redemption is entitled to retain possession as a tenant and the mortgagor's debt is reduced to a certain extent, the amount by which the debt is reduced is a 'premium' which is prohibited under Section 7, East Punjab Urban Rent Restriction Act (1949) — The covenant, therefore, cannot be enforced. A 1973 Punj 94.

(34) Agreements in contravention of Agra Tenancy Act are void. A 1923 All 453 (454) ** 1947 All WR (HC) 11 (12).

(35) Proceeding before Land Reforms Tribunal — Execution of power of attorney in favour of legal practitioner — Appearance of Legal Practitioner prohibited under Section 48 of Karnataka Land Reforms Act — Power of attorney cannot be acted upon. A 1976 Kant 33 (35).

(36) A contract of subletting without the written permission of the landlord is not only prohibited by Section 12A of the C. P. and Berar Rent Control Order, 1949, but is also punished as an offence under Section 8, C. P. and Berar Regulation of Letting of Accommodation Act, 1946, hence it is void. A 1955 Vindh Pra 31 (32).

(37) A lease of a tenement by landlord without intimation to Collector under Clause 22 (2) of the C. P. and Berar Letting of Houses and Rent Control Order (1949) is forbidden by law and is void. A 1980 Bom 25 (32) (DB).

(38) Compromise decree passed without establishment of any ground specified in Section 12 (1) of M. P. Accommodation Control Act (1961) cannot be executed as decree for ejectment. A 1977 Madh Pra 65 (67).

(39) A contract to deliver grain in discharge of money advanced, was held to be a contract in contravention of Food Grains Control Order (1942) and was therefore unenforceable. A 1945 Mad 512 (512).

(40) Agreement to sell paddy above the maximum price fixed under Maximum Price Control Order — It is unlawful and void. A 1972 Andh Pra 367 (368).

(41) Lending of foodgrains is prohibited under the provisions of the Maharashtra Scheduled Foodgrains (Stocks, Declaration and Procurement and Disposal, Acquisition Transport and Price Control) Order (1966). Lending of grains would amount to disposal of foodgrains by unauthorised person and thus would contravene Cl. 10 of the Order. A 1978 Bom 322 (324).

(42) Contract made in contravention of Yarn (Dealers) Control Order is illegal and cannot be enforced. A 1944 Mad 387 (387).

(43) A contract which is in violation of the Foodgrains (Futures and Options) (Prohibition) Order of 1942 is illegal. ILR (1953) 3 Raj 45 (48).

(44) A contract for purchase of bullion at a date later than 12 days from the date of the contract was held to be void on the ground that it was clearly hit by the provisions of Rule 90 of the Defence of India Rules, as applied to Jodhpur by a notification of the Government. 1953 Raj LW 220 (222) (DB).

(45) A settlement contract the basis of which is a forward contract falling within the mischief of the West Bengal Jute Goods Act, 5 of 1950, is also void. A 1953 Cal 618 (619).

(46) Agreement to sell certain bales of cotton before 25-11-1955 entered into on

Section 23 — Note 3 (contd.)

10-11-1955 — Payment to be made after weighment of bales — Parties carrying on business of buying and selling ginned Cotton but not members of any recognised association — Contract, held, was not a ready delivery contract and was hit by Section 15 read with Section 2 (c) of Forward Contract (Regulation) Act, 1952. A 1969 Andh Pra 88 (DB).

(47) Mere agreement to engage in speculation on the rise and fall in prices of goods is not necessarily a wagering contract — Badla transactions, nature and incidents of — Contract between A and B that B should enter into badla transactions in goods on behalf of A is only contract that B should engage in speculation on the rise and fall of prices of goods on behalf of A — As between A and B the contract is not a wagering contract — But the contract was held to be otherwise void under Section 23, Contract Act as being for an object which was prohibited by law, namely, the statutes forbidding forward contracts. **A 1975 SC 1223 (1227, 1229, 1232).**

(48) Where an agreement was entered into to render professional engineering services, without prior registration by the engineers as required by Sections 18 and 19 of Professional Engineers Act, the agreement subsequently could not be enforced. **(1979) 2 Malayan LJ 2 (3).**

(49) Agreement to transfer actual user's licence and goods imported thereunder — Transfer being forbidden by law agreement including arbitration clause therein is invalid. (1974) 78 Cal WN 1.

(50) Transactions by an unlicenced money lender on and after the date of amendment of Section 9, Hyderabad Money Lenders Act are void but transactions that took place earlier are not affected. **A 1955 Hyd 113 (127) (FB).** (A 1952 Hyd 38 (FB), **Overruled.)** ** A 1952 Hyd 43 (44) ** A 1951 Hyd 44 (44) (DB).

(51) A contract for repayment of money lent entered into with infants was held forbidden by virtue of Section 1 of Infants Relief Act (1874). **(1972) 2 Malayan LJ 166 (168) (FC).**

(52) Suit for damages for breach of contracts in respect of goods purchased by plaintiff on behalf of defendant — Defendant refusing to take delivery on due dates — Contracts entered into in February 1952 — Section 3 of the Act found to be valid — Relevant Prohibition Order prohibiting forward contracts continued to remain in force under Proviso to Section 17 (4) of Essential Supplies (Temporary Powers) Act (1946) — Contracts held to be against law — Suit for damages for breach of those contracts held to be not maintainable. **A 1969 SC 504 (508, 512).**

(53) Partnership entered into in contravention of Cochin Tobacco Act (1922) is illegal. A 1960 Ker 276 (278) (DB).

(54) Forward contract, the object of which was to give delivery of groundnuts on a future date is prohibited under Notification issued under Rule 72, Defence of Hyderabad Regulation and is void. (1962) 40 Mys LJ 483 (DB).

(55) Contract by Director with Company is prohibited by law. A 1964 Raj 237 : 1964 (2) Cri LJ 581.

(56) An agreement between parties to file award in a different Court is against the statute. A 1966 Andh Pra 134 (136).

(57) Transfer of right to collect fees on the sale of cattle under C. P. and Berar, Municipalities Act (2 of 1922) is illegal. A 1963 Madh Pra 240 (241) (DB).

(58) The power to give permission to determine the lease is conferred on the Rent Controller under Cl. 13 of the C. P. and Berar Letting of Houses and Rent Control Order (1949). Such power cannot be conferred on any other person, including an arbitrator by virtue of an agreement between the parties. Such an agreement would be unlawful and against the public policy embodied in law. A 1976 Bom 237 (240).

(59) Permanent alienation or transfer of any agricultural land is prohibited under Hyderabad Tenancy and Agricultural Lands Act (1950). A 1963 Andh Pra 232 (236). (Partly **overruled** on another point in A 1970 Andh Pra 19.)

(60) Subletting of phone in contravention of conditions is forbidden by law. A 1968 Andh Pra 315 (318).

(61) Alienation under Hyderabad Prevention of Agricultural land Alienation Act (3 of 1349, F.) without permission of Collector. A 1960 Mys 59 (63) (DB).

(62) Lease of land conferring hereditary rights in lieu of a premium is prohibited under Section 90 U. P. Tenancy Act 17 of 1939. A 1967 All 262 (263) (DB).

(63) Agreement under which the pawnee bank has been authorised to sell the securities pledged with it without notice to the pawner in case the credit balance of the pawner fell below the margin, would be inconsistent with the provisions of the Contract Act, and therefore, would be wholly void and unenforceable. A 1966 All 134 (135, 136).

(64) Contract for sale and purchase of jaggery powder at rates higher than rates fixed under U. P. Gur Control Order (1946). A 1963 All 206 (208) (DB).

(65) The transfer or mortgage of a property in respect of which the Collector can exercise his powers under Schedule 3, Para 11 of the Civil P. C., is a transaction forbidden by law. A 1933 All 468 (470) (DB).

(66) Baglas are herons which are birds which do not come within the exceptions mentioned in the Notification No. 5028 S. R., dated 19th September 1902, and a contract of partnership to trade in the feathers of Baglas is illegal and void being against public policy. A 1929 Lah 663 (663) (DB).

(67) The Foodgrains Control Order, 1942 is a statute which prohibits transactions in the interest not only of revenue but also of public health or morality and therefore any contract for entering into transaction which contravenes its provisions must be taken to have been impliedly prohibited by it. A 1955 Orissa 49 (52) (DB).

(68) A chity transaction to which Section 6 of the Travancore Chitties Act 26 of

Section 23 — Note 3 (contd.)
1120 applies is forbidden by law and therefore void. A 1953 Trav-Co 44 (45).

(69) Agreements of lease in contravention of Section 3 (3) of the Hyderabad Rent Control Act or Section 3 (5) of the A. P. Rent Control Act will not be illegal and void inter se between the parties, either on ground that it is forbidden by law or that it is against the public policy. **A 1980 Andh Pra 181 (189) : (1980) 1 Andh WR 1 (FB).** ((1969) 2 APLJ 66 **held no good law** in view of A 1974 SC 1924.)

(70) Trav. Chitties Act (20 of 1120), Section 6 — Chitti for more than Rs. 100 — Chitti not registered — The transaction of subscription illegal — Subscriber is not in pari delicto with foreman. 1969 Ker LR 659.

Instances of contracts not forbidden by law.

(71) A lease granted contrary to the provisions of a Robkar issued by the Ruler of a State cannot be held to be illegal or void under the section even if the Robkar is to be regarded as law, when it does not declare that such leases are illegal or unlawful. A 1958 Madh Pra 88 (90) (DB).

(72) It is not forbidden by law to make an agreement to substitute a mortgage for a judgment debt if it is done with the sanction of the Court. (1907) 31 Bom 552 (559) (DB).

(73) Order 23, Rule 3, Civil P. C. does not stand in the way of parties to a suit coming to an agreement that the defendant should deposit the money claimed by the plaintiff in a temple and that the latter should take it in the presence of the deity. A 1957 Andh Pra 69 (70).

(74) A contract to pay future rent for a period beyond three years from the date of the decree is perfectly lawful. A 1955 Trav-Co 233 (234).

(75) Agreement between landlord and intending tenant to the effect that latter to make finance for construction of premises sought to be taken on lease by him — Out of the monthly rent to be paid substantial amount was agreed to be appropriated towards repayment of loan — Agreement relating to appropriation not contrary to Section 6 (4) of M. P. Accommodation Control Act (1961). 1977 MPLJ 115 (118).

(76) Subsequent mortgage of property against which there is a temporary injunction by a Civil Court is not void as it is not forbidden by law. (1887) 9 All 497 (500) (DB).

[**See also** (1903) 25 All 431 (434) (DB).]

(77) An agreement to allow another person to occupy a house and pay compensation for use and occupation is a perfectly legal contract and it is not prohibited by law. A 1952 All 344 (345).

(78) Contract by mundcar to vacate suit house and shift to another house is not hit by Section 23 as transfer of mundcar's house is not barred by Goa, Daman and Diu (Protection from Eviction of Mundcars etc.) Act. A 1975 Goa 40 (43).

(79) Assignment of his share in the profits to a stranger by a co-sharer in a mahal is not within the prohibition of this section. 1894 All WN 140 (140) (DB).

(80) A person who according to the terms of a grant is not qualified to be a transferee of the subject of the grant is not a person who is "legally disqualified" within Section 6 (h) (3) of the Transfer of Property Act and therefore a transfer to him is not affected by Section 23 of the Contract Act. A 1928 Rang 136 (137) (DB).

(81) A bequest contingent upon consent of heirs is not forbidden by law. A 1928 All 494 (496) (DB).

(82) Agreement by pre-emptor to sell property to third person entered into prior to suit for pre-emption is valid and does not contravene provisions of Punjab Pre-emption Act. (1950) 52 Punj LR 387 (390).

(83) A family settlement by which disputes are compromised is not a transfer and hence a restriction against alienation imposed by the compromise is not invalid as offending the provisions of Section 10 of the Transfer of Property Act. A 1953 Punj 282 (283, 284) (DB).

(84) A provision for pre-emption in a deed of transfer does not offend against the rule against perpetuities and therefore is enforceable. **A 1927 All 170 (172) (FB).** (A 1923 All 511 and A 1923 All 514, **Overruled.**)

[**But see** A 1922 Bom 84 (94) : 47 Bom 191 (DB).]

(85) A covenant in a sale deed that the vendor would not claim ex-proprietary rights is neither forbidden by any law nor does it defeat the provisions of Section 7A (5), Oudh Rent Act or any other law and is not, therefore, unlawful within the meaning of Section 23. A 1942 Outh 1 (6) (DB).

(86) Bond executed by a disqualified proprietor is not void as it does not infringe Sections 173 and 174 of Oudh Land Revenue Act, 1876. (1902) 5 Oudh 256 (261) (DB).

(87) Agreement in Santhal Parganas to pay compound interest is not prohibited and hence not unlawful. A 1930 Pat 442 (450) (DB) ** (1899) 26 Cal 238 (240) (DB).

(88) The Cantonments Act does not contain any prohibition against a transfer by an owner of his right to continue in occupation of the house. A 1924 Bom 258 (259).

(89) Transfers of occupancy and ordinary tenant rights when they are not forbidden but are only made voidable by the Tenancy Acts, are not unlawful within the meaning of Sec. 23 of the Contract Act. A 1925 Nag 375 (375) ** A 1949 All 637 (638) ** A 1917 Nag 125 (126).

(90) The surrender of an occupancy tenancy when it does not comply with the provisions of Section 12, C. P. Tenancy Act is only voidable. It is therefore not illegal within the meaning of Section 23 of the Contract Act. A 1926 Nag 345 (346) ** A 1918 Nag 178 (179).

(91) The Bombay Rents, Hotel Rates and Lodging House Rates (Control) Act (1944) does not prohibit an agreement of subtenancy. (1973) 75 Bom LR 599 (601).

(92) There is no provision in the H. P. Rent Control Act (1971) which might restrict a tenant from giving up the benefits of that Act. A 1972 Him Pra 125.

(93) Bye-law of Co-operative Society that the Society shall not sell goods on

Section 23 — Note 3 (contd.)

credit to a non-member cannot have force of law and it cannot be brought against the Society suing for recovery of balance standing against non-member. A 1926 Nag 463 (464).

(94) A contract entered into by a legal practitioner in the course of a business or trade in which he is engaged in contravention of R. 26 of the Rules of the Allahabad High Court Rules framed under the Bar Councils Act is not void. A 1953 All 276 (281) (DB).

(95) In the absence of any statutory bar positively prohibiting a legal practitioner from being engaged in trade or business, a mortgage by a legal practitioner is valid and enforceable. A 1928 Nag 273 (275).

(96) A sale of property which provides for the discharge of the debts of the vendor is not a sale which contravenes the provisions of Section 15 (2) of the Relief of Indebtedness Act and therefore is a valid sale. A 1951 Nag 187 (187, 188).

(97) Budla or forward contracts in shares are by themselves not illegal and Rule 94C of the Defence of India Rules, which contained a prohibition only against the authorities of stock exchange from assisting its members in entering into such contracts or settling the accounts, did not render these contracts between the members themselves invalid. A 1953 Mad 296 (299, 300) (DB).

(98) A person seeking to construct a building involving the encroachment on the street is bound by the conditions which were imposed by the municipal committee while sanctioning the construction and to which he has agreed. The fact that the municipal committee could not have enforced these conditions under the Municipal Act itself because of the absence of certain conditions precedent required under the Act cannot render either the contract or the enforcement of it illegal. A 1931 Lah 634 (636).

(99) A contract between two parties cannot be held to be void or illegal merely because one of the parties is a member of an association which has not been registered as a company under Section 4 of the Companies Act although it is liable to be so registered. A 1953 Sau 141 (142).

(100) Although unregistered firms as such could not undertake contract work under the Public Works Department and such contracts would therefore be void, such contracts in one's individual name entered into for himself and on behalf of another financing the undertakings, both forming an unregistered firm, were not hit and a suit inter se such partners for rendition of accounts was not barred. A 1976 Gauhati 12 (15).

(101) Hindu Undivided Family — Death of father who was carrying on business in country liquor shop — Formation of partnership between his heirs — Agreement between his sons that licence for shop would be taken in name of one of them as common manager of joint business — Held, it could not be said that agreement pleaded was illegal or in contravention of Bengal Excise Act. A 1979 (NOC) 117 (Cal).

(102) An agreement of partnership between two persons for starting a filature or silk business is not forbidden by law in Bengal inasmuch as the Bengal Silk Control Order, 1945 did not prohibit such partnership. A 1957 Cal 336 (341) (DB).

(103) The provisions of the Motor Vehicles Act does not prohibit the carrying on of the business of plying a truck in partnership, even if it is plied on the strength of the permit obtained by one of the partners. Hence, such an agreement of partnership is not hit by the section. A 1980 Raj 14 (18, 19).

(104) Contract for transfer of route permit — Contract is not illegal or void because such transfer can be made with permission of transport authority. A 1976 Goa 62.

(105) A loan advanced by unregistered money-lender is not impliedly prohibited by Section 11-F of C. P. and Berar Money-lenders Act (13 of 1934). A 1962 Madh Pra 117 (125) (FB).

(106) Jute Goods (Export Control) Order 1949, does not prohibit or render unlawful a contract for the sale and purchase of Jute goods for export to a place outside India at a price in excess of the ceiling price. A 1960 Cal 590 (591, 592) (DB).

(107) Contract for sale of property which is subsequently declared as evacuee property is not void. 1961 MPLJ 791 (DB).

(108) Agreement whereby arrears of rent have been converted into a debt under a promissory note is not prohibited by law. (1966) 1 Mys LJ 37.

(109) Where no application for the fixation of fair rent is made and no fair rent has been in fact fixed under Madras Buildings (Lease and Rent Control) Act (25 of 1949), an agreement between landlord and tenant for the enhanced rent cannot be declared null and void. A 1959 Andh Pra 108 (110) (DB).

(110) Fixation of fair rent — Parties subsequently agreeing to enhancement for period anterior to effective date of fixation — Contract not violative of Section 5 of Madras Buildings (Lease and Rent) Control Act (1949) — Parties can agree to be governed by terms and conditions which may be inconsistent with some provisions of the Act — Such agreement is not necessarily illegal. (1969) 1 Andh LT 107 (112, 113).

(111) Though a wager is void and unenforceable it is not forbidden by law. A 1959 SC 781 (792).

(112) Under Assam (Temporarily Settled Districts) Tenancy Act (3 of 1935), transfer of land without consent of landlord is not void ab initio. A 1961 Assam 173 (175).

(113) A family settlement in which barber service inam lands are by agreement among the members allowed to be held by one of the members on an undertaking to perform the service instead of their being divided into a number of fractions could not be said to violate any law. A 1964 Andh Pra 465 (466).

(114) Contract by Gram Panchayats transferring right to recover taxes is not void, there

Section 23 — Note 3 (contd.)
being no prohibition in the C. P. and Berar Panchayat Act (1 of 1947). 1961 MPLJ 959.

(115) Contract between two companies, one private and another public, with some common shareholders and common directors. A 1959 Cal 715 (728).

(116) Contract by managing director without consent of directors with other private company of which he is member. A 1959 Cal 715 (727).

(117) Director of Company standing as guarantor for loan advanced by third party to company and company agreeing to pay Director guarantee commission — Contract does not contravene Ss. 89-E, 91-A or 91-B of Companies Act, 1913 and is not against public policy — Director can enforce it against company. (1971) 1 BCLJ 195 (All).

(118) Rule 33 (1), Forest Rules, itself shows, an assignment of any forest contract is not absolutely prohibited and cannot, for that reason, be regarded as void. A 1962 Madh Pra 22 (22).

(119) There is nothing to indicate that the Legislature has prohibited a contract to transfer land between one agriculturist and another. A 1968 SC 1358 (1360).

(120) A transfer of land by Bhumiswami cannot be treated as in contravention of Section 165 of M. P. Land Revenue Code, (1959). A 1976 Madh Pra 106 (110).

(121) Mere contract for sale is not hit by Section 154 of U. P. Zamindari Abolition and Land Reforms Act — Prohibition in Sec. 154 is against actual sale — Contract for sale does not become void. A 1971 All 444.

(122) Agreement of sale of land by Sirdar after depositing 20 times of land revenue and obtaining Bhumidari Sanad is valid — It is not hit by Sec. 23, as being forbidden by law namely S. 166 of U. P. Zamindari Abolition and Land Reforms Act (1951). 1980 UPLT (NOC) 43 (All) ** ILR (1971) 1 All 111 (120).

(123) Contract of tenancy entered into in violation of order under S. 7 (2) of U. P. (Temporary) Control of Rent and Eviction Act is not void. A 1964 All 1 (3, 4) (FB). (A 1961 All 347, Overruled; A 1961 All 295 (296, 297) and A 1964 All 395, impliedly Overruled.)

(124) An agreement between private parties creating tenancy is not void for want of allotment order under U. P. (Temporary) Control of Rent and Eviction Act (1947). 1979 All LJ 1127 (1134). (1974 All LJ 676 (FB), Held no good law in view of 1975 All LJ 270 (SC).) ** A 1978 All 144.

(125) In a suit for ejectment of a tenant a compromise decree can be validly passed. Such a decree is not against the provisions of Section 3 of the U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), Section 3. A 1973 All 324.

(126) Creation of subsequent perpetual lease neither violates U. P. Act III of 1947 nor is void under this Section. 1978 All LJ 759.

(127) Agreement by landlord with tenant for payment of rent in excess of the limits laid down under Section 6 of Rajasthan Premises (Control of Rent and Eviction) Act (17 of 1950). 1967 Raj LW 544.

(128) An agreement entered into after the Bombay Rents Hotel and Lodging House Rates Control Act (51 of 1947) has come into force, contrary to the provisions of Section 15 would be unenforceable. A 1959 SC 689 (692).

(129) B, a merchant contracted with 'A' a pacca addathiya to purchase one wagon of groundnut oil for 1954 June delivery — 'A' then entered into contract with 'C' to purchase one wagon of groundnut oil to be delivered to 'B' in June from C's godown — Fall in prices — A paid to 'C' the difference in price — Held it was a wagering contract. A 1965 Andh Pra 136 (142).

(130) Amount of Chitti less than Rs. 100 — Licence under Section 7 not taken by foreman — Transaction of subscription not illegal under Section 7 of Trav. Chittis Act (20 of 1120). 1969 Ker LR 659.

4. Excise contracts.— (1) Contracts violating the provisions of Abkari Act are illegal within Section 23 of the Contract Act. A 1921 Mad 455 (456) ** A 1955 Hyd 28 (32) (FB) ** A 1954 Hyd 156 (158) (FB) ** A 1925 Sind 55 (56) (DB) ** A 1962 Ker 21 (23, 24) (FB) ** A 1967 Andh Pra 119 (122) (DB) ** (1960) 2 Andhra WR 222 (DB).

(2) The provisions of the Abkari and Opium Acts are not intended merely to protect public revenue but the provisions contained in them are based on public policy. (1912) 35 Mad 582 (586) (DB) ** A 1954 Hyd 156 (158) (FB).

(3) A contract involving any of the mischiefs contemplated by Section 12 of Madras Abkari Act would be illegal within the meaning of Section 23 of the Contract Act. A 1921 Mad 455 (456).

(4) A benami purchase of toddy shop is in contravention of Section 13 of the Madras Abkari Act, 1 of 1886. A 1949 Mad 252 (253) (DB).

(5) A promissory note given in consideration for the transfer of a right to sell toddy prohibited under Section 22 of Madras Abkari Act is illegal within Sec. 23 of Contract Act. A 1916 Mad 272 (273).

(6) A contract for the sale of fermented liquor, by a person who has not obtained a licence under Bengal Act, VII of 1878, is illegal and therefore void. (1889) 16 Cal 436 (442) (DB).

(7) All contracts to evade the provisions of the Excise Rules are altogether illegal and void. (1911) 12 Cri LJ 11 (12) (DB) (Cal) ** A 1943 Pat 374 (375) (DB).

(8) A sub-lease of a licence to manufacture and sell country liquor given in violation of condition of such licence is forbidden by law. (1888) 10 All 577 (579) (DB).

(9) Where without obtaining previous sanction of Collector, as was necessary under the rules of licence to sell arrack, a licence-holder agreed to sub-let and sell arrack to sub-lessee, it was held that such agreement was illegal and therefore unenforceable. (1903) 26 Mad 430 (433) (DB).

(10) An agreement sub-letting the right to vend ganja in contravention of licence is illegal. A 1917 Mad 852 (853).

(11) Sub-lease of salt pans in contravention of conditions of lease is unenforceable at law. A 1922 Bom 78 (78) (DB) ** (1909) 33 Bom 636 (641) (DB).

(12) Contract to supply liquor on credit held illegal. A 1943 Sind 219 (221) (DB).

(13) The mortgage by the lessee of salt pans of his leasehold interest in infringement of the

Section 23 — Note 4 (contd.)
provisions of the Madras Salt Act is not void. (1954) 2 Mad LJ (Andh) 127 (129).

(14) A partnership entered into to conduct business in arrack or toddy on a licence granted or to be granted to only one of the partners is void ab initio. A 1950 Mad 444 (449) (FB) ** A 1935 Mad 440 (442) (FB) ** A 1944 Mad 295 (298, 299) (DB). (A 1935 Mad 895, Overruled.) ** A 1941 Mad 64 (65) ** A 1937 Nag 250 (250, 251) ** A 1925 Sind 55 (56) (DB) ** A 1960 Andh Pra 444 (448) (DB) ** (1969) 71 Pun LR 122 ** A 1965 Orissa 160 (161, 162) (DB).

(15) A licence under the Central Excises and Salt Act for tobacco trade is personal to the licensee and therefore any partnership entered into by him without getting the licence amended is illegal. A 1957 Mad 186 (189) ** (1966) 60 ITR 335 (DB) (All).

[But see (1960) 2 Andh WR 151 (DB).]

(16) As an excise licensee enters into special obligations towards the Government, both financial as well as affecting the public morals, public policy no doubt requires that the entire control of the business should be in his hands. But as no such question of public policy is involved if the licensee takes a partner only to share the profits and the loss, contract of partnership is in no way void. (1898) 11 CPLR 62 (63) ** A 1929 All 210 (211) (DB) ** A 1926 Mad 218 (220, 222) ** A 1914 Oudh 399 (402) (DB) ** (1913) 37 Bom 320 (325, 326) (DB) ** 1906 Punj Re No. 114, p. 440 (442) ** A 1961 Punj 405 (408, 410, 411) (DB) ** A 1960 Ker 276 (278) (DB). (Partnership entered into in contravention of Cochin Tobacco Act (1922), is illegal. A 1950 Mad 444 (FB), held not overruled by (1959) 37 ITR 271 (276) (SC); 27 Cochin 222 and A 1927 Lah 333, Dissented from.) ** 1969 BLJR 646 (DB).

(17) A licensee of salt manufacture admitting partners but manufacturing salt himself cannot be said to have contravened provisions of Bombay Salt Act against alienating benefits of licence. A 1921 PC 137 (137) ** A 1944 Mad 394 (395).

(18) Section 23 does not hit a partnership made in contravention of Section 6, Central Excises and Salt Act and Rr. 175 (2), 178 (4) and 210 framed thereunder. A 1960 Andh Pra 39 (42) (DB) ** 1968 Ker LJ 769.

[But see A 1959 Andh Pra 647 (648, 649) (DB). (Trading without a licence in transgression of the provisions of Section 6, Central Excises and Salt Act is illegal and is governed by S. 23.)]

5. "Defeat the provisions of any law". — (1) The term "law" used in the expression "defeat the provisions of any law" would include any enactment or rule of law for the time being in force in British India and hence a question as to the validity of a contract may arise on the basis whether its object or consideration would defeat (1) the provisions of any legislative enactment, or (2) the rules of Hindu or Muhammadan law, or (3) other rules of law for the time being in force in British India. A 1947 Sind 94 (96) (DB) ** A 1966 Mys 154 (162) (DB).

(2) Section cannot be invoked to invalidate a true and bona fide transaction. Even transfers which are likely to defeat the provision of the Act are not prohibited or declared void. (1971) 1 Mad LJ 274.

(3) The words "any law" refer to substantive law and not to an adjectival law, such as the Civil Procedure Code. (1889) 16 Cal 504 (508) (DB).

[But see A 1942 Sind 47 (49) (DB).]

(4) A contract which seeks to exclude the application of a statutory provision to the parties is not valid. A 1935 All 619 (619).

[See also A 1920 PC 190 (195) ** A 1968 All 95 (99) : 1968 Lab IC 326 ** A 1962 Cal 311 (323, 324).]

(5) The bankruptcy Court cannot allow proof when it is based on a contract against the policy of the bankruptcy law or is a result of secret agreement between the bankrupt and the third party. (1967) 1 Comp LJ 172 : 38 Com Cas 82 (Cal).

Instances of void agreements.

(6) The rules and regulations of a private provident fund are only in the nature of a contract between parties and they cannot affect the liability of the deposit lying to the credit of a depositor from attachment as a 'debt' due to him under law. A 1942 Sind 47 (49) (DB).

(7) Parties by contract can neither alter statutory period of limitation nor statutory starting point of limitation. Such a contract is void. A 1934 All 661 (675) (FB) ** ILR (1950) 1 Cal 313 (320) ** A 1947 All 38 (40) ** A 1917 Mad 892 (894) (DB).

[But see A 1950 East Punj 352 (353) ** A 1949 Cal 390 (393) ** A 1934 Rang 15 (16) ** A 1924 Cal 186 (187) (DB).]

(8) Oral agreement to postpone registration of deed of lease would defeat the provisions of the Registration Act. A 1923 Nag 76 (76).

(9) Agreement by vendor to relinquish exproprietary rights in sir land is void as being opposed to the policy of Agra Tenancy Act. A 1916 PC 59 (61) ** A 1922 All 430 (431) (DB) ** A 1917 All 111 (112) (DB) ** (1910) 7 All LJ 778 (781) (DB).

(10) Surrender and re-settlement added as a device to get over the bar against transfer by sale etc. — Resettlement is void and cannot be enforced. A 1975 Pat 58.

(11) An agreement the consideration of which is defeating the provisions of Insolvency Act is void within the meaning of S. 23 of Contract Act. (1912) 16 Cal LJ 162 (164, 165) (DB) ** A 1956 SC 336 (339) ** A 1938 Rang 11 (13, 14) (DB) ** A 1936 Lah 831 (832) ** (1936) 163 Ind Cas 858 (859) (Cal) ** A 1929 Mad 385 (386) ** (1906) 33 Cal 702 (709) ** (1897) 20 Mad 84 (86) (DB).

(12) Private agreement in respect of industrial dispute based on contracting out of statutory provisions of Industrial Disputes Act — It would be void under S. 23. 1969 Lab IC 725 (727) (DB) (Madh Pra).

(13) A loan made to a parent or guardian for the marriage of his minor child is for a purpose which if permitted would defeat the provisions of the Child Marriage Restraint Act. A 1952 Mad 579 (582) ** A 1958 Andh Pra 145 (146) ** 1958 Andh LT 14 (19).

(14) Sale of Malguzari without reservation of occupancy without necessary sanction is void. A 1928 Nag 232 (236) (DB).

(15) As an agreement by the tenant to pay the landlord the costs if he has to defend against a claim seeking to set aside the surrender would defeat the provisions of the C. P. Tenancy Act by preventing the heirs from exercising their rights, it would be an unlaw-

Section 23 — Note 5 (contd.)
ful agreement within the meaning of Sec. 23, Contract Act. A 1918 Nag 178 (179).

(16) Where a person before purchasing a tenancy under the Punjab Colonization of Government Lands Act, 5 of 1912, entered into an agreement with others to give them possession of one half of the lands and half the share of profits in consideration of their advancing half the purchase money and half the outgoings it was held that the agreement was void under Section 19 of the Punjab Act. A 1933 Lah 291 (292) (DB).

(17) An agreement by a tenant to pay the zamindar certain dues over and above the usual was held to be void on the ground that its intention was to defeat the provisions of Ss. 56 and 83, U. P. Land Revenue Act. (1913) 35 All 19 (22, 23) (DB).

(18) As the object of an agreement by the purchaser at a patni sale to reconvey the property to the defaulting patnidar is to defeat the provisions of Section 9 of the Patni Regulation of 1819 it is void. (1910) 14 Cal WN 1031 (1033) (DB).

(19) An agreement between the landlord and tenant to increase the rent by more than two annas in the rupee contravenes the provisions of Section 29 of the Bengal Tenancy Act and is void. (1897) 24 Cal 895 (896) (DB).

(20) A contract providing for the receipt of selami or premium contravenes the provisions of Section 7 of the W. B. Premises Rent Control Act, 17 of 1950 is void. A 1955 Cal 442 (447).

(21) A lease which if permitted would have defeated the provisions of the Calcutta Rent Act was held to be void. A 1924 Cal 57 (60) (DB).

(22) A contract by a Government servant which did not comply with the provisions of Section 175 of the Government of India Act of 1935 was held void. ILR (1950) 2 Cal 431 (439).

(23) A contract the object of which is to evade the provisions of the Forward Contracts Prohibition Order of 1944 being illegal and unenforceable, damages for the breach of such an illegal contract also cannot form consideration for promise to pay them by another contract. The latter contract is also illegal and unenforceable. A 1953 Mad 845 (845, 846).

(24) A contract to pay commission to a broker which violates the provisions of Sec. 5 of the Bombay Securities Contract Control Act, 8 of 1925 is void. A 1953 Bom 98 (101).

(25) A contract for supply of vegetable oil and oilcakes at a future date contravenes the provisions of the Vegetable Oil and Oilcakes (Forward Contracts Prohibition) Order of 1944 and is therefore void. ILR (1951) Mad 723 (727, 728) (DB).

(26) A contract which involves the transfer of ration documents was held to contravene Madras Rationing Order of 1943 and therefore void. A 1954 Andhra 51 (52).

(27) A contract by a Co-operative Credit Society to lend money to a non-member is illegal and cannot be enforced. A 1929 Lah 330 (331) (DB).

(28) An agreement to pay a tax prohibited by an Act of Legislature is void as it would defeat the provisions of law if permitted. (1884) 8 Bom 398 (403) (DB).

(29) An agreement between a Co-operative Society and one of its members that member will do life insurance business and the commission will be shared between them as calculated to defeat the provisions of Insurance Act and hence is void. A 1968 Cal 146 (150) (DB).

(30) Relinquishment or an agreement to relinquish their rights to share in their father's property by the heirs of a Mahomedan, on his death, would, if permitted, render Section 6 (a) of the T. P. Act futile. A 1964 Ker 200 (203) (DB). (A 1936 All 573, Dissented from.)

(31) Agreement whereby right of prior purchase is created is hit by Section 23 in that if it is permitted, it would defeat the provisions of J. and K. Right of Prior Purchase Act. A 1966 J & K 89 (94).

(32) Partnership agreement authorising one partner having licence to sell English wine to sell country liquor and others having licence to sell country liquor to sell English wine. (1969) 71 Pun LR 122.

(33) A partnership formed by a dealer in cloth who had obtained licence under Madras Cloth (Dealers) Control Order (1947) is hit by Section 23 in that it is of such a nature that if permitted it would defeat the provisions of the Order, specially Cl. (4). A 1964 Andh Pra 145 (150, 151) (DB).

(34) Transactions under kuri security bonds in Kuries not registered if allowed to be enforced would defeat the provisions of Kuries Act (7 of 1107). 1959 Ker LJ 130.

(35) Where a transaction is illegal its object being of such a nature that if permitted it would defeat the provisions of the U. P. (Temporary) Control of Rent and Eviction Act the transaction would be hit by Section 23 of the Contract Act. A 1959 All 440 (452).

Agreements not void.

(36) Purchase by decree-holder without the permission of the Court is not void. (1909) 32 Mad 242 (253) (DB).

(37) An agreement by the parties to a contract restricting them to have recourse only to one of several competent Courts may not be within mischief of S. 28, but it is void under Sec. 23. A 1956 Madh B 120 (121).

[But see A 1944 Mad 47 (48).]

(38) Although a clause to the effect that payment should be made at a particular place is inserted in a pronote with the object of bringing a suit at that place and thus avoid the operation of the U. P. Agriculturists' Relief Act the provision cannot be held to be illegal within Section 23 of the Contract Act. A 1939 Lah 498 (498).

(39) Contract to be bound by oath is valid, provided Court can administer it under Sec. 8, Oaths Act. A 1923 All 443 (444).

(40) Agreement, even apart from Indian Oaths Act, by parties to a suit to abide by statement of witness, who is also party to suits, is valid unless fraud, etc., can be proved. A 1933 All 861 (880) (SB).

(41) A debtor has the option to waive his right to apply for restoration of possession under Section 35 of the U. P. Encumbered Estates Act and therefore a compromise by which he contracts himself out of the right cannot be void on the ground that if permitted it would necessarily defeat the provision of Section 35. 1940 Oudh WN 1246 (1248) (DB).

Section 23 — Note 5 (contd.)

(42) Merely because the Public Demands Recovery Act has not expressly permitted the certificate officer to release the debtor before detention, it can not be said that he is forbidden by law from doing so and therefore the surety bond furnished for the release of the debtor under such circumstances is supported by lawful consideration. A 1937 Cal 625 (628) (DB).

(43) No question of defeating the provisions of Section 54, Transfer of Property Act will arise if a deed of mortgage executed for the consideration payable under an unregistered deed of sale is enforced when the sale is in substance only an agreement by an auction-purchaser not to enforce his rights in respect of the property against the mortgagor. (1910) 5 Ind Cas 581 (582) (DB).

(44) Although an agreement as between the parties make one of them responsible for the Government revenue payable by the other it cannot relieve the latter of his statutory liability for the Government revenue and therefore the agreement cannot be condemned as one defeating the provisions of the law. 1883 Pun Re No. 139, p. 421 (422) (DB).

(45) Transaction entered into to avoid incidence of tax is not illegal — Partition of family lands to avoid liabilities arising under Kerala Rice and Paddy (Procurement by Levy) Order not invalid. 1969 Ker LT 792.

(46) A contract to allow another person to occupy a house and pay compensation for use and occupation does not create any right of lessee in the other and therefore cannot be considered as a contract which defeats the provisions of S. 107, T. P. Act. A 1952 All 344 (345) (DB).

(47) Agreement for sale of land — Transaction dependent upon issue of notification under S. 109, Mysore Land Reforms Act exempting application of the Act to the said lands — Vendee applying to Govt. to issue such notification but application rejected — Subsequent suit to refund of advance paid to vendee — Held that vendee never intended to violate S. 80 of Mysore Land Reforms Act and the contract was not illegal. ILR (1973) Kant 1093.

(48) Where a forward contract was entered into at a place which was outside the jurisdiction within which such contracts had been forbidden by a notification extending the provisions of R. 90-C of the Defence of India Rules and it was also not intended by the parties to perform it either wholly or in part within such jurisdiction, it was held that the contract could not be declared illegal merely because a suit under it had to be filed within that jurisdiction on the ground of the defendant's residence. **A 1954 SC 500 (502). (A 1952 Raj 81, Reversed.)**

(49) When the contractor claims payment under the several work orders under which he executed the contracts he cannot be met with the plea that the contracts defeated the provisions of the Municipal Act, 15 of 1932. (1955) 59 Cal WN 762 (766).

(50) An agreement between parties to the effect that interest @ 6% would be payable on the amount of compensation awarded under Land Acquisition Act (1894) is neither opposed to public policy nor would defeat provisions of Section 28 (as amended by Madras High Court.) **1980 Legal Surv 71 (74) (Mad).**

(51) Where the object of the acquisition of share in the mahal or village in which the disputed property is situate is not to defeat the law of pre-emption but to acquire a preferential right, the acquisition does not come within the mischief of Section 23. A 1925 All 358 (360) (DB).

(52) The export of goods under a permit issued to another was not opposed to the provisions of the Export and Import Act of 1916 and hence the purchase of such export permits was held to be not unlawful. A 1930 Sind 175 (176) (DB).

(53) Contract for purchase of land entered into with full knowledge that purchaser may hold land in excess of the ceiling is not void. **A 1968 SC 1358 (1360).**

(54) A contract made by a tenant in respect of rent with the landlord is such that if permitted, it would defeat the purpose and policy of law. 1961 MPLJ 450.

6. Agreements opposed to personal law of parties.— (1) The word 'law' in Clause (2) of Section 23 means personal or customary law. **A 1939 Rang 305 (312) (FB) ** A 1947 Sind 94 (96).**

Hindu law.

(2)Agreement taking away absolutely the right to partition of members of joint family is unenforceable. A 1928 Oudh 365 (368) (DB).

(3) An agreement between joint owners that on failure of 'aurosa' son in one line impartible property of family should go to the other line where there is an aurosa son, would not bind the successors, such agreement being contrary to law. **(1886) 9 Mad 499 (499) : 13 Ind App 97 (PC).**

(4) A stipulation as between a husband and wife to avoid the marriage on the breach of a condition embodied in an ante-nuptial agreement between them is contrary to the policy of law. 1900 Pun Re No. 15, p. 53 (55) ** A 1953 Sau 88 (88) ** A 1937 Bom 358 (360) (DB).

(5) A post-nuptial agreement of separation between husband and wife providing for maintenance of wife is neither opposed to public policy nor to the spirit of Hindu law. A 1937 Bom 358 (360) (DB) ** A 1931 Nag 197 (198) ** A 1968 Mad 201 (202, 203) ** A 1962 Bom 35 (37) : 63 Bom LR 595 ** (1961) 65 Cal WN 1115 ** A 1968 Mad 201 (202, 203).

(6) An agreement by a Hindu bridegroom not to marry a second wife during the continuance of his marriage with his first wife, is not immoral or opposed to public policy. (1908) 4 Nag LR 86 (90).

(7) Contract by Hindu to maintain as wife a woman who is not his lawfully wedded wife, is contrary to public policy and consequently unlawful. (1912) 14 Bom LR 547 (557, 558) (DB).

(8) An agreement between husband and wife made on reconciliation, the object of which is to put an end to the present separation, is not opposed to public policy even if it contemplates a future separation and promise for maintenance in that event. A 1945 Mad 36 (37).

(9) Contract by a wife to suspend the operation of her maintenance decree for some time to give opportunity to husband to prove his willingness to maintain her property is not opposed to public policy. A 1944 Mad 17 (18).

Section 23 — Note 6 (contd.)

(10) In absence of proof of absence of custom, contract to compensate husband for expenses of his marriage upon his consenting to divorce wife is not void. A 1925 Nag 111 (114).

(11) Custom laying down particular mode of inheritance with regard to property held by ladies of zamindar's family and derived from the zamindar is not opposed to public policy. A 1916 Mad 102 (107) (DB).

Muhammadan law.

(12) In Muhammadan law marriage is a mere civil contract and an ante-nuptial agreement between the wife and her husband, that the husband would be liable to pay for her maintenance in case of dissension between them, is valid. A 1932 Lah 65 (66) ** A 1950 Cal 304 (305) (DB) ** A 1939 Lah 165 (165, 166) ** A 1921 All 152 (153) (DB).

[But see (1913) 37 Bom 280 (282, 283) (DB).]

(13) An ante-nuptial agreement which confers a right on the wife to get divorce in the event of the husband bringing without her consent other wives to stay with her is not void. A 1955 Assam 153 (153) (DB).

(14) An ante-nuptial agreement by a Muhammadan husband not to contract a second marriage is not illegal nor invalid as immoral or opposed to public policy or in restraint of marriage. A 1920 Low Bur 59 (60).

(15) An agreement by a Muhammadan who had married two wives, to give maintenance to one of them living separately due to disagreement, is valid. A 1928 Oudh 303 (303, 304) (DB).

(16) A post-nuptial agreement between a Muhammadan couple which deprives the husband of his independent volition and earnings and provides for his immediate divorce and realization of denmohur from him in case of breach of agreement is void. (1875) 15 Beng LR (App) 5 (7).

(17) Agreement for desertion on husband's second marriage is opposed to Muhammadan law. A 1935 Lah 902 (903).

(18) An agreement by a Muhammadan husband with his wife to the effect that he would lead a respectable life and live in a house approved by wife and her parents and in case of default the wife could divorce is valid and not opposed to public policy. A 1936 Lah 716 (717) ** A 1966 Cal 465 (467) : 1966 Cri LJ 983.

(19) Even if the parties be Muhammadans whose personal law allows wife to procure a divorce an agreement to advance money to a married woman to enable her to procure a divorce in a Court of law and marry the plaintiff is void as the object and consideration of such an agreement is unlawful and opposed to public policy. 1887 Pun Re No. 46, p. 97 (99, 100).

(20) There is nothing in the Muhammadan husband's promise to pay a certain sum of money for the personal expenses of his wife during his lifetime which can reasonably be regarded as opposed to public policy. A 1929 Lah 660 (661) (DB).

(21) Charge created by a Muhammadan on unknown shares of one of his heirs is invalid under Section 23, as it defeats the provisions of Muhammadan law. A 1933 All 934 (937) (DB).

(22) It is unlawful for a Hindu to make a dedication in favour of a mosque as it is unlawful for an unbeliever to make a 'wakf' in favour of a mosque. (1912) 16 Cal WN 114 (116) (DB).

(23) A contract for purchase of immovable property entered on behalf of a Muhammadan minor by his guardians is not unlawful. Under the Muhammadan personal law, the guardian is not prohibited from entering into such contract. However, the minor on attaining the majority can revoke such contract by showing that the agreement was void as the vendor had obtained the money fraudulently from his guardian and can recover the money by virtue of Section 65 of the Contract Act. (1964) 2 Andh WR 183 (DB).

(24) Agreement to maintain illegitimate child — Consideration is not unlawful and agreement is not void. A 1966 Raj 163 (164).

(25) A bequest to some of the heirs by a Mahomedan, if not consented to by the remaining heirs after the death of the testator is not valid under the Mahommedan law. A 1964 Ker 200 (202) (DB). (Overruled on another point in A 1973 SC 554.)

(26) Where in a partition suit by a Muhammadan lady against her co-heirs a preliminary decree was passed defining the shares of each of them and the co-heirs transferred their interest, the transfer was not opposed to Muhammadan Law. A 1966 Andh Pra 361 (368).

Buddhist law.

(27) According to Buddhist law, a rahan is forbidden by his law, that is the Vinaya, to engage in trade. Therefore, purchasing or selling property by rahan is opposed to Section 23. A 1939 Rang 305 (312) (FB).

(28) Neither the object nor consideration of sale to Buddhist monk is immoral within Section 23. A 1929 Rang 354 (363) (FB). (A 1928 Rang 3, Overruled.)

Parsi law.

(29) An agreement between a Parsi husband and wife for their living separate is lawful and binding. A 1921 Bom 399 (400) ** (1899) 23 Bom 279 (280, 281).

(30) A Parsi wife is not precluded from claiming future alimony under Section 40, Parsi Marriage and Divorce Act even if she had consented in the divorce proceedings to give up her future maintenance and that consent is embodied in the order of the Court. A 1945 Bom 537 (542).

Christian law.

(31) Promise by Christian to marry another when the person is already a married person is void. A 1926 PC 27 (27).

Jewish law.

(32) Where in a suit on contract one of the parties who are Jews allege that the contract is void under the Jewish law the Court must go into the allegation and determine what is the personal law which applies. A 1946 Cal 90 (107).

7. Fraudulent agreements.— (1) To acquire gains by fraud is an essential condition for the application of Illustration (e) of Section 23. A 1963 Him Pra 3 (6).

(2) Agreement between two persons to commit fraud on third party is void. A 1930 All 732 (733) (DB).

(3) Where the object of agreement is to conceal actual Sivai amdani and so to reduce as-

Section 23 — Note 7 (contd.)
sessment of land revenue the agreement is fraudulent. A 1923 Nag 76 (76).

(4) An agreement the consideration of which is to perpetuate fraud to defeat the creditors having decree is not enforceable. A 1923 All 504 (505, 507) (DB). (Bond.) °° (1973) 1 Malayan LJ 210 (212).

(5) An agreement to prefer some creditors in order to obtain their consent to a composition between debtor and creditors, is void being fraudulent. A 1939 Sind 33 (33, 34) (DB).

(6) Creditor agreeing not to sue one co-debtor if latter helped in realization of the debt from others and to refund deposit if realization made — Agreement is unenforceable. A 1920 Cal 515 (516) (DB).

(7) Where A, a stranger, who advanced money to three widows to enable them to make false claim of inheritance against rightful heir B, got the entire control of suit and under threats of prosecuting the suit to his ruin, induced B to enter into compromise of suit by virtue of which the widows were to withdraw the suit on B executing a bond to A for large sum in discharge of debts alleged to be due from widows to A, it was held that the bond was invalid and fraudulent as against B. (1873-74) 1 Ind App 241 (267) (PC).

(8) A sale made by a person with the object of defeating a probable execution against him is not necessarily one made with a fraudulent and unlawful object. (1879-80) 4 Bom 70 (73) (DB).

(9) An agreement providing that the judgment-debtor should pay the decretal amount with interest subsequent to the date of decree although the decree did not award interest, is not fraudulent. (1877-78) 3 Cal 602 (609) : 5 Ind App 78 (PC).

(10) Where the intention to deceive the Court by the execution of a document, if at all there is any, is there only in a secondary sense, the primary purpose of such execution being the rightful recovery of possession, the document cannot be said to be vitiated by an intention to practise fraud upon the Court. A 1949 Cal 204 (206).

(11) Where the fraudulent purpose has been effected the maxim in pari delicto, potior est conditio possidentis will apply and the Court will help neither party. A 1925 Oudh 120 (123) (DB) °° A 1957 Andh Pra 781 (784) °° (1909) 36 Cal 874 (881).

(12) Where the object of a clause in a partition deed between plaintiff and defendant on the basis of which the suit for contribution has been filed is rooted in fraud perpetrated by a plaintiff on a third person, the court would not render any assistance to the plaintiff to recover the share of money agreed to be paid by the defendant. (1951) 4 Sau LR 188 (191, 192).

(13) Where the plaintiff in apprehension that if he himself applied, he would not be granted a site by the Government set up some one else to apply for the site with the intention of appropriating the same himself; it was held, that it amounted to playing a fraud on the Government and the transaction being void the plaintiff could not succeed in getting back the site on the ground that it was a benami transaction. A 1954 Mad 811 (813) (DB).

(14) Omission to mention word "fraudulent" in pleading — Still it is open to the Court to examine contract as whole and see whether it falls within mischief of Section 23. A 1943 Nag 260 (262, 263) (DB).

(15) Where a case put forward in the trial Court was that the agreement in question was void as being opposed to public policy: Held that on same facts it could be attacked as fraudulent in revision. A 1939 Sind 33 (34) (DB).

(16) Where the vendor never pleaded that the bargain of sale was unfair or unrighteous, an argument on this basis is not open to a third party who has no cause to complain in this matter. A 1947 All 110 (114) (DB).

(17) Where the buyer himself knew full well that the seller had no title and entered into the transaction with full knowledge of want of title the contract was invalid being fraudulent involving injury to the person or property of another. A 1967 Mad 461 (463).

(18) Agreement between two firms according to which Firm A is to submit tender for Government contract for higher amount and Firm B is to pay certain amount to A if B's tender is accepted is neither fraudulent nor opposed to Public Policy. A 1963 Him Pra 3 (4, 5).

(19) Where fraud might have been contemplated but not perpetrated the defendants should not be allowed to perpetrate a new fraud. A 1960 SC 213 (217).

(20) Sale of property brought about with the Knowledge of the prior agreement to sell it to another is fraudulent and the purchaser under the agreement can resist the claim of the transferee under such sale. (1966) 79 Mad LW 368.

8. Injury to the person or property.— (1) Where one of the objects of an agreement was to deal with the minor's interest in property held that it involved and implied injury to the property of the minor and consequently the agreement was unlawful. (1935) 61 Cal LJ 89 (89, 90).

(2) The case of a mortgage by a person who has only a right to half and not the whole of the property mortgaged is not governed by Section 23 at all and therefore not void on the ground that it injures any person or his property. (1908) 12 Cal WN 94 (96) (DB).

(3) A contract to give a son in adoption in consideration of the natural parents receiving an annual allowance during their lives if permitted would involve an injury to the person and property of the adopted son. (1874) 13 Beng LR (App) 42 (43).

(4) Agreements which are calculated to prevent a person from enjoying a fundamental right and which compel him to seek redress in a Court of law are bad and unlawful. A 1954 Orissa 80 (86) (DB).

(5) A contract to prepare and supply copies of a picture produced in England is not vitiated on the ground that it involves injury to the property of another. A 1920 Bom 84 (85) (DB).

(6) Suit for dissolution of partnership and accounts — Compromise between plaintiff and some of the defendants — Compromise affecting rights of third party — Hit by this section. A 1980 Delhi 99.

(7) Suit raising dispute relating to right of shebait to manage endowed property — Compromise agreement dispensing with consultation of family members, providing for management by both plaintiff and defendant and for appointment of shebaits after plaintiff and defendant — Compromise is not agreement causing injury

Section 23 — Note 8 (contd.)
to property of another. A 1965 Pat 33 (37, 39) (DB).

(8) Trustee agreeing to sale property at grossly inadequate price — Agreement is void because the consideration was unlawful in that it involved injury to the property. (1972) 76 Cal WN 807.

(9) There is nothing wrong in the two parties, agreeing to obtain the land in front of their respective shares of the building for the purpose of using that particular portion of the land in front of their building. A 1968 All 79 (81).

(10) The word "injury" as used in the fourth clause of Section 23 means criminal or wrongful harm. Loss which ensures to a trader as a result of competition by a rival trader is not "injury" within meaning of the fourth clause. A 1963 Him Pra 3 (9).

(11) Where the buyer himself knew full well that seller had no title and entered into transaction, the contract was invalid being fraudulent involving injury to the person or property of another. A 1967 Mad 461 (463).

9. Immoral agreements.— (1) Word "immorality" is confined only to sexual immorality. A 1959 SC 781 (798) ** 1969 Ker LJ 620 ** (1921) 60 Ind Cas 727 (728) (Lah).

(2) Where a transaction, though completed, was intended to be for consideration, it can be impeached, if the consideration is immoral, and it makes no difference whether the transaction is executed or executory. (1905) 28 Mad 413 (418) (DB) ** A 1947 Bom 198 (203).

(3) Where object of transfer is immoral, no interest in property passes. A 1933 Bom 209 (212) (DB) ** A 1916 Cal 266 (269) (DB).

[See however A 1958 Cal 713 (719).]

(4) Court has power to dismiss a claim which is tainted with immorality, though such a plea may not be taken by either party. A 1930 Mad 547 (549) ** A 1933 Mad 187 (189).

(5) Where the pronote under which money is borrowed for an immoral purpose contains no recital as to the purpose, proof of the knowledge of the creditor about the immorality of the purpose is necessary to hold that the pronote is vitiated. A 1922 Mad 181 (182, 183) (DB).

(6) Where the consideration for a pronote is immoral, the question whether the consideration failed or not would be immaterial, as the agreement would be void under Section 23. (1908) 13 Mad LJ 7 (8).

(7) When transfers are tainted by immorality, the Court has a discretion which must be exercised judicially, having regard to all the facts and circumstances of the case, to decide whether the plaintiff is entitled to the relief by way of restitution of the proper transfer, even though such transfers may be void on the ground that its object of or consideration is immoral or opposed to public policy. A 1977 Bom 228 (236) (DB).

(8) A lease of a house for running a brothel is not only an act forbidden by statute but also an immoral act under Section 6 (h) (2) of the Transfer of Property Act read with Section 23 of the Contract Act. A 1958 Cal 713 (719).

(9) An amount paid by a person to the husband of a woman to make him grant her divorce is money paid for an illegal or immoral purpose and cannot be recovered. A 1956 Nag 160 (160).

[See also 1976 Cri LJ 1403 (1406) (All). (Money received to perform immoral contract — Element of cheating if present prosecution can lie, notwithstanding non-maintainability of suit to recover money paid or for specific performance of contract.)]

(10) Accused receiving money under an immoral void contract — Fraudulent performance thereof by accused constitutes no offence under Section 420, Penal Code (1860). (1973) 75 Pun LR 165.

10. Past and future cohabitation.— (1) Future cohabitation is immoral consideration. Agreement having such consideration is void. A 1933 Bom 209 (211) (DB) ** A 1925 All 437 (438) (DB) ** A 1924 Mad 159 (159) ** (1903) 13 Mad LJ 7 (12) ** (1971) 1 Cut WR 297 (302).

(2) Lack of pleading on the point of illegality of the object of a gift deed namely for contemplated future cohabitation does not preclude the party challenging the deed from relying on the ground of illegality provided the facts on record clearly disclose that illegality. A 1972 Raj 25 (28, 29).

(3) Although future cohabitation cannot support a promise as being immoral, yet there is nothing wrong in a promise made in consideration of past cohabitation. A 1943 Mad 253 (253) ** A 1947 Bom 198 (201) (DB) ** A 1940 All 385 (385) (DB) ** A 1938 Pat 502 (503, 504) (DB) ** A 1930 Mad 956 (960) (DB).

[See also A 1972 Raj 25 (28 to 30). (A gift for past cohabitation which is not adulterous would be enforceable.)]

[But see A 1952 Punj 293 (293) ** A 1933 Bom 209 (211) (DB) ** A 1930 Mad 239 (239, 240) ** A 1924 Bom 135 (136) (DB) ** A 1920 Bom 142 (143) (DB) ** A 1968 Mad 392.]

(4) Where an agreement to pay future maintenance is in consideration of the past cohabitation, the mere possibility that future cohabitation might also have been in the contemplation of the parties will not render the agreement void. A 1953 Mys 33 (35).

(5) The question whether past or future illicit cohabitation or both are the real consideration for an agreement must be decided upon the construction of the document itself. If the evidence clearly discloses that future cohabitation also formed part of the consideration, the transaction will be void and illegal. But if the agreement relates to past cohabitation it is not rendered invalid by the mere fact of the continuance of the cohabitation. (1972) 1 Mad LJ 244.

(6) Where a pronote is given during the continuance of cohabitation there is no presumption that the consideration is future cohabitation and is therefore, given for an immoral purpose (1903) 13 Mad LJ 7 (9).

(7) Where a bond executed for payment of loan is taken by creditor in name of his concubine's mother, debtor is not entitled to plead unenforceability due to immoral consideration. A 1920 Mad 198 (201) (DB).

(8) Where adultery was not without consent or connivance of the husband, a contract, for which such adultery forms the consideration, is not illegal. A 1928 Pat 375 (386).

11. Prostitution.— (1) Money lent for the purpose of assisting the borrower to visit brothels and bring in prostitutes cannot be recovered in a Court of law. A 1918 Cal 399 (399, 400) (DB).

Section 23 — Note 11 (contd.)

(2) No suit would lie by an adopted daughter of a dancing girl for accounts or a share in the profits of an immoral and illegal partnership. A 1939 Mad 139 (142).

(3) Knowingly letting a house to a prostitute with the object of her carrying on therein prostitution is immoral and contrary to public policy. (1909) 31 All 58 (58) (DB) ** A 1921 Cal 486 (487) (DB) ** 1904 Pun Re No. 65 p. 185 (185).

[See 1898 Pun Re No. 2 (3) (DB).]

(4) Where there was no proof that the lessor let out his house with the knowledge that it was to be used by the tenant to carry on her business of prostitution and while the tenant was in possession it was purchased by a third party, it was held that the purchaser could recover possession of the house through a suit. 1955 All LJ 634 (635).

(5) A custom among the prostitutes that if one of them contracts a marriage, she forfeits all rights in her original family, in other words, that she becomes practically an outcaste, is opposed to public policy and is immoral and consequently unenforceable in the British Indian Courts. A 1928 Lah 516 (520) (DB).

12. Public policy.— (1) A contract which is opposed to public policy cannot be enforced by either of the parties to it. A 1923 Mad 626 (628) (DB).

(2) Public policy requires that men of full age, and competent understanding, shall have the utmost liberty of contracting and that their contracts, when entered into freely and voluntarily, shall be valid and that Court should not interfere with this freedom of contract. A 1925 Oudh 120 (124) (DB).

(3) What is for the good of the community and therefore necessary on the ground of public policy must fluctuate and vary with the circumstances of the time. A 1940 Bom 369 (372, 373) (DB) ** (1961) 3 Orissa JD 190.

(4) Rules of public policy do not belong to a fixed or customary law; they are capable on proper occasions of expansion and modification. A 1957 Cal 336 (341) (DB).

(5) The question whether a contract is opposed to public policy or not is to be decided on general principles only, and not by any consideration of the terms of particular contract. (1909) 32 Mad 185 (190) (DB).

(6) A contract may be invalid because its substance or purpose is contrary to public policy or because of its coercive method of procurement, which is contrary to public policy. A 1945 Cal 218 (239) (DB).

(7) The expression "public policy" means and includes a wide range of topics such as trading with the enemies in times of war, stifling prosecutions, champerty and maintenance and various other topics which include certain recognised matters. A 1947 Sind 94 (96) (DB) ** A 1959 Madh Pra 131 (FB).

(8) The doctrine of public policy should be invoked only in clear and uncontestable cases of harm to public interest. 1976 Ker LT 448 (455).

(9) The Courts ought to be very cautious in deciding a question of public policy, and though with the development of public opinion and morality, the doctrine must be applied with necessary variation, each case has to be decided on its own facts. A 1931 Pat 22 (24) (DB) ** A 1959 SC 781 (794, 795) ** A 1959 Madh Pra 151 (FB) ** ILR (1962) Cut 266.

(10) The term 'public policy' does not admit of any definition. It is equivalent to the 'policy of the law.' Whatever tends to injustice of operation, restraint of liberty, commerce and natural or legal right; whatever tends to the obstruction of justice or to the violation of a statute and whatever is against the good morals when made the object of a contract is against a public policy and therefore void and not susceptible of enforcement. A 1964 Andh Pra 465 (467).

(11) Obiter.— The question whether the doctrine should or should not be applied to harmful tendencies does not depend on Sec. 23. If the Courts come to regard the doctrine of public policy as extending also to harmful tendencies then if the object of any contract has harmful tendencies the contract would be void as contrary to public policy. A 1959 Madh Pra 151 (166, 168, 169) (FB).

(12) Fine-spun speculations of social reformers or visionary theorists cannot constitute the ground on which the Court can reach any conclusion as to what is contrary to public policy. It is to be decided on well established principles of law. A 1954 Orissa 17 (20) (DB).

(13) The doctrine of public policy cannot be extended beyond the classes of cases already covered and the courts cannot invent a new head of public policy. A 1947 Sind 94 (96) (DB) ** A 1954 Orissa 17 (20) (DB) ** A 1934 Cal 328 (339) (DB) ** A 1931 Pat 22 (24) (DB) ** A 1923 Cal 154 (156) (DB) ** (1911) 6 Low Bur Rul 1 (2) (DB).

[See however ILR (1962) Cut 266 ** (1961) 3 Orissa JD 190.]

[But see A 1976 Andh Pra 112 (117) (DB). (Rejecting the argument that new heads of public policy should not be evolved for the risk of unruliness and uncertainty involved in such an attempt, the court held that in a modern progressive society with fast changing social values and concepts, new heads of public policy need be evolved whenever necessary.)]

(14) A person who asks a deed to be declared invalid as being opposed to public policy must prove the grounds which would bring it under Section 23. A 1941 Mad 727 (730).

(15) Where the validity of an agreement is impeached on the ground that it is opposed to public policy, the party setting up the plea must prove by clear and satisfactory evidence that the contract was supported by prohibited considerations. 1974 WLN 367 (Raj).

(16) A transaction, to be void as being against public policy, must be found as a fact, in its inception, to amount to or involve an illegality or be of such nature that, if permitted, it will defeat the provisions of the law. (1902) 4 Bom LR 948 (950) (DB).

(17) The plea that a contract is void as being opposed to public policy and illegal, may be raised for the first time in arguments though not pleaded. A 1923 Mad 626 (627) (DB).

(18) The question of public policy is one of law and even when the facts have not been fully pleaded by the parties, the Court will deduce them from evidence and apply the doctrine of public policy. (1910) 6 Nag LR 148 (151)

Section 23 — Note 12 (contd.)
** A 1965 SC 166 (169, 171) ** A 1976 Mad 102 (108) (DB).

(19) Plea as to deed being invalid as opposed to public policy is one of mixed law and fact and cannot be raised for first time in second appeal. A 1941 Mad 727 (731).

(20) If in contract part of consideration is void as being opposed to public policy, or one of its essential conditions could not be complied with, then it becomes unenforceable. A 1918 Bom 170 (170) (DB).

(21) Money paid under agreement opposed to public policy can be recovered. A 1918 Cal 409 (410) (DB).

[See however A 1976 Andh Pra 112 (121) (DB). (Agreement opposed to public policy — Moneys actually advanced to defendant, too could not be recovered — Case of a simple champertous agreement would stand on different footing.)]

(22) Sections 23, 26 and 27 of the Contract Act cannot be regarded as exhausting all instances of agreements which are contrary to public policy. A 1924 Oudh 404 (405).

(23) The following agreements have been held to be opposed to public policy.

(a) Contract for wholesale supply of rice in contravention of terms of license. A 1923 Mad 626 (628) (DB).

(b) Agreement that judgment-debtor should pay Rs. 6 out of Rs. 41 of his salary to decree-holder. A 1941 Bom 389 (392).

(c) Amount paid for securing seat in Medical College and not as loan — Agreement, against public policy. A 1979 Mad 42 (46) : (1978) 2 Mad LJ 417.

(d) "Opposed to public policy" — Agreement to use influence with Ministers of the Government — Question is not whether the persons proposed to be approached are amenable to influence — Question is if the agreement tends to corrupt or influence the decision-making machinery — Aforesaid agreement being such would be void. A 1976 Andh Pra 112 (120 121) (DB).

(e) Contract to sell not less than certain quantity of intoxicating drugs every year. (1906) 3 All LJ 802 (804) ** 1963 Ker LJ 19.

(f) Agreement by father to give up entirely the custody and control of his child to mother. A 1928 Cal 600 (601) (DB).

(g) When on account of unhappy relations between husband and wife resulting in frequent quarrels an agreement was entered between them in order to prevent further deterioration in their relation and this agreement provided separate residence of wife and children and their maintenance such an agreement is opposed to public policy. 1972 UPTC 21 (All).

(h) Transfer of decree with object to defraud other creditors. A 1924 Mad 189 (191) (DB).

(i) Alienation of swastivachanam service inam lands. A 1922 Mad 197 (198) (FB) ** (1962) 1 Andh LT 479 ** ILR (1977) Bom 63 (89, 90).

(j) Arrangement to secure one creditor advantage over others. (1906) 16 Mad LJ 418 (419) (DB) ** 1961 Ker LT 646.

(k) An agreement by the partner who holds the non-transferable contract for carrying mails to transfer it to the other partner or to continue the contract for the other after dissolution of partnership. A 1948 Nag 260 (262, 263) (DB).

(l) Agreement to appoint head of State who is not amenable to the jurisdiction of court as an arbitrator. ILR (1953) Trav-Co 974 (990).

(m) Contract involving transfer of ration documents in contravention of Section 13, Madras Rationing Order of 1943. A 1954 Andhra 51 (52) ** A 1967 SC 744.

(n) Contract to alienate that which is in the nature of a personal grant and without permission of the Tahsildar as required by a term of that grant. A 1954 Mad 811 (813) (DB).

(o) An agreement to confer exclusive perpetual right to perform religious services for the whole village. A 1951 Kutch 56 (58).

(p) Agreement to waive benefit conferred by Section 60 (i), Civil P. C. A 1950 Bom 155 (157).

(q) Contract of service which in substance amounts to nothing but serfdom. A 1958 Madh Pra 367 (368).

(r) Transfer of a right to sue which is personal to transferor. A 1917 Lah 222 (223).

(s) A contract of insurance effected by a person on the life of another when he has no insurable interest in the life. A 1941 Lah 33 (34) (DB).

(t) Partnership agreement authorising one partner having licence to sell English wine, to sell country liquor and others having licence to sell country liquor to sell English wine. (1969) 71 Pun LR 122.

(u) Agreements tending to injure the public service. A 1964 Andh Pra 465 (467) : (1964) 1 Andh WR 248.

(v) Formation of partnership by dealer in cloth with licence under Madras Cloth (Dealers) Control Order (1947). A 1964 Andh Pra 145 (151) (DB).

(w) Prohibition of child marriage is one of public policy — Child Marriage Restraint Act statutorily recognises it. A 1978 Orissa 84.

(x) Execution of decree of divorce obtained from foreign court by husband whose marriage was solemnized in Goa. A 1967 Goa 113 (116) (DB).

(y) A contract providing for a premium over and above the standard rent is opposed to public policy and cannot be enforced at law. 1973 WLN 408 : 1973 Raj LW 378 : A 1974 Raj 73 (76).

(z) Compromise in a suit between landlord and tenant in contravention of rules and curtailing the powers of the District Magistrate is unlawful and against the public policy. A 1975 SC 1525.

(z1) Tenant contracting himself out of rights conferred by statute solely enacted for benefit of tenants. A 1965 Andh Pra 86 90 (DB).

(z2) The public corporations have no implied powers to enter into contracts whereby performance of their duties to public is prevented or unduly restricted. If

Section 23 — Note 12 (contd.)

amounts to a condition so obviously inimical to the interests of the community that it offends almost any concept of public policy. A 1977 All 499 (502).

(z3) Sub-letting of phone in contravention of conditions. A 1968 Andh Pra 315 (318).

(z4) Compromise decree dividing amount of pension between parties to suit. A 1959 Pat 17 (20) (DB).

(z5) Contract to serve on Rs. 2 p. m. for 112 months. A 1958 Madh Pra 367 (368).

(z6) Settlement in conciliation proceedings under Industrial Disputes Act — Stipulation providing curtailment of period for claiming wages from one year to three months and forfeiture after that — Term held opposed to public policy. 1974 Lab IC 651 (MP).

(24) The following agreements have been held to be not opposed to public policy :—

(a) Contract whereby Government agreed to establish telegraph office in certain locality, on the merchants of locality undertaking to make good loss in its undertaking. A 1938 Cal 151 (153, 155) (DB).

(aa) Contract entered into in violation of Rule 178 (4) of Central Excise Rules (1944). 1968 Ker LJ 769.

(b) Contract for sale and purchase of sovereigns. A 1920 Bom 251 (254, 255) (DB).

(bb) Contract absolving party from liabilities under the contract if the claim was not enforced within certain period. A 1962 J & K 15 (16, 18).

(c) Agreement to pay remuneration for effecting settlement of civil dispute. (1912) 16 Cal WN 480 (481, 482) (DB).

(cc) An agreement between two firms according to which firm "A" is to submit tender for Government contract for higher amount and Firm "B" is to pay certain amount to A if B's tender is accepted. A 1963 Him Pra 3 (9).

(d) Contract by carrier, exempting himself from liability for negligence. (1909) 32 Mad 95 (107) (SB) ** A 1965 Cal 252 (259) (DB) ** A 1962 Cal 544 ** A 1960 Assam 71 (72, 75, 76) (DB).

[But see A 1962 Cal 311 (323).]

(dd) Partnership formed to carry on Government contract which expressly prohibited assignment or sub-letting of contract — Not illegal on ground of public policy A 1967 Mad 449 (450) (DB).

(e) Risk note exonerating railway company from liability except for loss of complete package. A 1918 Cal 796 (797) (DB).

(ee) Partnership agreement to carry on transport business with vehicles belonging to a partner or to the firm on the authorisation of permits held by a partner. A 1966 Madh Pra 13 (17) (DB) ** A 1969 SC 493 (495, 496). (A 1967 Mad 100, Reversed; A 1963 Mad 413 and A 1962 Andh Pra 14, Overruled.)

(eee) Transfer of a licence to give cinematograph exhibition by a licensee is not opposed to public policy. 1979 All LJ 1205 (1207) (DB).

(ei) Clause on receipt stipulating that launderer shall incur no liability in respect of any damage — Validity — Liability of Launderer — No question of public policy is involved but minimum duty of care imposed upon all bailees under Section 151 cannot be avoided by inserting such a clause — Breach of that duty clothes party affected with right to recover damages commensurate with consequences. A 1970 Mys 154 (155).

(f) Sale of jajmanka brit. A 1924 Pat 321 (322).

(ff) Agreement between parties to submit a single tender to Government at an agreed rate to avoid competition. ILR (1962) Cut 266.

(g) Insurance policy covering risk of death by suicide. A 1945 Oudh 152 (160) (DB) ** A 1968 J & K 39 (44).

(gg) Contract to supply jute to foreign firm — Supply dependent upon seller obtaining quota and licence from Government — Contract not subject to any term that contract was subject to quota or license — Quota and licence not obtained — Jute not supplied — Arbitration award awarding damages against sellers — Contract and award held not against public policy. A 1960 Cal 702 (708) (DB).

(h) Custom of Dhadwai charging certain percentage on commodities sold is not opposed to public policy. A 1927 Nag 89 (95).

(i) Marriage performed outside British India to evade provisions of Sarada Act. A 1940 Mad 901 (902).

(j) Partition suit among co-sharers — Award — Clause that none of such co-sharers should acquire interest in tenancy falling to share of another and on such acquiring to transfer it to such co-sharer without price — Provisions held, was not opposed to public policy. (1936) 163 Ind Cas 347 (350) (Cal).

(k) Sale of calf for less amount reserving right of pre-emption and on condition not to castrate with provision for damages for breach. A 1915 Cal 53 (54) (DB).

(kk) Agreement for sale of goods in 'black market' — Consideration to consist of 'black money' — Transaction not opposed to public policy. A 1976 Delhi 24 (29).

(kkk) The averments in the plaint disclosed that the money which was to be advanced to the defendants under the agreement in question was money which had not been disclosed to the Income-tax authorities, and that the said fact was made known by the plaintiffs to the defendants.

Held that the object of the agreement pleaded in the plaint was not to evade the payment of income-tax, and the said agreement was not opposed to public policy and illegal or void on that ground. (1974) 76 Bom LR 156.

(l) Promissory note executed to induce witness to give evidence in executant's favour. A 1914 Mad 366 (367) (DB).

(m) An agreement by a widow not to claim enhancement of the maintenance. A 1924 Mad 687 (688) : 47 Mad 308 (DB).

[See also 1978 Cri LJ 703 (705) : 1978 All LJ 159. (Compromise between husband and wife that amount of maintenance agreed to be

Section 23 — Note 12 (contd.)
paid by husband to wife will not be enhanced at any time — Not against public policy.)]

(mm) Agreement by wife not to claim any maintenance in consideration of lump sum payment — Held not opposed to public policy. A 1978 Mad 103 (DB).

(mmm) Suit for judicial separation by wife — Husband agreeing to maintain wife and children — Subsequently, husband stopping sending maintenance amount — Suit for enforcement of agreement — Defence by husband that agreement was against public policy not accepted. A 1980 Cal 244 (249).

(n) Contract of pre-emption in United Provinces. A 1924 All 400 (403, 404) (DB).

(o) Rule providing that on death of shareholder his legal representative should apply for transfer of shares in his name, else shares would not vest in him is reasonable. A 1926 Mad 785 (786).

(oo) The dealing in shares with unregistered remisier of Stock Exchange does not make the contract between the parties as being opposed to public policy. (1976) 2 Malayan LJ 253 (256).

(p) Agreement by person appointed as deputy of minor khatib to pay money in consideration of his appointment. (1910) 8 Ind Cas 745 (745) (Mad).

(pp) Motive and consideration or object are two different things. An expectation that there would be no prosecution for embezzlement if the embezzled amount is made good by transfer of house property by sale provides only motive and does not provide any prohibited consideration. The transfer therefore does not offend against public policy. ILR (1970) 2 All 94.

(q) Agreement to withdraw application for licence to carry mails in consideration of payment of money by a competing applicant. A 1946 Mad 289 (290, 291).

(r) An agreement by an executor to receive remuneration for services rendered by him, not from the estate but from third person. (1895) 22 Cal 14 (20) (DB).

(s) Loan of money to aid litigant not for the purpose of getting the property recovered but only with a condition for refund of money actually advanced. A 1954 Hyd 98 (103) (DB).

(ss) Agreements to finance litigation in consideration of having share of property, are not per se opposed to public policy. They may be so if the object of the agreement is an improper one, such as abetting unrighteous suits or gambling in in litigation. A 1931 PC 100 (104) ** A 1924 PC 162 (174) : 52 Ind App 1 ** (1905) 27 All 271 (290) : 32 Ind App 113 (PC) ** (1893) 20 Cal 843 (847) : 20 Ind App 112 (PC) ** (1876) 2 Cal 233 (257) : 4 Ind App 23 (PC) ** A 1963 Andh Pra 370 (372) (DB) ** A 1958 Andh Pra 630 (631) (DB).

(t) Agreement by member of joint Hindu family to take a share lessened to the extent of the cost incurred on his higher education. A 1954 Nag 361 (364, 365) : ILR (1954) Nag 479 (DB).

(u) Loan advanced by Government with condition that the amount is recoverable as arrears of land revenue. A 1955 Bom 305 (311) (DB).

(v) Chit fund not involving any risk, speculation or uncertainty. 1958-1 Andh WR 456 (457).

(w) Agreement to bring suit in one only out of two Courts having jurisdiction is not opposed to public policy. A 1946 Lah 57 (61) (FB). (Per Mahajan J.) ** A 1968 Mad 194 (194) ** A 1968 Pat 44 (45) (DB). (A 1956 Madh B 120, Not foll.) ** A 1968 Raj 89 (93, 94) : 1967 Raj LW 129. (A 1956 Madh B 120, Dissented from.) ** 1960 MPLJ 1359 (DB).

(x) Agreement in a compoundable case to pay money in lieu of other party agreeing to drop prosecution. 1946 Jaipur LR 327 (331) (DB).

(y) Dealing in differences by way of forward contracts. A 1958 Cal 703 (706, 707) ** A 1958 Cal 703 (707, 708) ** ILR (1956) 1 Cal 297 (DB).

(z) Agreement among the members of Senayar community to entrust all betel leaves grown in the village to a particular person — the highest bidder at the auction — and not to sell themselves to any other individual. The contract is not in restraint of trade. (1967) 1 Mad LJ 117 (120).

(25) The condition in a sale deed that the purchasers of the share would not partition the same without the consent of the vendor places a restriction on the right of ownership of the vendees only during the lifetime of the vendor and not permanently and therefore is not opposed to public policy. A 1915 All 40 (41).

(26) Where a creditor by operation of a foreign law was deprived of his claim over a debt arising in that country and at the same time discharged the debtor of his liability by the payment made to the Government in whom the property in the debt was vested, it was held that the creditor could not enforce that liability in India by attachment of the debtor's property ignoring what has happened under the foreign law which being a law of the same kind as the one existing in India itself could not be said to be opposed to public policy. A 1955 SC 590 (604).

(26) The common law of England and that of India have never struck down contracts of wager on the ground of public policy; indeed they have always been held to be not illegal notwithstanding the fact that the statute declared them void. There is no definite head or principle of public policy evolved by Courts or laid down by precedents which would directly apply to wagering contracts. A 1959 SC 781 (797).

13. Champerty and maintenance.— (1) Champerty, under English law, is something against good policy and justice; something tending to promote unnecessary litigation; something immoral in law, and to constitute which a bad motive, in the same sense is necessary. (1863) 8 Moo Ind App 170 (187) (PC).

(2) The English law of champerty is not applicable in India. (1873-74) 1 Ind App 241 (265) (PC) ** (1893) 20 Cal 843 (847) : 20 Ind App 112 (PC) ** (1876-77) 2 Cal 233 (255) : 4 Ind App 23 (PC) ** (1955) 2 Mad LJ 339

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(352) (DB) ** A 1954 Bom 478 (482) (DB) ** A 1963 Andh Pra 370 (372) (DB) ** A 1962 Andh Pra 457 (458) (DB) ** A 1958 Andh Pra 630 (631) (DB).

(3) There is no law in India which would make agreements, which would, under English law, be called champertous, void. (1908) 35 Cal 420 (426) : 35 Ind App 48 (PC) ** A 1924 PC 162 (173) : 52 Ind App 1 ** A 1945 Oudh 152 (158) (DB) ** A 1930 Lah 392 (393) (DB) ** A 1924 Mad 877 (879) ** A 1921 Oudh 207 (208) ** A 1920 Nag 69 (71).

(4) The ground, upon which agreements, which are champertous or agreements for maintenance, have been held to be void, in this country, is that they are contrary to public policy, or are considered to be immoral and against public policy. (1874) 13 Beng LR 530 (548) (DB).

[See also A 1937 Mad 161 (162) (DB).]

(5) In deciding whether a particular transaction is vitiated under this section, the Courts are to consider whether the transaction is merely the acquisition of an interest in the subject of the litigation bona fide entered into or whether it is an unfair or illegitimate transaction, got up for the purpose merely of spoiling litigation or disturbing the peace of families, and carried on from a corrupt and improper motive. (1873-74) 1 Ind App 241 (265) (PC) ** A 1938 Lah 23 (28) ** A 1936 Rang 491 (492) (DB) ** A 1933 Rang 418 (421) (DB) ** A 1931 Cal 144 (149, 150) (DB).

(6) In a suit to recover money given to finance litigation, plaintiff must prove the agreement to be just and equitable. A 1934 All 1023 (1024).

(7) Champertous agreement — Though unenforceable money advanced thereunder is recoverable. A 1976 Andh Pra 112 (121) : (1975) 1 APLJ (HC) 344.

(8) Where A who had agreed to pay B a certain sum of money, in consideration of B supplying funds to A and otherwise assisting him in a litigation, it was held, that B was entitled to recover the amount which A had agreed to pay. (1932) 138 Ind Cas 900 (902) (PC).

(9) Where an agreement to finance litigation up to the High Court is entered into, the mere fact that no appeal was lodged, as it became unnecessary to do so, does not enable the party to evade his obligations. A 1934 Lah 1017 (1018).

(10) Agreement by N as agent of F, to give loan to K — K promising to grant lease of his zamindari to N — K getting loan from another person and granting him lease — N suing K for specific performance of agreement — After N's death his heir assigning his interest under agreement to F — Assignment, held, was not void for champerty. (1861) 8 Moo Ind App 170 (188) (PC).

(11) Where a claimant to property, unable to fight out his own case, engages another person to act and represent him wherever necessary and promises certain sum to him on success of suit, such agreement is not champertous or void as against public policy. A 1936 Rang 491 (493) (DB).

(12) An agreement, taken by a pleader, that he shall be given part of the property, in dispute, in the suit, in which he is engaged, must, necessarily be contrary to public policy, and therefore, unlawful. A 1925 Bom 470 (471) (DB).

(13) Where suit is not a speculative one, any agreement about it is not champertous. A 1922 Upp Bur 12 (14).

(14) A speculative sale is not bad on the ground of being against public policy. (1895) 18 Mad 374 (378) (DB).

(15) Transferee's claim to recover property, which he has bought by paying costs of suit, is a speculation in litigation, but it is not of such a nature as to be rendered invalid in law. A 1925 Oudh 71 (72).

(16) Champertous agreements are, in their essence, speculative; and fairness or otherwise of a particular bargain is to be decided regard being had to the value of property and the commercial value of claim. The proportion to be retained by the claimant is an important matter to be considered while judging the fairness of a bargain made at a time when result of litigation is problematical. A 1940 PC 19 (23) : 67 Ind App 50.

(17) In considering the fairness of the transaction the circumstances have to be weighed as a whole and the disparity in consideration is not the sole criterion. In doing so it is to be remembered that it is not the market value of the property which has to be taken into consideration but the commercial value of the property which is the subject-matter of the transaction. A 1955 All 393 (396) (DB).

(18) Where the reward stipulated was out of all proportion to the actual expenses incurred, held, that the agreement was unconscionable and, therefore illegal as against public policy. A 1926 Lah 43 (45) ** A 1938 Lah 23 (27, 28) ** A 1924 Rang 48 (51) (DB) ** (1889) 11 All 128 (135) (DB) ** (1889) 11 All 118 (125) (DB) ** (1874) 20 Suth WR 446 (450) (DB).

[See however A 1928 Mad 437 (439) (DB).]

(19) In the case of a contract, to advance money to help an appeal being preferred to the Privy Council with a stipulation for reward of a size which is unconscionable a decree should be passed only for the amount actually advanced with interest. (1893) 15 All 352 (358, 359) : 20 Ind App 127 (PC) ** (1889) 11 All 128 (135) (DB) ** (1889) 11 All 118 (126) (DB).

(20) Agreement to finance litigation and receive half of decretal amount is prima facie inequitable and opposed to public policy. A 1934 All 1023 (1024) ** A 1962 Andh Pra 457 (459) (DB).

(21) Agreement by plaintiff to finance defendant's partition suit in consideration of defendant giving half of his share is an unconscionable and extortionate bargain and opposed to public policy. A 1940 Bom 143 (147) (DB).

(22) Agreement to fianance litigation in consideration of the claimant's getting a share of property, if successful, but containing no provision for refund in case of failure, is champertous. A 1919 Mad 718 (724) (DB).

(23) Agreement under which Mahommedan Mooktear interfering in affairs of Hindu family advanced money to carry on suit by members of that family to set aside alienations, made by their father, on the understanding that he was to be entitled to the share of estate, recovered from purchasers in the event of success, savours of champerty. (1874) 13 Beng LR 516 (517, 518) (DB).

Section 23 — Note 13 (contd.)

(24) Where the form of a contract is so adopted as to evade the effect of the transaction being stamped with the character of champerty, it will be set aside. (1869) 12 Moo Ind App 275 (309) (PC).

(25) An agreement by a Chartered Accountant to accept engagement on percentage of profits is void. A 1957 Cal 449 (458) (DB).

(26) An agreement to pay the agent appearing in a case before the Supreme Court his out of pocket expenses and a fixed amount in any event and the taxed cost if the case proved to be successful is not void on the ground of the latter portion of the agreement. It is not either an agreement affected by the law of maintenance or one which is champertous. A 1954 SC 26 (28).

(27) The plaintiff cannot be non-suited merely because some other person has been attending the hearings or has been helping the plaintiff in the conduct of the case. This conduct does not constitute collusion which can, in law by itself entail dismissal of the suit. A 1959 Punj 434 (439) (DB).

14. Agreements to stifle prosecution.—(1) An agreement, the object of which is to stifle a prosecution, is against public policy. A 1945 Cal 218 (234) (DB) ** A 1969 Mad 15 (17) (DB) ** A 1963 Madh Pra 139 (140) ** 1966 Ker LJ 819 ** A 1960 Cal 741 (748) ** 1959 Raj LW 75.

(2) The essential element in stifling a prosecution is the tampering with the administration of justice by a private individual. A 1926 Cal 519 (521) (DB) ** A 1926 Cal 455 (456) (DB).

(3) In regard to agreements to stifle prosecutions, it is of the essence of the defence that the defendant should establish a contract, whereby the proposed or actual prosecutor agrees, as part of the consideration received or to be received by him, either not to bring or to discontinue criminal proceedings for some alleged offence. A 1941 PC 95 (96) ** A 1952 Bom 315 (320) ** A 1936 Mad 656 (658) ** A 1966 Orissa 228 (229) ** A 1965 SC 166 (169, 171) ** 1965 Ker LT 849.

[See also A 1973 Mad 223 (224) (DB).]

(4) It is only where recourse is not had to Section 345, Cr. P. C. and the agreement between the injured person and the offender is to terminate the criminal proceedings against the offender otherwise than in accordance with that section, the agreement would fall within the mischief of this Section. And what Section 345 permits cannot be viewed as unlawful or opposed to public policy. (1976) 78 Bom LR 661 (668).

(5) If it be an implied term of a deed that criminal complaint would not be further proceeded with, then the consideration for the deed is unlawful, quite irrespective of the fact, whether any prosecution in law has been started or there is something for which it is to be dropped. A 1940 Pat 573 (575) (DB) ** A 1969 Mad 15 (17, 18) (DB) ** A 1967 Ker 51 (53).

(6) Stiffling of prosecution — Contract for sale of disputed plot with sole consideration of securing acquittal in a pending criminal case is opposed to public policy and hence not enforceable — Adequacy of sale consideration will not change the position. (1971) 1 BCLJ 82 (All).

(7) The question whether there was, or was not, an agreement to stifle prosecution is one of fact. A 1945 Cal 218 (245) (DB) ** 1950 All LJ 379 (381) ** A 1967 Ker 51 (54) ** A 1961 All 173 (174) ** 1959 Ker LJ 733 (DB).

(8) An agreement which has the object of stifling a prosecution, is from its very nature seldom set out on paper. Like many other contracts, it has to be inferred from the conduct of the parties. A 1950 Nag 71 (76) ** A 1967 Ker 51 (54).

(9) In deciding the question as to whether the consideration for an agreement was the settlement of the pending criminal cases the Court cannot be confined to the terms of the agreement. A 1940 Cal 337 (342) (DB).

(10) Transaction entered into with object of stifling criminal prosecution — Object achieved — Parties not in fiduciary relationship — Both parties in pari delicto — One of the parties cannot repudiate transaction. A 1938 Oudh 24 (26).

(11) Where an offence is non-compoundable, an agreement, the purpose of which is to compound that offence, is forbidden by law and is illegal as opposed to public policy. A 1945 Bom 82 (84) ** A 1950 Nag 71 (76) ** A 1941 Pat 349 (350) ** A 1939 Lah 98 (99) (DB) ** 1963 Ker LJ 505 ** A 1960 Ker 194 ** 1960 Raj LW 27. (A 1947 All 317, Dissented from.) ** A 1945 Cal 218 (234) (DB).

(12) If, even a part of the consideration of an agreement is shown to be the stifling of a non-compoundable offence, the agreement must be held to be void. A 1943 Sind 197 (205) (DB) ** A 1953 Cal 415 (421, 423) ** 1950 All LJ 379 (381) ** A 1942 Mad 173 (174, 176).

(13) Where the consideration for an agreement is a promise not to prosecute for an offence, which is non-compoundable the agreement is not enforceable. A 1933 Bom 413 (414, 416) (DB) ** A 1942 Mad 662 (662) (DB). (A 1942 Mad 173 : 43 Cri LJ 734, Reversed.) ** A 1940 Pat 683 (689) (DB) ** A 1923 Cal 292 (292) (DB) ** A 1957 Pat 477 (480) ** A 1940 Pat 573 (576) (DB) ** A 1937 All 370 (372) ** A 1934 Pesh 105 (106) (DB) ** A 1923 Lah 689 (690) ** (1912) 8 Nag LR 97 (104) ** (1905) 3 Low Bur Rul 42 (42, 43).

(14) An agreement not to prosecute for a non-compoundable offence, is not enforceable only where the consideration for the agreement was clearly such an illegal promise. A 1938 Bom 413 (414, 416) ** A 1922 Pat 502 (503) (DB) ** A 1917 Pat 454 (455) (DB).

(15) Where the consideration for an agreement is withdrawal of a complaint for a non-compoundable offence, the bond is void. (1913) 40 Cal 113 (117, 118) (DB) ** A 1938 Cal 840 (850) (DB) ** A 1934 All 1068 (1069) ** A 1931 All 128 (128) ** A 1924 Pat 305 (306) (DB).

[See however A 1929 All 456 (457). (It is not necessarily unlawful to agree to withdraw a criminal complaint of a non-compoundable offence; because it may have been withdrawn because complainant had very little chance to succeed in establishing his case.)]

(16) It is not enough that the motive which impelled the party, who undertook the liability under the agreement, was that a pending criminal case should be withdrawn. The test to be applied is whether it was an express or implied term of the bargain between the parties

Section 23 — Note 14 (contd.)
that a non-compoundable criminal case should not be proceeded with. A 1945 Bom 82 (84) ** (1955) 8 Sau LR 324 (326) ** (1952) 56 Cal WN (4DR) 91 (96) ** A 1927 All 318 (318) (DB) ** A 1922 Pat 502 (503) (DB).

(17) Contract for payment of money in respect of which a criminal prosecution is pending is not by itself opposed to public policy, where there is a civil liability. The consideration and object of such a contract is not illegal within the meaning of Section 23. A 1931 Cal 421 (422) (DB) ** A 1947 All 317 (325) (DB) ** A 1941 Oudh 593 (596) (DB) ** A 1934 Pesh 105 (106) (DB) ** A 1932 Lah 541 (543) (DB).

(18) The fact that the prosecution was actually withdrawn as a result of the execution of the bond does not necessarily show that the object or consideration of the bond was the stifling of the criminal case. A 1938 Cal 840 (850) (DB).

[See also A 1951 All 613 (614).]

(19) Agreement between husband and wife, pending criminal case against husband by wife's brother relating to a non-compoundable offence, is valid, provided, it is made independently of the criminal case. A 1926 Lah 33 (34).

(20) Where security is given by an outsider, who is under no existing obligation, the consideration could be nothing else but withdrawing of the criminal case and as such, the security is not entertainable in law. A 1938 Cal 840 (851) (DB).

(21) Where the withdrawal of the complaint is due to the debtor having executed a pronote in favour of the creditor, but such withdrawal is not the consideration of the pronote the pronote is not invalid. A 1927 Lah 530 (533).

(22) Sale of property, for raising money to be given to third party as bribe, to induce him to withdraw criminal charge against vendor — Vendee not party to unlawful agreement — Sale held valid. (1882) 8 Cal 24 (28) (DB) ** A 1955 Mad 369 (375) (DB).

(23) The advance of a loan by A to B for payment by latter to C in order to avoid the prosecution of his father for embezzlement is not hit by Section 23. A 1952 Bhopal 32 (33).

(24) A man, to whom a debt is due may take security for that debt from his debtor, even though the debt arises out of a non-compoundable offence, and he threatens to prosecute for that offence, provided, he does not in consideration of such security agree not to prosecute and such an agreement will not be inferred from the creditor using strong language. A 1933 Bom 413 (416) (DB) ** A 1945 Cal 218 (224) ** A 1940 Cal 337 (341, 342) (DB) ** A 1936 Mad 656 (659) ** A 1927 Lah 231 (232).

(25) In cases of agreement to stifle prosecutions, the fact that there was a debt really due from the accused to the complainant, is irrelevant if the agreement to abandon a prosecution is part of the consideration for payment of the debt. A 1941 PC 95 (96) ** A 1951 All 613 (614).

(26) A creditor must not, by stifling prosecution, obtain a guarantee for his debt. A 1933 Bom 413 (416) (DB) ** A 1926 Cal 59 (64) (DB).

(27) If the agreement as to the civil liability changes the nature or the extent of the original civil liability; for example, if the guarantee of a surety is introduced or if the liability is changed from a personal one to a mortgage security, this will be an indication that the agreement is not merely in settlement of the original civil liability, but that it is one made under pressure and in return for an agreement not to prosecute. A 1940 Cal 337 (342, 343) (DB).

(28) A reference is invalid and the award which followed would be inoperative when the reference is the result of an understanding between the parties to abandon the prosecution of a non-compoundable case. A 1944 Sind 80 (81) (DB) ** A 1939 Pat 291 (292) ** A 1933 Cal 817 (818) ** A 1963 SC 107 (112).

(29) If it is an implied term of the reference to arbitration of a civil dispute that the criminal complaint would not be further proceeded with, then the consideration of the reference is invalid, whether any prosecution had been started or not. A 1930 PC 100 (102). (A 1926 Cal 519, Reversed.)

(30) Where the partners agree to refer their whole dispute concerning the partnership to arbitration, the agreement does not become void under Section 23 simply because a criminal prosecution under Section 406, Penal Code, is pending against one of the partners at the instance of the other partners, and in pursuance of such an agreement the prosecution is dropped. A 1927 Lah 465 (466).

(31) In case of offence compoundable with or without Court's leave, agreement between complainant or prosecutor and accused, or person interested in his welfare, to withdraw prosecution, is not against public policy and is therefore valid. A 1941 Rang 231 (233) ** A 1946 Mad 80 (80) ** A 1945 Bom 82 (84) ** A 1942 Mad 173 (176) : 43 Cri LJ 734 ** 1935 Oudh WN 553 (554) ** 1960 MPLJ 1374.

(32) Agreement to stifle prosecution — Agreement to compound offence compoundable with Court's permission — Not illegal when Court's permission is obtained. A 1973 Raj 260 (261) : 1973 Raj LW 446.

(33) Compounding, on behalf of wife, a compoundable offence, for consideration, by husband, is legal and the consideration is not illegal merely because of the absence of signature of wife. A 1928 Bom 305 (306).

(34) A promise to pay sum of money as compensation for the abduction of woman is not enforceable, abduction being a non-compoundable offence. 1904 Pun Re No. 82, p. 302 (304) (DB).

(35) Though criminal breach of trust is not compoundable in British India, pronote executed in consideration of dropping prosecution of such offence committed in French territory, where it is a compoundable offence, for consideration, payable in British territory, is valid. A 1923 Mad 708 (709, 711).

(36) Offence compoundable with Court's permission — Compromise during pendency to refer dispute to arbitration and withdraw prosecution — Compromise is lawful. A 1939 Lah 98 (99, 100) (DB).

(37) Where the complaint is about a non-compoundable offence but the sworn statement discloses an offence which is only compoundable, the parties are at liberty to compound

Section 23 — Note 14 (contd.)
and an agreement in respect of such compoundable offence is not invalid. A 1946 Mad 80 (80) ** A 1916 Cal 917 (917, 918) (DB).

(38) The withdrawal of a false complaint intentionally lodged to coerce the opposite party to enter into an agreement is not good consideration for such agreement even though the offence alleged is a compoundable one. A 1932 Lah 446 (447) (DB).

(39) Agreement with a consideration to withdraw criminal case for offences under S. .420 and S. 406, I. P. C. — Agreement is hit by this Section. A 1976 Cal 196.

(40) A promissory note executed for the amount to the person who reported an offence under Section 406, Penal Code, immediately after his complaint was recorded by police, is not void under Section 23. 1950 All LJ 379 (382).

(41) An agreement to settle brother's dues to save him from contemplated criminal action with creditor who concedes time and accepts instalment payments is not hit by the section. The motive behind the agreement is saving the brother and not stifling criminal proceedings. The consideration therefor is the creditor's such acceptance and not his refraining from taking the criminal proceedings. The latter is no doubt an outcome of the agreement but that cannot be used to claim the agreement vitiated by the section. (1971) 2 Andh WR 98.

(42) Agreement to forfeit one's legal share in property for saving one's son from criminal prosecution is void. A 1971 Pat 385 (388, 389).

(43) Pronote executed with motive to escape civil or criminal liability — Consideration for pronote was not the one to stifle prosecution and therefore illegal. A 1975 Ker 101 (102, 103).

(44) The test to determine whether the condition amounted to stifling the prosecution is really to find out from the language of reference along with the attending circumstances as to what was the consideration for the agreement. A 1961 All 173 (174).

(45) There cannot be an agreement to the effect that even if there is an embezzlement, the person who has embezzled will not be prosecuted and the matter will be referred to an arbitration. 1965 All LJ 538.

(46) A principal has right to revoke vakalat given by agent in favour of Advocate, for if he is to be constrained to continue his litigation through a counsel not of his choice, it would tantamount to stifling the prosecution of a lawful suit and certainly, therefore it will be against public policy. A 1968 Mad 333 (334).

(47) Where the offence is compoundable only with the permission of the Court before which the prosecution is pending, till such permission is granted, the offence remains non-compoundable. A 1963 Madh Pra 139 (139, 140).

15. Marriage contracts.— (1) Marriage contract is not per se opposed to public policy and therefore void. A 1949 Pat 250 (252) (DB) ** A 1963 Mys 245 (247).

(2) Contract of betrothal entered into by a Hindu parent is not void as being against public policy or Hindu Law. 1937 Mad WN 1274 (1277).

(3) A breach of betrothal agreement gives rise to a claim for damages. A 1915 Lah 480 (481).

(4) It is a matter of public importance that parents and guardians, as a class, should duly perform their duty as sponsors in the marriages of infant children and agreements which intend to cause misfeasance in the performance of this duty may be properly held void as being opposed to public policy. 1889 Pun Re No. 128, p. 446 (450, 451) (FB).

(5) To constitute marriage brokerage contract, some third party must stipulate for a personal benefit to himself for bringing about marriage. 1937 Mad WN 1274 (1277).

(6) Where the object of an agreement is to procure by corrupt means, the guardian's consent to a desired marriage and is therefore, a bargain and sale of the minor in marriage, as it were, such agreement is void, as opposed to public policy. 1892 Punj Re No. 112, p. 385 (387) (DB).

(7) A contract to pay money to the father of a girl in consideration of his giving her in marriage is immoral and opposed to public policy. (1909) 32 Mad 185 (188) (FB) ** 1889 Pun Re No. 128, p. 446 (448) (FB) ** A 1957 Orissa 124 (129) ** A 1928 Nag 89 (90) ** (1912) 10 All LJ 159 (161, 162).

[But see A 1926 Pat 582 (600) (DB).]

(8) An agreement for the purchase of a bride for the son of a person who had given his daughter in exchange for finding a wife for that person is void being against public policy. A 1930 Lah 561 (566) (DB).

(9) Contract by A to give his daughter in marriage to D's son and to pay damages in case of breach, is void since it creates pecuniary interest in marriage taking place. A 1914 Mad 551 (552) (DB) ** A 1935 Pesh 121 (122).

(10) An agreement providing money payment for the negotiation of a marriage by a third party is void being immoral and contrary to public policy. (1889) 13 Bom 131 (136).

(11) Agreement to pay money to a person for persuading woman to marry a person, paying money, is opposed to public policy. A 1919 Upp Bur 2 (2).

(12) The defendant bigamously married the plaintiff in contravention of Section 5 of the Hindu Marriage Act and executed a deed of gift in plaintiff's favour soon after marriage. Some time later the defendant dispossessed the plaintiff. The plaintiff filed a suit for declaration of title and possession. It was held that the plaintiff must be non-suited not only because the gift was void but also because the object of transaction being illegal and immoral, the Court could not lend its aid by reason of the doctrine of 'pari delicto' or 'particeps criminis'. (1974) 40 Cut LT 582.

(13) Receiving consideration, by those who arrange marriages, when the money received, is intended to benefit those persons and not for the expenses of the ceremony or for the benefit of bridegroom or bride, is against public policy and hence no suit would lie to enforce any agreement to that effect. A 1944 Nag 159 (160) (DB).

(14) Contract for payment of money by parent of either boy or girl, after performance of marriage is not void ab initio, as being opposed to public policy. A 1919 All 248 (248) (DB).

(15) A promise to pay a particular sum of money or to settle some property on a bride or bridegroom in consideration of her or his

Section 23 — Note 15 (contd.)
marrying the son or daughter of the promisor is not illegal. A 1945 Mad 165 (166) •• (1959) 2 Mad LJ 502.

(16) Betrothal with unborn person is against public policy. A 1930 Lah 561 (564) : 11 Lah 598 (DB).

(17) Consideration paid in consideration of betrothal agreement is not recoverable. A 1915 Lah 480 (481).

(18) Although a marriage when performed in the Asura form is valid, an agreement to pay money to the father, in consideration of such marriage, is not valid, and the money cannot be recovered by suit. (1909) 32 Mad 185 (190) (FB) •• A 1926 Pat 582 (588) (DB).

(19) A suit can lie to recover money already paid to the girl's father, in case the marriage falls through, there having been a breach of the marriage contract. A 1928 Nag 89 (90) •• A 1954 Orissa 17 (23) (DB) •• A 1951 Pat 519 (520) (DB) •• A 1949 Pat 250 (252) (DB) •• A 1947 Pat 132 (134) •• A 1968 Andh Pra 375. [But see (1912) 10 All LJ 159 (161, 162).]

(20) Money paid for arranging for marriage can be recovered if contract is not one of brokerage. A 1923 Nag 296 (296, 297).

(21) Where certain amount was borrowed under a promissory note for celebrating the marriage of the borrower's daughter but the lender had no knowledge that the marriage was in contravention of the Child Marriage Restraint Act the transaction was not unlawful within the meaning of Section 23, Contract Act. (1958) Andh LT 14 •• A 1967 Andh Pra 83 (85) •• A 1958 Andh Pra 145 (146) (DB). [See also A 1972 All 357. (Debt incurred by major members for marriage of a minor which is restrained by Child Marriage Restraint Act, 1929 is a 'debt' for legal necessity — Such debt is binding.)]

(22) Where the plaintiff's case in the plaint was that a promissory note executed by their father came into existence while the criminal proceedings were pending against their father and therefore its execution was opposed to public policy, it is the duty of the plaintiffs to prove that the promissory note was executed under the circumstances stated in the plaint. Where there is no evidence to connect the criminal prosecution with the execution of the promissory note its execution cannot be held to be opposed to public policy. A 1964 Mad 327 (329).

(23) Taking of 'Tilak' forbidden by and made offence under Bihar Dowry Restraint Act — Money paid under contract — Marriage not taking place — Money cannot be recovered, contract under which it was paid being one forbidden by law. A 1962 Pat 343 (345, 346, 348) (DB).

16. Adoption contracts.— (1) Agreement by widow, whereby she undertakes not to exercise her power to make adoption, is void as being opposed to public policy. A 1919 Mad 447 (452) (DB) •• A 1962 Bom 175 (181) (DB).

(2) A contract to give a son in adoption in consideration of the natural parents receiving an annual allowance during their lives is void under Section 23. (1874) 13 Beng LR (App) 42 (43, 44) •• A 1922 Bom 382 (382) (DB).

(3) Agreement by adoptee as condition precedent to give some property to widow's brother is binding on adopted son. A 1926 All 7 (10, 14) (DB).

(4) Agreement to pay bribe to procure adoption of a boy is one against public policy and therefore void. A 1915 Mad 130 (131) (DB).

(5) Contract offering inducement to one party to adopt a certain person on pain of losing a part of his property is not opposed to public policy, if the parties intend thereby to end family trouble. A 1925 Mad 321 (322, 323) •• A 1926 Mad 1093 (1093, 1094) (DB).

(6) Although under law a person validly adopted cannot renounce his status arising under the adoption a person whose alleged adoption is disputed can by an agreement admit that there had been no adoption of him at all. As his admission does not amount to the renouncement of any status the agreement is not invalid. 1947 Marwar LR (Civ) 100 (104) (DB).

(7) Recognition by Thikanedar of adoption made by Sikmi Jagirdar under him upon execution of bond for payment of nazarana — Bond cannot be enforced after Constitution — Power to give sanction of payment of nazarana lapsed after Constitution — Bond is therefore without consideration and cannot be sustained on any ground of public policy. 1961 Raj LW 632.

17. Religious contracts.— (1) An agreement to pay money to another for offering prayers to God for the success of the promisor in a suit is not opposed to public policy. A 1929 Mad 812 (812) (DB). [But see A 1927 All 406 (407) (DB).]

(2) Agreement to perform religious rites to secure, by propitiation of deity, confirmation in post — Agreement is not opposed to public policy. A 1935 Nag 119 (120).

(3) Agreement for consideration by a Gayawal to pay part of his earnings from certain ceremonies to an Acharya is neither opposed to public policy nor uncertain and so is not void. A 1916 Pat 218 (219) (DB).

(4) Agreement by Pandas of temple to share offerings to deities is not necessarily against public policy. A 1923 All 56 (57).

(5) Agreement among Maha Brahmans regulating method in which offerings shall be collected or divided which does not control or restrict discretion of those, by whom offering or gifts are made, is valid. A 1918 Oudh 462 (463).

(6) Sale of a share of the right to receive the offerings of a share is not opposed to public policy, if it is made in favour of one, who is a participant in the offerings, and not to a stranger. A 1933 Lah 223 (224).

18. Agreement to indemnify surety.— (1) An agreement by the accused with the surety who gives bail to him, that he will indemnify the surety if the bail is forfeited on account of the accused's non-appearance is void, being opposed to public policy. A 1925 Nag 59 (60) •• A 1930 Cal 598 (597) •• A 1920 Cal 498 (498) •• 1899 Pun Re No. p. 1 (4) (DB).

(2) Bail bond forfeited due to accused's failure to appear — Third person agreeing to indemnify surety in case of forfeiture — Agree-

Section 23 — Note 18 (contd.)
ment to indemnify is illegal. A 1915 Cal 695 (695) (DB).

(3) Person standing surety for another on receipt of cash consideration — Latter cannot recover consideration. (1922) 65 Ind Cas 137 (138) (DB) (Lah).

(4) Where A deposited a certain sum of money with B who undertook to stand surety for a person who was an accused in a case but not for his good behaviour and B agreed to refund the money to A on the termination of the case it was held that the agreement was not void as being opposed to public policy. A 1952 Ajmer 28 (28).

(5) No agreement between surety and accused that latter would reimburse former for amount of security on forfeiture — Amount forfeited — Accused, three years later, voluntarily executing mortgage in favour of surety, consideration being amount forfeited — Section 23, held, did not apply. A 1938 Lah 732 (734) (DB).

19. Office brokerage contracts.— (1) A promise to pay money in order to procure resignation of public servant with a view to promisor's securing that appointment is void as being an office-brokerage agreement. (1907) 30 Mad 530 (531).

(2) It is contrary to public policy to induce public officers for money or other valuable consideration, to use their position and influence to procure a benefit. A 1921 Cal 185 (187) (DB) ** A 1916 Cal 266 (267) (DB).

(3) Agreement to withdraw candidature for a public office in consideration for certain sum to be annually paid amounts to bargain or traffic relating to public office and is opposed to public policy. A 1931 All 428 (429) ** A 1957 Pat 659 (660).

(4) A Kaikagada under which certain amount is paid as consideration with the object that a shanbhogue should not revert to his post and the person making the payment should continue in his place as a shanbhogue, is void under Section 23, Contract Act as its object is opposed to public policy. A 1953 Mad 506 (506, 507).

(5) Where plaintiff and defendant agreed that both should eventually bear costs of lambardari suit, brought by both of them and that successful party should pay to other half the pachotra of the office, held, agreement was void ab initio. 1893 Pun Re No. 86, pp. 346 (347).

(6) Transfer of a right to conduct charity by one trustee to another co-trustee for consideration, is against public policy, and confers no right on transferee. A 1938 Mad 982 (987) (DB).

(7) Agreement to pay money in consideration of recommendation to appointing authority is against public policy, and, therefore, void. A 1933 Mad 768 (768) ** A 1951 Madh B 113 (1) (113).

(8) The object or consideration of an agreement under which one person promised to pay another in consideration of his securing him an appointment outside the territorial limits of the Travancore State was held to be not unlawful within the meaning of Section 24 of Travancore Contract Act, 10 of 1115. 1949 Trav-Co LR 244 (245).

(9) Sale of palanquin bearing service Inam is not opposed to public policy. (1911) 2 Mad WN 588 (588) (DB).

(10) Agreement to give share of commission, allowed by Government as salary for services, is not opposed to public policy. 1912 Pun LR No. 201, pp. 642 (646).

20. Interference with course of justice.— (1) Agreement between parties to assist the other in litigation with object of delaying execution of decree is opposed to public policy within the meaning of Section 23. A 1933 All 303 (305) (DB).

(2) An agreement to make a disposition of property in the hands of the Court Receiver is against public policy, as an interference with the Receiver's work, and is unlawful. (1912) 16 Cal WN 114 (116) (DB).

(3) Contract to transfer property to a person, in consideration of his giving false evidence, is void as being against public policy. A 1940 Rang 73 (75).

(4) A promissory note executed in consideration of giving evidence is unenforceable whether the statement which a person may have promised to give be either true or false. A 1938 Mad 911 (913, 914).

(5) Agreement to bring suit in one only out of two Courts, having jurisdiction, is not opposed to public policy. A 1946 Lah 57 (61) (FB) ** A 1954 Mad 845 (846) (DB) ** A 1937 Nag 334 (335).

[But see A 1935 Nag 48 (49).]

(6) The mere fact that a part of the consideration for a sale of property is dependent on the result of a suit relating to that property, does not make the transaction bad as opposed to public policy. A 1932 Pat 80 (83) (DB).

(7) Agreement by judgment-debtor, not to appeal against the decree, in consideration of certain arrangements with the decree-holder, is binding upon the parties under Section 23. A 1931 Nag 126 (127).

(8) A contract involving a reference to arbitration in a pending suit without order of Court has the effect of ousting the jurisdiction of the Courts though only temporarily to proceed with the trial and therefore is opposed to public policy. A 1950 Orissa 169 (176) (DB).

(9) A compromise in a suit between tenant and landlord in contravention of Rules framed under the U. P. (Temporary) Control of Rent and Eviction Act and curtailing the powers of the District Magistrate, held, unlawful. A 1975 SC 1525.

(10) Where the illegality of an agreement on the ground of its interfering with the course of justice is established before the Court, it will be declared to be void even in the absence of a plea from any party about its illegality. 1954 Raj LW 423 (426).

21. Agreements creating interest against duty.— (1) If a person enters into a contract with a public servant, which he knows casts upon the public servant duties, conflicting with his duties as a public servant, the contract is void. (1909) 13 Cal WN 59 (62).

(2) It is sufficient to show that the personal interest created by the contract has a tendency to prevent the plaintiff from discharging his duties. A 1959 Madh Pra 151 (166 to 169) (FB).

(3) Commissioner appointed by Court, though at instance of party taking bond from latter —

Section 23 — Note 21 (contd.)
Bond is not enforceable. A 1923 Cal 436 (437) (DB).

(4) Person entrusted with sale of land, and occupying fiduciary position, using that position for interest of prospective purchaser for which purchaser agrees to pay him commission — Contract is unenforceable. A 1936 Mad 541 (543).

(5) Loan by a regimental bania to a sowar is not opposed to public policy. 1902 Pun Re No. 96, p. 432 (437) (DB).

(6) Payment of money to procure exercise of private influence with Government is not immoral or contrary to public policy. A 1917 Pat 92 (98) (DB).

(7) Suit to enforce agreement to sell two and half annas share in managing agency by way of bribe offered to plaintiff, a member of committee appointed to report on management of Company by defendant — Held agreement was not enforceable. A 1966 SC 1734 (1738).

22. Agreement between client and his pleader.— (1) Agreements between legal practitioners and their clients whereby the payment of the former is contingent on the success of the litigation, are improper and opposed to public policy. 1907 Pun Re No. 61, p. 280 (288) (FB) ** A 1954 Bom 478 (484, 485) : 1954 Cri LJ 1531 ** 1874 Pun Re No. 26, p. 130 (132) (DB).

[But see 1878 Pun Re No. 5, p. 33 (42) (DB).]

(2) A champertous agreement between an advocate and his client for the former being remunerated proportionately to the results of the litigation out of the property recovered cannot be enforced. A 1954 SC 557 (559, 560) : 1954 Cri LJ 1410.

(3) Agreement to pay vakil's clerk for special attention to his case is void, as against public policy. A 1918 Mad 504 (504) (FB).

(4) Loan transaction between a pleader and person, who is not his client, is not opposed to public policy and is enforceable. A 1917 Oudh 34 (36) : 20 Oudh Cas 67 (DB) ** A 1953 All 276 (281) (DB).

23. Benami transactions.— (1) Benami transactions are entered into for a variety of reasons and the benamidar holds the property in trust for his principal. A 1960 SC 213 (219).

(2) Where a public servant buys property in the name of another without the permission of the Government, his conduct is reprehensible but cannot be deemed to be against public policy. A 1923 Cal 154 (156) (DB) ** A 1931 Bom 269 (270, 271) (DB).

[But see A 1918 Oudh 457 (459) ** (1911) 11 Ind Cas 2 (2, 3) (All).]

(3) Benami purchase by police officer, while in service, is not void as being opposed to public policy. A 1919 Nag 50 (52).

[See however A 1933 Bom 262 (265) (DB).]

(4) Assignment of mortgage in the name of a patwari's mother is not against public policy. A 1917 All 462 (463) (FB).

[See also A 1944 Nag 325 (326).]

(5) Transfer of property to kanungo's wife, but really in favour of kanungo, is not against public policy. A 1917 All 447 (447) (DB).

(6) Plaintiff entering into agreement with defendant 1, Inspector of Land Records, to buy land in his circle — All transactions to be carried out in name of defendant 2 — Defendant 1 buying land in name of defendant 2 — Contract held, was not opposed to public policy. (1911) 6 Low Bur Rul 1 (3) (DB)

(7) Money lending by pleader in the name of his wife. Question in such cases is really one of professional etiquette rather than of public policy, and contract is not invalid. A 1923 Oudh 3 (4).

(8) Since the Service Rules of Court of Wards were not shown to be statutory rules, disregard thereof did not taint a benami arrangement whereby an employee of Court of Wards was conducting business in name of another person, with illegality. A 1965 SC 1364 (1367, 1369).

24. Agreement against bidding.— (1) There is nothing unlawful in two or more persons agreeing not to bid against one another at an auction sale. (1894) 18 Bom 342 (346) (DB) ** A 1975 Delhi 159 ** ILR 1962 Cut 266 ** A 1951 Mad 390 (391) ** A 1949 Nag 113 (113) ** A 1940 Bom 369 (373) (DB). (Public sale held for farming out public revenues.) ** A 1933 Oudh 124 (127) (DB) ** A 1918 Low Bur 77 (81) ** A 1917 Nag 62 (63). (Excise auction.) ** (1911) 10 Mad LT 338 (340) (DB) ** (1907) 6 Cal LJ 111 (116) (DB) ** (1889) 16 Cal 194 (199) (DB).

(2) An agreement not to bid against each other, with the object of defrauding a third person, is void. A 1933 Oudh 124 (127) (DB).

(3) An agreement between intending bidders that one should keep off from bidding is not unlawful or opposed to public policy. A 1973 Ker 266 (267).

(4) An agreement by intending bidders at an auction forming a ring to share the profits resulting from the 'knock out' is against public policy. A 1943 Lah 100 (100, 101) ** A 1954 Mys 29 (31) ** (1907) 6 Cal LJ 111 (116) (DB) ** A 1914 Sind 165 (169, 170).

(5) An agreement not to bid against each other in auction sale and the other should get a share in property purchased is not against the public policy. 1977 Pun LJ 255 (256).

(6) An agreement between several persons to purchase land jointly at an auction-sale, held under the Punjab Colonization of Government Lands Act, without bidding against each other, is not opposed to public policy. A 1932 Lah 32 (33).

(7) An agreement by which one party agreed to withdraw his tender to postal authorities to carry mails on bus, in consideration of the other paying certain amount, is not invalid under Section 23 as being opposed to public policy. A 1946 Mad 289 (291).

25. Monopoly.— (1) An agreement, the object of which is to create a monopoly is void, as being opposed to public policy. (1905) 28 Mad 520 (523) (DB).

(2) Agreement attempting to monopolise right to ply on hire motor boats, tends to fix hire at artificial figure and as such is against public policy. A 1936 All 112 (115).

(3) A contract by a District Board giving a person a monopoly to ply lorries along a road undertaking to permit no other lorry proprietor to use the road is void being opposed to public policy. A 1934 Lah 474 (475).

(4) Agreement of plaintiff not to set up business in consideration of which defendant promised to pay off certain sum for life is unlawful under Section 23 in spite of the fact that it was partly carried out. A 1916 Low Bur 51 (54) : 8 Low Bur Rul 380 (FB).

Section 23 — Note 25 (contd.)

(5) Grant of a monopoly in favour of a person by a panchayat to sell vegetables in the village is opposed to public policy under Section 23. A 1928 Lah 33 (34).

(6) A contract purporting to be a licence, granting exclusive right to collect hides of animals from a certain area amounts to granting a monopoly and is unenforceable by reason of S. 23. A 1938 Pat 473 (475, 476) (DB).

(7) Defendant executing kabuliyat in plaintiff's favour agreeing to pay him specified rent for privilege of carrying on trade within certain area — Contract held was not in nature of monopoly. A 1916 Pat 304 (305) (DB).

(8) A claim to an absolute right of sending scavengers in Madras to various houses and thereby to extort from the scavengers a certain portion of the wages earned by them is opposed to public policy as being an oppresive monopoly. A 1940 Mad 558 (559) (DB).

(9) Where in its essence a contract executed on 4-10-1947 is a monopoly contract granted to the plaintiff to manufacture radios, etc., in an area for a stipulated period of years for certain concessions, the contract will be hit by Art. 19 (1) (g), Constitution of India ever since the commencement thereof. A 1964 Raj 205 (212) (DB).

26. Trade combines.— (1) Agreement to form combination to fix rates and to divide profits in certain manner is not in restraint of trade or opposed to public policy. (1912) 34 All 587 (588) (DB) ** (1905) 29 Bom 107 (119) (DB).

(2) An agreement whereby it is provided that the manufacture and sale of certain produce shall be distributed according to certain proportions, that the manufacturing capacities of the parties to it shall remain in status quo, and the produce, if and when manufactured, shall be sold at a particular rate does not fall within Section 23. (1905) 29 Bom 107 (119, 120, 121) (DB).

(3) Where the Government allows a market to be held on its land and restricts the admission of brokers, there is nothing illegal or contrary to public policy in it. A 1914 Cal 202 (203) (DB).

(4) Traders agreeing to carry on business among members of their private association only and to penalise the breach of condition — Agreement does not offend against the provisions of Section 23. A 1931 All 83 (85) (DB).

27. Service contracts.— (1) A contract under which a labourer engages to work without any payment under conditions which make it practically impossible for him to discharge the debt is wholly void. A 1918 Pat 249 (250) (DB).

(2) Even if the contract consists of two covenants, viz., a positive covenant undertaking to serve a particular person during a particular period and also a negative covenant agreeing not to serve any other person during that particular period, such an agreement would be void neither under Sec. 23 nor under Sec. 27. A 1964 Guj 215 (217).

(3) In order to succeed in an action for procuring breach of a service contract there ought to be some evidence, to predicate active association of the defendant with the breach of contract by the servant. A 1958 Madh Pra 367 (367, 368).

(4) Harwahi bond executed by an agricultural labourer which binds the executant to daily attendance and manual labour until a certain sum is repaid in a certain month and penalises default with overwhelming interest is unenforceable being opposed to public policy. A 1916 Cal 718 (719) (DB).

(5) Where a bond provided for payment of interest in the shape of work to be done by the executant and his wife and the wages to be paid were low, and there was no provision for repayment, it was held that it was a slavery bond and unenforceable. A 1929 Mad 267 (268) (DB) ** A 1918 Cal 409 (410).

[See also A 1927 Mad 818 (819) ** A 1918 Mad 917 (917).]

[But see A 1927 Mad 531 (532) (DB).]

(6) A contract to do gratuitous service, in lieu of rent for the land occupied, is not illegal as being against public policy under Section 23. A 1929 Cal 224 (224).

(7) Contract to engage dancing boy on payment of certain sum is not contrary to public policy. A 1919 Cal 1002 (1003) (DB).

(8) Agreement to do what constitutes breaches of the service agreement defeats the provision of law relating to contract and is void. 1961 Ker LT 885.

(9) Agreements tending to injure the public service are always considered to be opposed to public policy. A 1964 Andh Pra 465 (467).

(10) Contract to serve on Rs. 2 P. M. for 112 months is illegal. A 1958 Madh Pra 367 (368).

(11) Section 23 has no application to rules such as Rule 143 of the Railway Establishment Code, containing provision for service agreement. A 1959 All 643 (649).

(12) (Per Bal Raj Tuli and Prem Chand Jain, JJ.) :— It could not be said that no such provision for discharge from service having been made in the Punjab Civil Services Rules, the condition regarding termination of service on notice in the contract of service would defeat the provisions of the rules regarding permanency of tenure and the lien to the post. Those rules had no overriding effect and had to be administered along with the Rules. 1974 Lab IC 1313 (1327) : ILR (1974) 2 Punj 303 (FB).

28. Contract of agency.— (1) Contract of agency is not by itself unlawful. When principal makes agent do something which is unlawful the act of the agent becomes unlawful. A 1930 Sind 9 (10) (DB).

(2) A fraudulent agreement entered into by the agent cannot bind the principal. (1978) 1 Malayan LJ 1 (2).

(3) One of several judgment-debtors got an assignment of decree in name of his agent who was to be paid commission for executing the same against the remaining judgment-debtors. Held that suit by principal against agent for money realised was maintainable as agency was not in itself unlawful. A 1921 Mad 334 (335) (DB).

(4) A principal having paid money to his agent for an unlawful purpose is entitled to a locus paenitentiae till the execution of the unlawful object and the unlawfulness of the commission, he was entrusted with, could not be set up by the agent in defence. 1898 Pun Re No. 63, p. 218 (221) (DB).

(5) Where an agent puts through transactions contravening control legislation, he abates the commission of an offence under the law and the contract of agency is vitiated by Sec. 23. A 1951 Kutch 50 (52).

Section 23 — Note 28 (contd.)

(6) Where an agent makes collections as a result of transactions forbidden by law no claim to recover such amount from the agent can be given effect. (1957) 2 Andh WR 226 (232) ** A 1954 Nag 306 (319) (DB).

(7) An agent can recover from his principal the amounts paid by him for the principal's gambling debt. 1912 Pun Re No. 79, p. 249 (251, 252) (DB).

(8) Agreement of agency — Trader appointed selling agent of medicines — Trader though not holding wholesaler's licence at time of agreement obtaining licence subsequently — Agreement is not void. A 1970 Bom 128 (131) (DB).

(9) As to non-liability of employer of agent to do a criminal act, see Section 224.

29. **Partnership.**— (1) A partnership is prima facie legal, unless it is proved that the object of the same was illegal or that the object of the partnership necessarily involved something illegal or contrary to public policy. A 1930 Mad 361 (363) ** A 1956 Nag 225 (227) (DB).

(2) Partnership with a person who is not a citizen of India — Not illegal. 1975 MPLJ 473 : 1975 Jab LJ 656.

(3) When some objects of a firm are lawful while others are unlawful and it is possible to separate the lawful objects from the unlawful objects, the deed of partnership is not void but is partly valid to the extent it relates to the lawful objects. 69 ITR 819 (DB) (All).

(4) An agreement of partnership which contravenes the provisions of Section 4 of the Companies Act in that it is between persons exceeding seven in number is illegal and void. A 1952 Vindh Pra 1 (3).

(5) A partnership formed for the purpose of carrying on business in violation of the Food Grains Control Order is illegal. A 1957 Andh Pra 837 (840) ** (1967) 2 Andh LT 405.

(6) Where the terms of a licence for running a talkie prohibited assignment for transfer or subletting by the licencee, a partnership agreement entered into by the licencee about subject-matter of the licence is void. A 1955 Mad 536 (539) (DB).

(7) A suit to recover money lent to a partnership which is an illegal one or forbidden by law, with the knowledge that it is going to be used for purposes forbidden by law, is not maintainable. A 1936 Mad 603 (604).

(8) A suit filed by a firm consisting of partners all of whom obtained licences to carry on business in fireworks but did not obtain a licence in the name of the firm as such is not in any way affected by the provisions of this Section. (1958) 1 Andh WR 474 (476).

(9) Money lent for illegal partnership but not known to lender to be so can be recovered. A 1926 Mad 772 (774) (DB).

(10) Illegal association suit by member for dissolution and realization of his share — Per Sulaiman J.: Simple partition of assets can be granted — Per Mukerji and Walsh JJ.: Relief of partition amounts to dissolution of partnership and so cannot be granted. A 1926 All 591 (594, 597, 601) (DB).

(11) The party who in the suit for the dissolution of a partnership pleads that the partnership being one prohibited by the provisions of law must prove the illegality by such evidence as he can place before the Court. A 1954 Mad 1074 (1075).

(12) Partnership entered into in contravention of Cochin Tobacco Act (1922) is illegal. A 1960 Ker 276 (278) (DB). (A 1950 Mad 444 (FB), held not Overruled by (1959) 37 ITR 271 (276) (SC); 27 Cochin 222 and A 1927 Lah 333, Dissented from.)

(13) Section 23 does not hit a partnership made in contravention of Section 6, Central Excises and Salt Act and Rr. 175 (2), 178 (4) and 210 framed thereunder. A 1960 Andh Pra 39 (42) (DB).

(14) A new partner, merely by joining a business which is being carried on by the old partner in a shop, does not become a tenant of the shop. An agreement making him a co-tenant without the permission as required by law is void. 1967 All LJ 410.

(15) Where the contractor who undertook Government works was himself permitted to appoint agent for the purposes of completion of the works, and was not prohibited from taking a financing partner to finance the business, the agreement of partnership between the contractor and financing partner was not illegal. (1961) 3 Orissa JD 190.

(16) Motor transport business carried on by partnership on strength of permit obtained by partner and with vehicle belonging to such partner is legal. A 1966 Madh Pra 13 (17) (DB) ** A 1969 SC 493 (495, 496). (A 1967 Mad 100, Reversed; A 1963 Mad 413 and A 1962 Andh Pra 14, Overruled.) ** A 1980 Raj 14 (18, 19) ** (1975) 88 Mad LW 412 (DB).

(17) Person, owning truck and its route permit, entering in partnership business to carry on transport business — Transfer of truck and its route permit by him to partnership business — Failure to comply with Section 59, Motor Vehicles Act before transferring permit — Partnership is void in entirety — In absence of separate valuation of truck and permit-partnership to the extent of transfer of truck also not valid. A 1970 J & K 165 (166, 169) (FB).

[See also (1970) 2 An WR 218 (DB). (Partnership formed for carrying on business with permits standing in another's name — Opposed to Sec. 59 (1) of Motor Vehicles Act — Such partnership is hit by this Section.)]

(18) A partnership agreement which contravenes the positive provision of S. 28 (1) of the Electricity Act (1910) is void. A 1967 Pat 191 (199) (DB).

(19) Partnership formed to carry on Government contract which expressly prohibited assignment or subletting of contract is not illegal. A 1967 Mad 449 (450) (DB).

(20) Partnership agreement by dealer in cloth with licence under Madras Cloth (Dealers) Control Order (1947) is illegal. A 1964 Andh Pra 145 (151) (DB).

[See also A 1972 Punj 185 (187, 188). (Licensee under Cotton Control Order, 1955 — Partnership agreement with non-licence-holder to work out licence is hit by this Section — Licence is a personal privilege the benefit whereof cannot be extended to others by entering into partnership with them when they do not hold any such licence — Further there is a definite prohibition in the Cotton Control Order, 1955 from carrying on the business covered by a licence except by the licencee.)]

(21) Licence holder under C. P. and Berar Cotton Cloth Trade Regulation Order, 1948,

Section 23 — Note 29 (contd.)
Cl. (8), entering into partnership with another — Business actually carried on by licencee — Neither licence nor provisions under which it is granted prohibiting taking of partner — There is no transfer or sublease of licence — Partnership is not illegal — Suit for dissolution is maintainable. (1970) 72 Bom LR 333.

(22) Partnership being an agreement within the meaning of Section 23, it is not unlawful, though its object is to carry on wagering transactions. A 1959 SC 781 (792).

(23) Where four partners, one of whom was a licencee of selling English wine and others were licencees for selling country liquor formed a partnership authorising the other partners also to sell English wine, the partnership is illegal. (1969) 71 Punj LR 122 (Punj).

(24) A partnership for carrying on business in forward contracts is not illegal. A 1958 Cal 703 (708) (DB).

30. Void Contracts — Enforcement of.— (1) In cases which fall under Section 23, the agreement is void ab initio. A 1936 Nag 268 (269)

(2) Where a contract is illegal being contrary to positive law or against public policy, an action cannot be maintained to enforce it directly or to recover the value of services rendered under it or money paid on it. A 1916 Cal 266 (268) (DB) ** A 1919 Low Bur 71 (73, 74) ** A 1914 Lah 353 (353) ** A 1967 Cal 294 (306, 307) ** A 1967 Pat 72 (75, 76) ** (1962) 28 Cut LT 485.

[But see A 1928 Mad 476 (476).]

(3) Tenancy agreement hit by Section 23 of Contract Act (1872) — Proceedings for ejectment under Sec. 14 (1), Proviso (k) of Delhi Rent Control Act (1955) — Maintainable — No estoppel. ILR (1972) 1 Delhi 408. (Reversed on another point in A 1973 SC 921.)

(4) When a transaction is entered into for an unlawful or immoral purpose and that purpose has been achieved, the Court would not interfere at the instance of the 'particeps criminis' to relieve him from the legal effects of the transaction. A 1921 Mad 326 (327) (DB) ** A 1941 Oudh 529 (555) ** A 1930 Oudh 196 (199) ** A 1924 Pat 321 (322) ** A 1923 Mad 626 (628) (DB) ** A 1919 Nag 43 (43) ** (1888) 12 Bom 422 (424) (DB) ** A 1966 Andh Pra 209 (209, 210) (DB) ** A 1958 Cal 713 (724, 729, 730) (DB).

(5) Where a contract is void for illegality as opposed to being merely nugatory, money paid in pursuance of it cannot be recovered unless it is still executory because of the maxim 'ex turpi causa non oritur actio". A 1938 Nag 335 (344) (FB) ** A 1918 Low Bur 77 (81).

(6) A party cannot recover money paid in respect of a contract which is tainted with criminality or immorality, even though the contract has not been performed. A 1916 Cal 266 (268) (DB) ** A 1919 Pat 316 (316) (DB).

[But see A 1930 Lah 1018 (1020) ** A 1968 Andh Pra 375 (378). (Presents and monies given in connection with contract of marriage of minors — Contract being admittedly illegal — Repudiation of contract — Amount paid is recoverable.) ** A 1967 Cal 294 (310).]

(7) The law allows locus paenitentiae. So before fraud or an illegal purpose is carried out the money may be recovered from the person to whom it was advanced. A 1959 Andh Pra 647 (649) (DB).

(8) Where an illegal purpose of a void contract has been carried out even in part, a Court of equity will not only refuse to enforce the obligation created or to restore property given away, but will also refuse to grant relief by way of declaration on the principle that no relief could be given to a wrongdoer. A 1916 Pat 284 (288, 290) (DB) ** A 1972 All 130 (133).

(9) Transferee of property for illegal purpose cannot get transfer annulled if intended purpose has been carried out. A 1924 Mad 849 (849).

[See A 1938 Lah 732 (734) (DB).]

(10) The money due under an illegal or immoral agreement cannot be recovered by a change in the form of action based on another agreement, which has for its support the original illegal agreement. A 1935 Cal 748 (750).

(11) Where a deposit has been made in connection with an illegal contract, such a deposit can be recovered by a suit if the plaintiff does not rely for his claim on the illegal contract. A 1932 Nag 32 (33) ** (1974) 76 Bom LR 156.

(12) Where a promissory note is void being made payable to bearer on demand the creditor can sue on the basis of any obligation independently of the execution of the promissory note. A 1928 All 371 (376) (SB).

(13) A party to an illegal and void contract, willing to perform his part, cannot enforce performance. A 1916 Low Bur 51 (54) (FB).

(14) Defendant borrowing money from plaintiff intending to utilise same for gambling — Plaintiff not privy to this intention — Plaintiff can recover money by suit. A 1931 All 458 (458).

(15) The right of a person who pays money to another, in pursuance of an illegal agreement, to claim its refund is not lost by the fact that it was really due to the payee. A 1917 Mad 607 (608) (DB).

(16) Purchasers are not entitled to refund by reason of fact that they are deprived of the benefit of portion of what they purchased under a deed of conveyance which turned out to be unenforceable. A 1927 Sind 62 (65) (DB).

(17) A Court cannot decline to enforce a contract which is legal as between the parties on a mere assumption that in reality it is intended for the benefit of a third person, against whom a statutory prohibition to enter into such contract exists. A 1925 Lah 65 (66).

(18) When a contract is void because prohibited by statute, the Court has power to work out the equities and place the parties upon terms. A 1938 Nag 335 (344) (FB) ** A 1954 Kutch 7 (8).

(19) While it is the duty of the Court not to render its aid to the enforcement of transactions which are illegal, it is at the same time incumbent that the illegality should be sufficiently proved and the facts constituting illegality established. A 1930 Mad 361 (363) ** A 1940 Rang 73 (74) ** A 1925 Rang 275 (277) ** A 1920 Cal 704 (705) (DB) ** A 1968 SC 1165 (1176) ** A 1965 SC 1364 (1368) ** A 1959 Andh Pra 647 (649) (DB) ** 1963 Ker LJ 19 ** A 1959 Andh Pra 370 (376) (DB).

(20) Where a contract or transaction is illegal there need be no pleading of the parties raising the issue of illegality and the Court is bound to take judicial notice of it. A 1965 SC 1364 (1370) ** A 1959 Madh Pra 151 (168) (FB) **

Void agreements.

24. Agreements void, if considerations and objects unlawful in part.—If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful,[a] the agreement is void.

Illustration

A promises to superintend, on behalf of B, a legal manufacture of indigo, and an illegal traffic in other articles. B promises to pay to A a salary of 10,000 rupees a year. The agreement is void, the object of A's promise, and the consideration for B's promise, being in part unlawful.

[Malaysian Contract Act 1950, S. 25.]

[a] See Ss. 57 and 58, infra.

Section 23 — Note 30 (contd.)
1963 Ker LJ 19 ** A 1960 Andh Pra 190 (191) ** A 1960 Pat 145 (146) (DB) ** A 1959 Andh Pra 370 (376) (DB) ** A 1976 Delhi 24 (26).

(21) Objection that contract is illegal must be considered even though taken late. A 1944 Mad 387 (387).

(22) Although a contract is not enforceable at law, as being for an illegal purpose, it can form the basis of a prosecution. A 1933 Rang 199 (200) : 34 Cri LJ 1255 ** A 1963 Madh Pra 326 (329) (DB).

(23) Maxim "in pari delicto potior est conditio defendantis" does not apply (a) where the illegal purpose has not yet been substantially carried into effect before it is sought to recover money paid or goods delivered in furtherance of it; (b) where the plaintiff is not in pari delicto with the defendant; (c) where the plaintiff does not have to rely on the illegality to make out his claim. A 1968 SC 534 (537) ** A 1960 SC 213 (216) ** A 1972 All 130 (133).

(24) Money advanced under a void agreement is recoverable. (1972) 2 Malayan LJ 154 (155) ** (1978) 1 Malayan LJ 202 (203).

[See however (1979) 2 Malayan LJ 48 (48). (Where the contract was void and unenforceable within the knowledge of the parties to the same, money advanced thereunder could not be recovered.)]

(25) Andhra Pradesh Food Grains Dealers Licensing Order — Sale of paddy by landholder A to B — A having no knowledge that B had no licence to purchase paddy — Agreement to sell is not illegal — A not being pari delicto can recover value of paddy sold under Sec. 65. (1975) 1 Andh WR 378.

(26) Suit by sleeping partner for accounts of partnership business — Partnership agreement even if void Court should help plaintiff in having accounts settled as parties were not in pari delicto and defendant partners were in fiduciary relationship with plaintiff. A 1971 Punj 134.

(27) A wagering contract cannot be enforced as being hit by Section 23. A 1964 Andh Pra 537 (538, 539) ** A 1967 Cal 25 (28) (DB).

(28) Where the cause of action is not founded either on the illegal contract or on its breach, the party's right to possess his own chattels will be enforced against those who without any right detain the same or convert it to their own use even if it appears either from the pleadings or evidence led at the trial that they have come in possession of the defendants as a result of an illegal transaction. A 1960 Bom 548 (551) (DB).

(29) When the agent for purchase knows at the time he makes the purchase that the goods he instructed to buy are to be dealt with in a manner prohibited by law, he cannot enforce any right arising out of the contract of agency. A 1960 Andh Pra 190 (192).

(30) Illegal contract through agent — Immaterial whether agent deals with third party as being a principal or as being his sub-agent — Suit by agent on basis of such contract — Cannot be enforced. A 1975 SC 1223 (1229).

(31) A promissory note or a mortgage in favour of the society does not become unenforceable when it is not shown to be illegal by the fact that the society under the memorandum of association had no power to lend money. A 1959 Madh Pra 172 (175) (DB).

(32) Where the forward contracts in respect of cotton were not void ab initio but became void and unenforceable due to prohibition of law, there is no bar to their enforcement when the inhibition is lifted by the repeal of that law. A 1961 Raj 52 (59) (DB).

(33) A contract entered into in defiance of a legal provision continues to be illegal even after the legal provision ceases to be effective and a plea that the contract, when it was to be enforced, was not hit by any subsisting law is not open to the party seeking to enforce it. A 1963 All 206 (209) (DB).

(34) If the illegality be trivial or venial and the plaintiff is not required to rest his case upon that illegality, the public policy demands that the defendants should not be allowed to take advantage of the position. A 1960 SC 213 (218, 219).

SECTION 24 — SYNOPSIS

1. Scope and applicability.
2. Indivisible contracts.
3. Divisible contracts.
4. Mortgage transactions.

1. Scope and applicability.— (1) Section 24 lays down no principle at variance with the English common law. It is declaratory in its nature. A 1940 Rang 45 (47).

(2) Section 24 does not apply to a transfer of immovable property. A 1934 All 246 (249) (DB) ** A 1930 All 1 (3) (FB) ** A 1935 Oudh 501 (505) (DB).

(3) Section 24 does not apply to cases of an out and out transfer. A 1925 All 474 (476).

(4) There is nothing in Sections 23 and 24 to support the view that a sale, made with the view to defeat a probable execution, would be a sale with a fradulent and unlawful object, and, therefore, void. (1879-80) 4 Bom 70 (73) (DB).

(5) Section 24 has no application to promises which are offered in the alternative. A 1931 All 589 (592) (DB).

Section 24 — Note 1 (contd.)

(6) Section 24 has no applicability to a case where the plaintiff is seeking to enforce an equity in respect of a perfectly valid security. A 1917 All 290 (292) (DB) ** A 1935 All 862 (863) (DB).

(7) Where, after the marriage, the Muhammadan husband agreed by a Kabinnama in favour of his wife that he would do nothing without the permission of his wife, that if he so did, she would be at liberty to divorce him, that he would pay over to her the whole of the money which he might earn during the time the marriage continued, and so on: **Held**, in a suit by the wife to enforce such a contract, that Section 24 did not apply. (1875) 15 Beng LR (App) 5 (7).

(8) Where the agreement is hit by Sec. 24, Section 65 may not apply. But where neither the consideration nor the object is illegal Section 24 has no application. A 1955 Assam 33 (43) (DB) ** A 1938 Bom 54 (59, 60) (DB).

(9) A permanent lease of wakf land by mutawalli without the permission of Wakf Board is not void but voidable. Unless and until such a lease is avoided by the persons concerned, it is valid. Nor is such a lease void when its consideration or the object is not unlawful under S. 24 of the Contract Act. Therefore the lessee in such a case has a right to transfer his lease rights to another. A 1972 All 553 (554).

(10) Plaintiff compromising his suit agreeing to buy defendant's interest — Agreement is for valid consideration. A 1971 Cal 411.

(11) Agreement tending to injure public service — Suit to enforce the same not maintainable. ILR (1978) 3 Mad 389 (399).

(12) Loan made by moneylender in name other than registered name — Agreement forbidden by law — Contract void — Parties unaware of illegality until after execution of contract — Moneylender entitled to recover money lent and that award of interest was in the discretion of Court. (Malay States) Ordinance 1950, Ss. 24 and 66. **(1977) 1 Malayan LJ 91 (PC).**

(13) Where the consideration under sale deed was for marriage expenses of minor girl, **Held** that the sale was a void transaction being opposed to public policy and that the entire sale consideration was not for marriage expenses, was immaterial in view of S. 24. A 1978 Orissa 84 (86).

2. Indivisible contracts.— (1) When a contract consists of a number of terms and conditions each condition does not form a separate contract but is an item in the one contract of which it is a part. The consideration for each condition in a case like this is the consideration for the contract taken as a whole. **A 1954 SC 236 (242).**

(2) Where a part of the consideration is unlawful, then general rule is that when you cannot sever the illegal from the legal part of a contract, the contract is altogether void. A 1933 Bom 132 (134) (DB) ** ILR (1963) 1 Ker 522 ** **A 1970 J & K 165 (169) (FB).**

(3) Where each part of contract is an inducement to every other part of it, there is an entire contract for a single consideration and there is no warrant to divide the contract into distinct parts. **A 1938 Mad 982 (985, 992) (DB).**

(4) Where the various promises of the two parties are quite interdependent, one large part of contract, if void, vitiates the whole. A 1922 Upp Bur 9 (11).

(5) One entire consideration for two several contracts, one of them for doing illegal act — The whole is void. A 1940 Rang 45 (47) (DB).

(6) Part of transaction without necessary sanction of Magistrate — Whole is invalid. A 1928 Nag 283 (283) (DB).

(7) Proceedings in Supreme Court — Agent's remuneration fixed by agreement in any event and taxed costs in event if success — Case succeeding — In taxing costs between party and party, latter part of agreement cannot be ignored and only earlier part given effect. If agreement is considered, void, whole of it should be treated as non-existent. **A 1954 SC 26 (28).**

(8) Debtors executing bond with interest at high rate — One of them to render service without pay till bond becoming payable — Consideration as to rendering service is unlawful — Contract being indivisible is void. A 1918 Pat 249 (250) (DB).

(9) A licensee of electric supply created a partnership. The partnership agreement vested the building, license and book etc., in the partners and the partners agreed to pay one-tenth of the profits to the licensee and after his death to his heirs as long as the company was in existence. It was held that the transfer of the undertaking was void under the Electricity Act and the contract not being divisible was void as a whole under Section 24. A 1937 Rang 47 (49).

(10) Defendant agreed, by a kabuliat, to pay the plaintiff an enhanced rent by more than two annas in the rupee, thus contravening provisions of Sec. 29 (b), Bengal Tenancy Act. The plaintiff contended that the decree be given for so much of the enhanced rent as does not exceed the two annas in the rupee. **Held**, the contract was to pay the enhanced rent; the contract, qua the payment of the enhanced rent, did not consist of two parts. The contract was not severable and, therefore was void. (1897) 24 Cal 895 (896) (DB) ** 1947 All WR (HC) 11 (12).

(11) Pending a criminal prosecution against the defendant, his pleader stood bail for his apperance in the Criminal Court; and to indemnify the pleader against any loss which he as bailee might suffer, a nominal sale deed and a nominal rent-note were passed to the pleader's relative, the plaintiff. In a rent suit by a plaintiff: **Held**, that agreement was indivisible agreement; part of a single consideration for one object was unlawful and therefore, whole agreement was void under S. 24. (1908) 32 Bom 449 (453, 454) (DB).

(12) Where the finding of the Court was to the effect that the consideration for the promissory notes was, at least in part, losses to the plaintiffs in respect of gambling debts and the Court could not ascertain the exact proportion of such consideration: **Held**, the whole of the suit was properly dismissed. (1913) 35 All 558 (559) (DB).

(13) If adultery, past or future, is consideration or indivisible part of the consideration for an agreement; such agreement is illegal and the contract would be void. (1905) 27 All 266 (269).

Section 24 — Note 2 (contd.)

(14) Consideration for an agreement by a person to pay a certain sum of money to a prostitute, if she allowed him to cohabit with her, is immoral and unlawful and the contract is, therefore, void under S. 24. A 1935 Oudh 71 (71, 72) •• (1905) 27 All 266 (270).

(15) Client agreeing to pay pleader money and part of the suit property as Inam for "religious purposes": Held, that in spite of the words "religious purposes" the consideration for the services of the pleader was the money agreed to be paid and the gift of part of the property in suit. Agreement being inseparable the whole of it was void. A 1925 Bom 470 (470, 471) (DB).

(16) Transfer of occupancy holding is forbidden by law and contract, a part of consideration for which is such a transfer, is void. (1913) 18 Ind Cas 9 (10) (All).

(17) Suit for recovery of loss suffered in forward contract which is prohibited by law is not maintainable. A 1963 Madh Pra 323 (329) (DB).

(18) Where the terms of a settlement are not separable and two of them which are the basic terms are found to be illegal, the settlement must be set aside as a whole. A 1952 Cal 763 (767).

(19) Agreement between Landlord and Tenant that in addition to agreed monthly rent tenant would invest his money in repairs and improvement of premises — Landlord agreeing to allow tenant to continue lease for twenty years more on same rent — Agreement to invest, held null and void under Karnataka Rent Control Act (1961), S. 18 — Agreement to extend period of tenancy not being severable from agreement to invest is also null and void. (1975) 1 Kant LJ 257.

3. Divisible contracts.— (1) In an agreement, if different clauses are separable, the fact that one clause is void does not necessarily cause the other clauses to fail. A 1931 Bom 264 (265) (DB) •• A 1930 All 1 (3) (FB) •• A 1933 All 468 (470) •• A 1917 All 290 (291, 292) (DB) •• (1910) 7 All LJ 778 (781) •• (1968) 69 ITR 819 (DB) (All).

(2) Where in the same instrument there are distinct engagements by which a party binds himself to do certain acts some of which are legal and some illegal the performance of those legal can be enforced. A 1922 Pat 171 (177, 178) (DB).

(3) In cases of contract only partly beyond the competence of the promisor, there is no good ground why the promisee who has paid good consideration should not be allowed to enforce that part of the promise which the promisor was competent to make. A 1930 All 1 (3) (FB) •• A 1933 All 468 (470, 472) (DB).

(4) The bad part may be rejected and the good retained. A bond may be good though consideration is partly good and partly illegal. A 1933 Pat 306 (309) (DB) •• A 1926 Oudh 270 (271) (DB) •• (1911) 10 Ind Cas 465 (466) (All).

(5) Provision in a will or contract partly for illegal purposes can stand though not separated from valid purposes. A 1928 PC 119 (121).

(6) Where contract is legal and as evidence of contract something illegal is done, the whole contract cannot be said to be illegal. A 1925 Mad 929 (931).

(7) Where the sale of lands and surrender of occupancy rights therein were both contended to be void as being one transaction and intended to defeat the Tenancy Law: Held that the surrender was separable from the sale and the former alone was void. A 1925 Nag 302 (304) (DB) •• A 1931 Nag 6 (7).

(8) Where a suit was based upon a bond for a certain sum of money, part of which was interest upon the amount covered by the first bond, and it was agreed in the second bond that the whole amount of the consideration as mentioned in the bond should bear interest. Held, that the obligee can recover such sums of money as in law he is entitled to recover, notwithstanding that part of the consideration is compound interest which could not, under the law in Sonthal Parganas, be decreed by Courts. (1899) 26 Cal 238 (240) (DB).

(9) The void part of an agreement would not invalidate the rest of the agreement if it could be properly separated from it. But where the parties thereto have treated the two debts as a lump sum the contract must be regarded as an integral one and void. (1885) 9 Bom 176 (179) (DB).

(10) Where a claim consisting of two items — one for Rs. 1,000 and the other for Rs. 600 was preferred but the foundation of the claim for Rs. 1,000 was that that amount be paid to a vendor to influence the co-vendors to enter into a sale transaction, it was held that this part of the claim was immoral and cannot be enforced and the plaintiffs were entitled to recover only Rs. 600, the other part being void. 1955 Raj LW 230 (231).

(11) Agreement that party failing to appear should pay certain sum and the winner should get the gate money — Former being legal and separate from the other illegal one, is enforceable. A 1931 Bom 264 (265) (DB).

(12) Bond agreeing to repay money on a certain date — Further condition that if money was not repaid on that date the creditor to enter into possession of plaintiff's cultivatory holding as a usufructuary mortgagee — Whole contract is not illegal though the latter covenant was contrary to the provisions of the Tenancy Act, and the plaintiff could get money decree. A 1924 All 80 (80) (DB).

4. Mortgage transactions.— (1) While an application for execution was pending the defendants executed a mortgage for satisfaction of judgment-debt providing for payment in excess of the decretal amount. The mortgage was for a certain amount and bore an interest at 9 p. c. p. m. on the whole amount. In a suit to recover the amount of mortgage, with future interest: Held, the money that was agreed to be paid in consideration of the mortgage, was the entire sum of money mentioned as principal in the deed along with interest on it and it was not permissible to split up the consideration. The mortgage therefore was void. A 1932 Bom 237 (239) (DB).

(2) Mortgage executed for a certain sum misappropriated by son of mortgagor and as compromise of police prosecution pending against the son — Prosecution for uncompoundable offence — Mortgage held void under Sec. 24. A 1960 Ker 194 (195).

25. Agreement without consideration, void, unless it is in writing and registered, or is a promise to compensate for something done, or is a promise to pay a debt barred by limitation law.— An agreement made without consideration is void, unless—

(1) it is expressed in writing and registered under the law for the time being in force for the registration of [a][documents], and is made on account of natural love and affection between parties standing in a near relation to each other; or unless

(2) it is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do; or unless

(3) it is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that be-

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Section 24 — Note 4 (contd.)

(3) Mortgage of occupancy holdings with other properties legally transferable, for single consideration → Mortgagee given possession of occupancy lands not transferable — Suit to recover possession of the remaining lands → Held, that mortgagee-plaintiff was not entitled to seek any relief in Court at all as part of mortgage contract was illegal. A 1925 All 543 (544) (DB).

[But see A 1917 All 290 (2) (291, 292) : 39 All 539 (DB).]

(4) Mortgage of occupancy holding with covenant for indemnity if mortgagee is not paid → As the two portions of the deed were inseparable and the mortgage of the occupancy holding being illegal, the covenant also could not be enforced. A 1921 All 392 (392) (DB) •• A 1926 Rang 186 (187).

(5) If a usufructuary mortgage of an occupancy holding is void a personal covenant to that effect embodied in the deed is also void and unenforceable. A 1922 All 134 (135) (DB) •• (1929) 27 All LJ 479 (480).

(6) In a contract where one of several considerations moving from the defendant was the mortgage of reversionary interest which was illegal under Section 6 (d), T. P. Act; Held, the whole agreement was void. A 1917 Oudh 230 (232).

(7) Where the mortgagor actually received Rs. 1036 only as consideration but the mortgage-deed showed a sum of Rs. 1,451 as the consideration for the mortgage and the balance of Rs. 415 was fictitiously entered, the part of the consideration for the balance fails and is inoperative. The mortgagor is entitled to redeem the mortgage at Rs. 1,036. 1956 Raj LW 84 (86).

(8) Where the mortgagee on redemption is entitled to retain possession as a tenant and the mortgagor's debt is reduced to a certain extent, the amount by which the debt is reduced is a 'premium' which is prohibited under S. 7, East Punjab Urban Rent Restriction Act (1949) — The covenant, therefore, cannot be enforced under Section 24 of the Contract Act. A 1973 Punj 94.

SECTION 25 — SYNOPSIS

1. Agreement without consideration is void.
2. Compromise and forbearance to sue.
3. Existing obligations as consideration.
4. Clause (1) — Promises made out of love and affection.
5. Clause (2) — Compensation for past services.
6. Clause (3) — Contract to pay time-barred debts.
7. Agreement by acceptance of offer necessary.
8. Promise to pay is an essential ingredient.
9. Writing and signature of party to be charged with, necessary.
10. "Person to be charged therewith."
11. Persons authorised to renew time-barred debts.
12. "Debt," meaning of.
13. Explanation 1.
14. Explanation 2.

1. Agreement without consideration is void.→ (1) An agreement without consideration is void under this section and therefore, it cannot be enforced. A 1927 Mad 1102 (1102) •• A 1939 PC 219 (221) •• A 1957 Raj 29 (31) (DB) •• A 1952 Trav-Co 255 (256) •• A 1929 Lah 169 (170) (DB) •• 1976 All WC 795 (798).

(2) Mortgage without consideration is a nullity and so inoperative. A 1917 Mad 492 (495) (DB) •• (1913) 24 Mad LJ 355 (357) (PC) •• (1875-77) 1 All 309 (311) •• 1969 Raj LW 207 •• 1978 Pun LJ 84 (85).

[See also A 1956 Trav-Co 80 (81, 82) (DB).]

(3) Every one of the several undertakings given by one party is supported by consideration where all of them constitute together a single consideration for the promise of the other party. Therefore it is not permissible to single out any one of those undertakings and repudiate it on the ground that it is not supported by consideration. A 1954 Sau 8 (10).

(4) Where there is a recital of receipt of consideration in a document the onus of proving absence of consideration lies on the party denying it. (1933) 32 Pun LR 577 (578) (DB).

(5) In the case of a negotiable instrument a presumption that there was consideration for its execution arises under Section 118, Negotiable Instruments Act. A 1938 Oudh 14 (15).

(6) A disposition of property brought about by transfer is not a contract and therefore is not governed by Section 25 of the Contract Act. A 1955 Bom 122 (126) (DB).

(7) A receipt is merely evidence of a fact. It is not an agreement requiring consideration to make it a valid contract. A 1924 Nag 156 (156).

(8) A condition precedent attached to an agreement by consent of parties does not become unenforceable on the ground that there is no fresh consideration for the same. A 1921 PC 71 (75).

half, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.

In any of these cases, such an agreement is a contract.

Explanation 1.—Nothing in this section shall affect the validity, as between the donor and donee, of any gift actually made.

Explanation 2.—An agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate; but the inadequacy of the consideration may be taken into account by the Court in determining the question whether the consent of the promisor was freely given.

Illustrations

(a) A promises, for no consideration, to give to B Rs. 1,000. This is a void agreement.

(b) A, for natural love and affection, promises to give his son, B, Rs. 1,000. A puts his promise to B into writing and registers it. This is a contract.

Section 25 — Note 1 (contd.)

(9) The section saves certain agreements from the general rule declaring all agreements without consideration void and gives effect to those excepted agreements. A 1921 Lah 205 (207) (DB).

(10) Certain agreements, like agreements to pay time-barred debts, are made valid under Indian law; while they are illegal contracts under English law. (1906) 16 Mad LJ 422 (425) ** A 1949 Bom 215 (217).

(11) Mere moral duty to perform a promise given to a party cannot be a consideration to support a contract. A 1963 Madh Pra 37 (40).

(12) Where a newly admitted partner, along with the existing partners acknowledges a debt due from the partnership to their creditor there is consideration for the new partner's undertaking to pay the debt. The new partner obtains the promise of a partnership as the condition of his liability. **A 1943 PC 147 (152). (Reversing A 1939 Pat 323.)**

(13) A bond executed by one to another upon the dissolution of an admitted partnership between them for dues on account of such partnership is fully supported by consideration and the fact that all the accounts had not been gone into and cleared before its execution would not in the least detract from that consideration. **A 1950 Kutch 67 (67).**

(14) Where the manager of a firm writes an account demanded by the servant for the purpose of knowing his remuneration and the manager states it for the purpose of enabling the servant to know it, it was held that this was a case of a promise made to pay the balance for a good consideration. **A 1934 PC 144 (147).**

(15) Whenever a third person undertakes the liability of another, in whom he is interested, the third person's promise cannot, in law, be considered as being made without consideration or vitiated by illegality. A 1937 Mad 223 (225) (DB).

(16) Tenants executing pro-notes in favour of Manager of indigo factory in order to obtain release from their supposed obligation to grow indigo on their lands — Bona fide belief of both parties in existence of such obligation — Agreement held was supported by consideration. A 1920 Pat 552 (553) (DB).

(17) A promise to pay bonus which is a part of the contract of service between the parties is not a promise without consideration. A 1953 Mad 433 (434).

(18) Contract of sale — Vendee agreeing to defend contemplated suit by a collateral of the vendor by expending money left with him — Such promise is legal consideration for sale. A 1920 Lah 468 (469) (DB).

(19) A, a ward of Court of Wards, executing a promissory note in favour of B — After release of estate from Court of Wards and after A's death A's son executing a bond, a substantial portion of the consideration being the debt under the promissory note — Agreement held was not without consideration and could not be brought within Section 25. A 1923 All 590 (590) (DB).

(20) Where at the request of a person another performed the loi lena ceremony at the tonsure of the former's daughter and the former promised to pay a guzara in return it was held that the promise was supported by consideration and hence enforceable. 1950 All LJ 168 (171, 172) (DB).

(21) Where an arrangement has been arrived at between certain members of the family that is designed to promote peace and good will among certain of its members, this, by itself, is a good consideration to support the transaction. A 1932 All 174 (176) (DB) ** ILR (1975) HP 656 ** A 1979 SC 982 (983) ** A 1971 All 151 (154).

(22) A bond remains valid though the consideration was not paid in full; the bond is operative to the extent of the sum actually advanced. A 1921 Cal 435 (440) (DB).

(23) If the sale and the promise to resell were parts of a single transaction no question of mutuality arises. The purchaser's promise to reconvey the land is based on consideration. This consideration may be a promise for a promise or an act already performed in return for a promise. A 1965 All 83 (86) (DB) ** 1963 All WR (HC) 811 ** A 1961 Assam 173 (175) ** A 1963 Cal 325 (327) (DB).

(24) Mortgage bonds executed during Collector's regime without Collector's permission — Later mortgage bond executed in lieu of earlier bonds after Collector's regime had ended are not without consideration and hence valid. A 1959 All 788 (789) (DB).

(25) A contracting to purchase goods from B at contract price — A refusing to take delivery of some goods on ground of fall in price — C,

(c) A finds B's purse and gives it to him. B promises to give A Rs. 50. This is a contract.

(d) A supports B's infant son. B promises to pay A's expenses in so doing. This is a contract.

(e) A owes B Rs. 1,000 but the debt is barred by the Limitation Act. A signs a written promise to pay B Rs. 500 on account of the debt. This is a contract.

(f) A agrees to sell a horse worth Rs. 1,000 for Rs. 10. A's consent to the agreement was freely given. The agreement is a contract notwithstanding the inadequacy of the consideration.

(g) A agrees to sell a horse worth Rs. 1,000 for Rs. 10. A denies that his consent to the agreement was freely given.

The inadequacy of the consideration is a fact which the Court should take into account in considering whether or not A's consent was freely given.

[Malaysian Contract Act 1950, S. 26.]

[a] Substituted for "assurances", by the Amending Act, 1891 (12 of 1891).

Section 25 — Note 1 (contd.)

agent of B guaranteeing performance of contract by A promising A to pay money and inducing him to take delivery of goods — A promising to take delivery — Contract between A and C is for consideration. A 1963 Madh Pra 37 (40).

(26) Fees on sale of cattle is tax — Levy of fees by following procedure for imposition of fees — Transfer of right to collect fees — Right to recover such fees not being legal, no consideration passed due to transfer — Agreement is void. A 1963 Madh Pra 240 (241) (DB).

(27) Agreement of sale of business — Trifling consideration — Second document stipulating for payment of maintenance to vendor and to his wife on his demise — Sale of business at undervalue can be a consideration for second document. (1962) 66 Cal WN 8.

(28) An agreement by a tenant under a subsisting tenancy to pay a different rent when measurement would be made cannot be enforced as it is not supported by consideration. A 1933 Cal 725 (726).

(29) A bond given by a person arrested in execution of a decree for money, passed by Court having no jurisdiction, to the holder of such decree, for the decree amount plus the cost of stamp paid for him, in order that he might be released from such arrest, is one given, under decree and executed without consideration. (1882) 4 All 352 (354, 355) (DB).

(30) Woman living in adultery with a Hindu till his death is not entitled to maintenance from estate. Promise by the widow to pay maintenance to such woman is not valid as it is not supported by consideration. A 1922 Oudh 27 (28).

(31) An agreement executed by the father after his son's marriage that he would pay maintenance to the son's wife on the happening of certain event was held to be one without consideration. 1911 Pun LR 910 (911, 912).

(32) A mere promise to subscribe to a charitable institution is without consideration and cannot be sued upon. A 1953 Nag 195 (198) •• A 1953 Pat 231 (234).

(33) Subscriptions were raised from persons of the caste of plaintiff and defendant for festival but it was not in consequence of any prior agreement by defendants that plaintiff incurred obligations. There was not any promise by defendants to compensate plaintiff for something done by him for defendants. Held, the promise by defendants to pay was purely voluntary for no legal consideration and payment could not be enforced as payment of money due under contract. A 1923 Mad 330 (330).

(34) Defendant had agreed to pay out of his pocket certain sums proportionate to the value of goods imported by him, to a charitable society. As such sums were in arrears, he executed a hatchita in favour of society promising to pay the sum with interest. In a suit on hatchita, it was held that the promise to contribute out of his pocket was unenforceable as being without consideration and that it was merely a voluntary promise. A 1937 Pat 358 (359, 360) (DB).

(35) An agreement by the patnidar under the lease to pay cess on the property which is not liable to pay any cess is an agreement which is void as being one without any consideration. A 1947 Cal 70 (73) (DB).

(36) An agreement to take less than what is due and to give time for payment being without any consideration is a mere nudum pactum, and cannot be binding in law. Section 63 cannot validate such an agreement. A 1928 Rang 144 (144) (DB).

[See however A 1925 Mad 660 (666). (Agreement to give up a portion of claim needs no consideration.)]

(37) Where there is no dispute also as to the legitimacy of any one of the brothers an agreement by one of them to take a smaller share merely because the others promise not to disturb his possession or family peace must be struck down as an agreement without consideration. A 1954 Orissa 80 (85).

(38) The promise of a Government servant, in return for the sanction of the leave to which a person is legally entitled, not to return to duty after the expiry of the leave is without consideration and hence unenforceable. A 1956 All 439 (444) (DB).

(39) Agreement to pay certain amount of remuneration "forgone" by a party — Held void as without consideration. A 1978 Cal 221.

(40) Purchase of machine by A from B — Statement by A in respect of amount due "I am arranging to pay the amount" held constituted promise to pay. A 1977 Kant 24.

(41) Transfer of undivided coparcenary interest by coparceners without consideration is void. A 1970 Mys 270 (276).

Section 25 — Note 1 (contd.)

(42) Contract of guarantee — Consideration for guarantee — Pronote executed by company for consideration — Letter of guarantee will also be deemed to have been executed for consideration. 1979 Pat LJR 122 : 1979 Tax LR (NOC) 119 (DB).

(43) Under agreement between A and State Government — A becoming purchaser of Tendu Leaves for 1973 Season — A entitled to apply for renewal of agreement for next season on condition that if he did so, he would be bound by his offer till its acceptance or rejection by Govt. — A applyiny for renewal — A held was bound by condition — Condition could not be said to be without consideration because agreement in which it was contained was supported by consideration. A 1980 Madh Pra 91 (93) : 1980 MPLJ 227 (DB).

2. Compromise and forbearance to sue.— (1) A compromise of a doubtful claim or right is a sufficient foundation for an agreement. A 1925 Pat 68 (94) (FB) ** A 1928 Bom 539 (543) ** A 1924 Pat 736 (744) (DB).

(2) An agreement by a husband to pay maintenance to his wife in settlement of a doubtful claim of maintenance is not void for want of consideration. A 1931 Nag 197 (198).

(3) In a case of mutual compromise, consideration passes from either side and it is impossible to hold that such a compromise is without consideration. A 1926 All 715 (717) (DB).

(4) Relinquishment by a party of his counterclaim is a good consideration for the withdrawal by the plaintiff of his claim. A 1924 Sind 41 (45).

(5) Withdrawal of proceedings by plaintiff under Section 523 of Act XIV of 1882 is a sufficient consideration for a compromise by the parties to the suit. A 1914 Lah 131 (132) (DB).

(6) The question whether an agreement of compromise is supported by valid consideration depends on whether the plaintiff in the suit had a bona fide claim to the property which was the subject of the agreement of compromise. A 1948 PC 7 (7).

(7) The forbearance to enforce a claim bona fide believed to exist and enforceable is a good consideration for the contract. A 1922 All 260 (262) (DB) ** (1947) 48 Cri LJ 522 (527) (Lah) ** A 1929 Lah 485 (486) (DB) ** A 1915 Lah 285 (286) (DB) ** A 1960 Raj 237 (241).

(8) A promise to pay the amount found due and acknowledged in writing is supported by consideration where by reason of such promise, the creditor abstained from suing the debtor. A 1930 Nag 298 (299).

(9) Threat of bringing a false suit cannot be regarded as good consideration for contract. A 1936 Lah 6 (6, 7) ** A 1919 Oudh 120 (120).

(10) See also Notes under Section 2 (d).

3. Existing obligations as consideration.— (1) Promise to pay what the promisor is already under an obligation to pay is without consideration. Any separate promise to pay the amount at a particular place must be supported by consideration before it can be legally enforced. A 1918 Low Bur 101 (102).

(2) No right of suit arises, where a person promises a pleader any extra money for winning the case, after his remuneration is fixed and he has been engaged on his behalf. The promise has no consideration. (1871) 3 NWPHCR 25 (26) (DB) ** ('77-78) 2 Bom 362 (364) (DB).

4. Clause (1) — Promises made out of love and affection.— (1) An agreement to pay a certain sum of money to a near relative out of love and affection is a contract under this section. A 1952 All 564 (576) (DB).

(2) Agreements simpliciter are not required to be registered — Agreement executed for natural love and affection between the parties — Not registered — Agreement is enforceable in law. A 1976 Cal 430.

(3) In a case which falls under Clause (1) of Section 25, the contract cannot be declared to be void on the ground of the absence of any monetary consideration. A 1950 Trav-Co 73 (76) (DB).

(4) Where a person undertakes by means of a registered document, out of natural love and affection, to discharge the debt due by another and, on the former failing to do so, the debtor himself discharges the debt, the debtor is entitled to recover from such person the amount paid by him to discharge the debt as the breach of the obligation becomes actionable under Section 25. (1903) 13 Mad LJ 428 (428) (DB).

(5) Father executing mashahara patra in favour of widowed daughter providing for monthly allowance and charging certain property with its payment — Allowance not to be allowed to fall into arrears for more than one year — Grantee restricted from bringing suit for more than one year — Mashahara patra held to be agreement within Section 25 (1) and the restrictive condition was void under S. 23. A 1932 Cal 720 (721) (DB).

(6) A sued B, his brother who was on bad terms with him, for a half share in certain ancestral property — Suit dismissed on oath of B that property was not ancestral — Subsequently, B executing a registered document by which he agreed to give half share to A — Suit by A to recover share — **Held**, that the agreement was valid under Section 25 (1) as B had such natural love and affection for his brother that he was willing to give him the property in order to be reconciled to him — **Held** also that the document was a valid gift or family settlement. (1899) 1 Bom LR 495 (497) (DB).

(7) An agreement by a person entitled to a certain share in the income of a trust to pay out of that share a certain amount to his mother over and above her own share of that income is supported by adequate consideration within the meaning of Section 25 (1). A 1949 Bom 17 (18) (DB).

(8) A suit is not maintainable by a wife for an allowance for maintenance on an agreement, for which the sole consideration is a stipulation that the wife is not to communicate with or molest her husband. A 1926 Nag 501 (503).

(9) Husband promising to pay wife for maintenance, and separate residence by a registered deed, which stated certain quarrels and disagreements as the cause, which were not enough to entitle the wife to claim the amount under Hindu law : **Held**, that the agreement was without consideration and Section 25, Cl. (1), did not apply as the agreement was not made on account of natural love and affection, the document showing quite a contrary state of affairs. (1900) 4 Cal WN 488 (490) (SB).

(10) Where a person settles an annuity upon his alleged wife who was not validly married to him, the settlement cannot be construed to

Section 25 — Note 4 (contd.)
be a contract for consideration of love and affection but is a gift pure and simple and no consideration is necessary. A 1932 PC 34 (35).

(11) 'Parties standing in a near relation' do not mean 'near relatives' only. The parents of a Mahomedan lady stand in a near relation to her husband and an agreement to pay them certain maintenance is a valid disposition within Section 25 (1). A 1927 Oudh 146 (146, 147) (DB).

(12) An advocate is entitled to his legal remuneration from his near relation when there is no agreement in writing to work without remuneration. A 1965 Andh Pra 409 (409, 410).

5. Clause (2) — Compensation for past services.— (1) This clause appears to cover cases where a person without the knowledge of the promisor, or otherwise than at his request, does the latter some service and the promisor undertakes to recompense him for it. In such cases the promise does not need a consideration to support it. (1896) 20 Bom 755 (758) (DB).

(2) The expression 'voluntarily done' used in the section when applied to actions denotes something performed or done of one's own will, impulse and choice and not under constraint, prompting or suggestion of another. A 1958 Andh Pra 605 (607).

(3) A promise to compensate another for the assistance he had rendered in a suit in which the promisor was interested is valid within the meaning of Section 25 (2). ILR (1954) Madh B 337 (343).

(4) Where a man promises to pay a woman an allowance in consideration of past co-habitation, he merely undertakes to compensate for past services voluntarily rendered to him. (1881) 3 All 787 (788) (DB) •• A 1935 Oudh 71 (72) •• ('75-77) 1 All 478 (480) (DB).

[But see A 1924 Bom 135 (137) (DB).]

(5) Two joint Hindu brothers applied to have their property taken up under Court of Wards and while it was being so managed an agreement was made between them whereby one of them H. D., became manager of the property with an allowance of Rs. 12,000 per annum and ceded to the other, S. D., absolutely and unconditionally, his interest in the family property. (1895) 17 All 264 (269, 271) (DB).

(6) Agreement to pay a certain annuity to a person in consideration of past services rendered by him voluntarily and also for future services that might be rendered by him — No promise to render future services by such person — **Held**, that the agreement so far as regards future services was without consideration and that with regard to past services was valid under Section 25 (2) — The agreement being one and indivisible was wholly void. A 1919 Cal 765 (766) (DB).

(7) Where plaintiff had voluntarily expended money or establishing a market to please District authorities, and not at the request of defendants (shop-keepers) or for their benefit, agreement by defendants to pay plaintiff in consideration of such expenditure certain commission on articles sold through their agency in such market, is one that does not come within Section 2 (d) of Contract Act, and is void for want of consideration. (1881) 3 All 221 (227) (DB).

(8) A promise to pay bonus or compensation to employees for services rendered by them as a part of their duty under the contract of service will not fall under Section 25 (2) because it is not a promise in consideration of services voluntarily rendered. A 1952 Trav-Co 99 (100).

(9) Where a person had paid money to another not at his request and also not voluntarily but because he was bound under an agreement to do so, it was held that a pronote executed by the person to whom the money was paid was without consideration. In the circumstances the pronote did not fall under Section 25 (2) and, therefore, could not be enforced at all. A 1948 PC 150 (155).

(10) Where a son without expecting any compensation for the same sent several amounts of money to his father and the latter also had never treated them as loans it was held that a sale executed by the father for these amounts in order to defraud his creditors was not a transaction which could be rendered valid by S. 25 (2). A 1948 Bom 265 (267) (DB).

(11) A cheque drawn by a customer on his bank was presented for payment through another bank. The first bank which dishonoured the cheque on the ground of absence of sufficient credit for the customer failed to communicate the fact within the prescribed time to the presenting bank. Consequently it found itself compelled to pay the presenting bank which had already paid the value of the cheque. Subsequently it took an undertaking from the customer to pay the amount back. It was held that as there was no question of the bank having paid upon the cheque to preserve the credit of the customer there had been no services voluntarily rendered to the customer to bring the case within S. 25 (2). A 1958 Andh Pra 605 (607) (DB).

(12) Proviso to Sec. 32-FF of Pepsu Tenancy and Agricultural Lands Act and Rule 23-A of Pepsu Tenancy and Agricultural Land Rules, 1958, imply that gift for love and affection is not included in dispositions of land for consideration contemplated under S. 32-FF of the Act. (1966) 68 Pun LR 888.

(13) A Muhammadan son based his claim upon a Rukka written by his father by which he was appointed manager of his father's shop and the Rukka was not gratuitous but was by way of remuneration for work done. The Rukka was written by the father under the apprehension of immediate death and was against the rule of Muhammadan law: **Held**, that the agreement was without consideration and it did not fall under Clause (2) of Section 25 as it was not a promise to compensate one who had voluntarily done something for the promisor. 1893 Pun Re (Cri) No. 61, p. 272 (272) (DB).

(14) X agreed to pay Y Rs. 5 per mensem for life in consideration of Y having trained X in the art of singing and dancing at his own cost. It was found that Y's sister and not Y himself had rendered those services for X. In a suit by Y it was held that, as Y himself had done nothing for defendant, there was no consideration for the agreement and, therefore, it was unenforceable. A 1916 Pat 80 (81).

(15) A contract entered into by a minor is null and void and any consideration received by the minor cannot be a good consideration for a fresh promise by him after attaining majority. A 1928 All 440 (441) (FB) •• 1941 Nag LJ 363 (364) •• A 1938 Oudh 14 (15) •• A 1935 Lah 561 (565) (FB). (Overruling A 1920 Lah 37; A 1921 Lah 205, 1911 Pun Re No. 31 and 1888 Pun Re No. 86.) •• A 1934 Peah 123

Section 25 — Note 5 (contd.)
(125) ** A 1927 Lah 24 (25, 26) (DB) ** (1906) 16 Mad LJ 422 (423) (DB).

(16) Where a person executed a mortgage after attaining majority in consideration of the mortgagee paying off certain debts due to a third person which the mortgagor had incurred during his minority: **Held**, payment by mortgagee to creditor was valid consideration. A 1933 All 659 (660) (DB).

6. **Clause (3) — Contract to pay time-barred debts.**— (1) Under S. 25 (3) a debtor can enter into an agreement in writing to pay the whole or part of a debt of which the creditor might have enforced payment but for the law of limitation. A 1954 Pepsu 44 (45).

(2) While an acknowledgment under the Limitation Act in order to be valid, must be made before the expiry of the period of Limitation, a promise under Section 25, sub-sec. (3) of the Contract Act, to pay a debt may be made after the debt has become barred by limitation. A 1975 Mad 333 (336) ** ILR (1971) Cut 1268 (1278) (DB).

(3) Law is well settled that in order to invoke the provisions of S. 25 (3) of the Contract Act, there must be an express promise to pay the barred debt. Though the word "express" is not used in Sec. 25 (3), that is to be construed that way as otherwise there will be no promise to pay in writing as required under that provision. Where there is no express promise to pay, but the intention is inferred only indirectly cannot be treated as a promise in writing to pay the time-barred debt so as to come within S. 25 (3) of the Contract Act. (1976) 42 Cut LT 244 (247) (Orissa) ** 1979 LS (AP) 132 : A 1980 NOC 41.

(4) A suit on a written promise to pay a barred debt under Sec. 25 (3) lies as it is valid contract. A 1923 Lah 481 (483) ** ('54) 20 Cut LT 100 (102) ** A 1935 Lah 984 (984) ** A 1932 Lah 212 (213) (DB) ** (1909) 31 All 495 (496, 497) (DB) ** 1959 Ker LT 294.

(5) Suit need not be specifically based on promise under Sec. 25 (3). It is enough if it is based on original debt and the promise under S. 25 (3) is referred in the original plaint. (1975) 1 Mad LJ 414.

(6) A time-barred debt can form a good consideration because the debt is not extinguished although the remedy is lost. A 1929 All 657 (657) (DB) ** A 1958 All 313 (316) ** A 1958 Raj 10 (11, 12) ** A 1954 Pepsu 44 (45) ** A 1926 Lah 633 (634) (DB) ** (1912) 16 Cal WN 636 (638).

(7) Tenant giving an undertaking to landlord to pay off arrears of rent (part of arrears time-barred) — Landlord is entitled to recover entire arrears. A 1975 Mad 164 (167).

(8) Contract to pay time-barred debt — Mere intention to pay unascertained amount not covered by S. 25 (3). 1975 Lab IC 1554 (1555, 1556) (Orissa) ** (1977) 4 Cal HC (N) 794 (801) (DB).

(9) Communication from Railway directing reinstatement of an employee whose services were terminated wrongfully, restricting "pay and allowances to the period covered by the law of limitation" — **Held** communication amounted to acknowledgment of liability and "promise to pay" under Section 25 of the Contract Act. (1975) 88 Mad LW 378 (DB).

(10) A mortgage deed obtained in lieu of the amount due under a preliminary decree passed in a suit on a prior mortgage which had abated on the failure of the deceased plaintiff's heirs to obtain their substitution within the prescribed time is not void for want of consideration inasmuch as it is covered by S. 25 (3). A 1931 All 154 (155) (DB).

(11) Section 25 (3) speaks of a promise to pay time-barred debt and although a promise to pay a time-barred debt can in a sense be said to have been made without consideration, that provision says that such an agreement to pay a time-barred debt is a contract. Now if a person promises to pay a time-barred debt and the person to whom that promise is made sues thereon, it is difficult to conceive of a situation where it may be said that the person suing must be non-suited for he failed to accept the promise. 1980 UPLR 55 (60) (All).

(12) A barred debt is a valid consideration for a promise to pay under Section 25 even if the promisor did not know it to be barred on the date of the promise. A 1915 Mad 242 (242) (DB) ** A 1951 Mad 903 (904) (DB) ** (1913) 18 Cal LJ 329 (331) (DB) ** A 1958 Raj 10 (11) ** A 1969 Orissa 301 (303) ** (1977) 2 Kant LJ 495 (498) (DB).

[But see (1910) 20 Mad LJ 656 (656).]

(13) Where the document contains an express promise to pay it is valid under S. 25 (3) even though the time-barred debt itself is not referred to in it. (1936) 63 Cal 759 (762) ** A 1951 Mad 903 (904) (DB) ** A 1943 Bom 447 (450) (DB) ** (1910) 33 Mad 159 (161, 162) (DB).

[But see 1941 Nag LJ 363 (364) ** A 1976 Goa 53 (54).]

(14) Where actual consideration was something different from that recited in document, effect must be given to real consideration and this rule is equally applicable to contracts falling under Section 25 (3). A 1936 Lah 1016 (1018) ** A 1943 Bom 447 (450) ** (1910) 33 Mad 159 (160, 161) (DB).

(15) A promise to pay a part of a barred debt would render the promisor liable to pay only that part not the whole debt. A 1940 Mad 678 (679) ** (1975) 1 Mad LJ 414.

(16) Where a debt is not binding on the defendant, and consequently not enforceable against him, there is no question of applicability of Section 25, Cl. (3), because the barred debt is not one which would be enforceable against the defendant, but for the law of limitation. A 1934 Mad 549 (551) (DB) ** A 1937 Oudh 300 (301) (DB) ** A 1933 All 175 (176) ** A 1928 Bom 539 (542) ** A 1967 Mad 189 (190) ** A 1973 Mys 203 (205).

[See (1906) 8 Bom LR 644 (645, 647) (DB).]
[See however A 1937 Lah 484 (484).]
[But see (1975) 41 Cut LT 506 : (1975) 1 Cut WR 292.]

(17) A contract entered into by a guardian is voidable by the minor on attaining majority but not void. Sub-section (3) of Section 25 applies to the case of a minor who executes a promise in writing to pay a debt incurred by his guardian. A 1922 Nag 250 (252).

(18) Original debt borrowed by father and son — Promise under S. 25 (3) signed by son alone — No decree can be granted against father. (1975) 1 Mad LJ 414.

(19) A promise to pay time-barred debt referred to in this clause constitutes novation of

Section 25 — Note 6 (contd.)
the contract which can form the basis of a suit independently of the original debt. A 1930 Oudh 287 (289) (DB) ** A 1938 Rang 134 (136) (DB) ** A 1967 Orissa 158 (158) (DB).

(20) What Sec. 25 (3) does is not to revive a dead right but to resuscitate the remedy to enforce payment by suit. The right of lender to receive payment and the obligation of borrower to repay never dies by lapse of time. A 1947 Cal 267 (268) (DB) ** ILR (1977) 2 Cal 425 (442) (DB).

(21) Where a promise to pay a time-barred debt is made for some consideration though inadequate the agreement falls outside the ambit of Sec. 25 (3) which applies only when there is a wholly gratuitous promise. Such an agreement constitutes an entirely new valid contract executed for a fresh consideration. A 1943 All 63 (65, 66) (DB) ** A 1936 All 160 (161, 162) (DB).

[See also A 1921 Pat 29 (30) (DB).]

(22) The debts or items of claim may be barred by limitation and yet they can be taken into account while arriving at account stated and be treated as paid off or discharged by the debts on the other side. The account stated thus results in an agreement by one party to pay to other the balance found due on account stated and it furnishes a new cause of action to the party in whose favour the balance found is due. (1962) 3 Guj LR 574. (Overruled on another point in A 1967 SC 1078.) ** A 1968 Cal 292 (295).

[But see A 1975 Mad 333 (337) ** A 1958 Ker 31 (33) (FB).]

(23) Where a promissory note contained a promise made in writing and signed by a person as karta, manager and representative of joint family in lieu of father's antecedent debt to be charged therewith to pay any part of the debt of which the creditor might have enforced payment but for the law of limitation of the suit, the agreement though without consideration was not void. ILR 42 Pat 704 (730, 731) (DB).

(24-25) Averment in plaint about cash consideration — Plaintiff can still prove that consideration consisted of past debts. (1974) 76 Bom LR 171.

(26) Recovery of instalments barred under Debt Conciliation Act — Promise to pay them by person other than the debtor — Cannot be a lawful consideration for a promissory note by him. A 1974 Bom 72.

(27) Fresh contract between creditor and debtor — Application for loan by debtor to Bank for payment of creditor's dues — Section 25 (3) does not apply. A 1972 Mys 283 (285, 286).

(28) Persons authorised to renew time-barred debt — Acknowledgment of liability by member of joint family — To charge entire family, it must be proved that member was specially authorised to make such an acknowledgment. (1971) 2 Cut WR 775.

(29) Contract to pay time-barred debt — Municipality by resolution acknowledging liability to refund amount of tax illegally collected — Does not constitute promise to pay where suits are time-barred at the date of resolution. (1975) 1 APLJ 173.

(30) Where the context and manner in which the "khata' came to be executed suggested that the defendant acknowledged his liability to pay, held that it constituted an acknowledgment of liability with a stipulation to pay and as such it is covered under S. 25 (3) of the Contract Act. 1978 WLN (UC) 195 (198) (Raj).

(31) Post-card containing references to some payment which might be made by the writer, did not refer expressly or by implication to any existing right with regard to the alleged debt. No jural relationship of debtor and creditor was disclosed by the language used in the post-card. Therefore the post-card neither constituted an acknowledgment under Sec. 18 of the Limitation Act nor a promise within the meaning of S. 25 (3) of the Contract Act. A 1974 Mad 191 (194) (DB).

(32) The expression "Baki Deva" constitutes an acknowledgment of liability. Literally translated, it means 'the balance which is owned'. Such an expression may not constitute a fresh promise to pay within the meaning of Sec. 25 of the Contract Act. A 1979 Guj 110 (111) (DB).

(33) Equitable mortgage — Deposit of title deeds — Mortgage in satisfaction of time-barred debt — Section 25 (3) of the Contract Act not attracted. A 1978 Cal 111 (114) (DB).

7. Agreement by acceptance of offer necessary.— (1) Applicability of S. 25 (3) depends upon there being an agreement by the acceptance of offer. Hence where the offer is rejected by the creditor and there is no agreement the creditor gets no right of suit merely on basis of the offer. A 1946 Mad 72 (73) ** A 1964 Orissa 111 (113) (DB) ** A 1961 Raj 211 (216) (DB).

[See A 1940 Rang 159 (160).]

(2) Section 25 (3) requires that there must be an agreement by the acceptance of a proposal before or at the time when the writing is made and signed in accordance with its provisions. A 1952 Cal 443 (446).

(3) In order to bring a deposition within the meaning of a fresh contract, the necessary ingredients of proposal and acceptance with the consciousness of the purpose for which the contract is being entered have to be clearly brought out. A 1963 Andh Pra 337 (339).

8. Promise to pay is an essential ingredient.— (1) A promise to pay the time-barred debt is a condition precedent to the applicability of the section. A 1958 All 313 (316) ** A 1952 Sau 79 (79) ** A 1938 Lah 155 (156) ** A 1936 Lah 164 (165) ** A 1930 Nag 236 (237) ** A 1929 Oudh 529 (529) (DB) ** A 1929 Pat 258 (260) (DB).

(2) The promise to pay may be conditional or absolute. (1912) 14 Ind Cas 133 (134) (Cal).

(3) The promise necessary to attract the operation of S. 25 (3) is a promise to pay at sometime in the future. A 1949 Oudh 48 (51) (DB) ** ILR (1954) Patiala 306 (308).

(4) The promise necessary to bring a case within Sec. 25 (3) must be such as what is contemplated under Section 9 of this Act. A 1953 Punj 28 (30).

(5) Under Sec. 25 (3) a promise to pay a debt barred by limitation must be express promise to pay and not merely an unconditional acknowledgment involving an implied promise to pay. A 1938 Bom 460 (461) (DB) ** A 1958 Ker 31 (33) (FB) ** A 1949 Oudh 48 (51) (DB) ** A 1942 Nag 92 (94) ** A 1941 Nag 100 (101, 102) (DB).

[See however A 1958 Madh Pra 21 (22) : 1957 MPLJ 859 (DB).]

Section 25 — Note 8 (contd.)

[But see A 1938 Lah 757 (757) ** A 1968 Pat 203 (207) (DB). (A 1935 All 129, held overruled by A 1953 SC 225 : A 1956 Raj 12, Dissented from.)]

(6) An acknowledgment in which there is no express promise implying new contract to pay the debt must be made before the debt is barred by time and in this respect an acknowledgment under Section 19, Limitation Act, differs from a promise to pay a barred debt under Section 25 (3) of the Contract Act. A 1955 Pat 320 (329) (DB) ** A 1954 Pat 575 (579) ** 1962 Raj LW 483.

(7) An acknowledgment of the liability which contains an express promise to pay the debt even though made after the debt has become time-barred would constitute fresh promise to pay within the meaning of Section 25 (3) of this Act. A 1958 Madh Pra 21 (22) ** A 1938 Lah 234 (237) (FB). (Reversing A 1937 Lah 642.) ** A 1949 Nag 229 (284) (DB) ** A 1943 All 63 (64) (DB) ** A 1929 Lah 695 (696, 697) ** A 1929 Lah 511 (512) ** 1969 MPLJ 501 (502, 503) ** 1961 MPLJ 169 ** 1962 Raj LW 215 ** 1962 Raj LW 483.

(8) Whether there is an express promise to pay or not in a given document will depend upon its language. ILR (1954) Patiala 306 (308).

(9) The distinct or express promise which is necessary for S. 25 (3) must be so in the sense that the language indicates that payment would be made in the future. A 1949 Oudh 48 (51) (DB) ** A 1954 Madh B 11 (12) ** A 1939 Lah 466 (467) ** A 1935 Nag 221 (222) ** A 1932 All 461 (464) (DB) ** A 1929 Cal 444 (444, 445) (DB) ** A 1925 Cal 338 (338) (DB) ** ('84) 8 Bom 405 (407) (DB).

(10) The words in each case should be weighed on their merits and with reference to the circumstances of the case to arrive at a decision on the question whether they do import or do not import a promise to pay. A 1942 Lah 50 (54, 55) (FB). (A 1932 Lah 470; A 1934 Lah 835; A 1938 Lah 503; A 1938 Lah 511 and A 1939 Lah 486, Overruled.)

(11) There is no difference between an endorsement written in the hand of the creditor that a certain amount is receivable by him and an entry made by the debtor himself stating that a certain amount is payable by him. In either case the entry signed by the debtor implies a promise to pay on the part of the debtor within the meaning of Sec. 25 (3). A 1955 Ajmer 59 (60).

(12) The defendant's Munim, duly authorised by the defendant, acknowledged in writing a certain time-barred sum due to plaintiff and there was also a written promise to pay within the month. Held, it was not a mere acknowledgment but an express promise, which was enforceable. A 1932 All 38 (40).

(13) Where there are both barred debts and others that are not barred a promise to pay the latter debts cannot be interpreted as a promise to pay the former also. A 1941 Cal 449 (451).

9. Writing and signature of party to be charged with, necessary.— (1) Unless a promise to pay is in writing it cannot fall within the purview of S. 25 (3). A 1941 Nag 100 (101) (DB) ** A 1938 Nag 180 (181) ** A 1937 Lah 382 (383) (DB) ** A 1925 Mad 1147 (1148) ** (1900) 23 Mad 94 (97, 98) (DB).

(2) A statement which is not signed by the person to be charged with or by his agent, generally or specially authorised, cannot constitute a valid contract under S. 25 (3). A 1924 All 12 (15) (DB) ** A 1953 Mad 433 (434, 435) ** 1908 Pun Re No. 102, p. 473 (479) (DB) ** 1907 Pun Re No. 132, p. 626 (634) (DB) ** (1900) 23 Mad 94 (97, 98) (DB).

(3) As a promise to pay which falls within Sec. 25 (3) is a contract, it must be expressed, if the Governor-General is the person to be charged under it to have been made on his behalf and executed on his behalf by such persons and in such manner as directed or authorised by him. A 1952 Cal 443 (446).

(4) An acknowledgment of the liability to pay an amount found due on a particular day although it is a contract is not with reference to a time-barred debt. Therefore S. 25 (3) would not be attracted to the case and writing is unnecessary. A 1930 Nag 298 (299).

10. "Person to be charged therewith.— (1) The words "by the person to be charged therewith" in Section 25 are wide enough to cover the case of a person who agrees to become liable for the payment of a debt due by another, and need not be limited to the person who was indebted from the beginning. A 1940 Mad 678 (678, 679) ** A 1957 Mad 14 (16).

(2) The liability to be proceeded against in an action for the debt by reason of the possession of the property of the debtor is sufficient to put a person, even though he himself is a third party to the transaction between the creditor and the debtor under an obligation to pay the debt under Section 25 (3). A 1957 Mad 14 (16).

(3) As the son under the Hindu Law cannot be made personally liable for the debts of his father he does not become by the operation of Section 25 (3) personally liable by his execution of a promissory note for a time-barred debt of his father. A 1934 Cal 178 (179) ** A 1938 Lah 159 (160) ** A 1929 All 586 (586) (DB)

11. Persons authorised to renew time-barred debts.— (1) Section 25 (3) specifically requires that the person renewing a time-barred debt must be either the person himself or his agent generally or specially authorised in that behalf. A 1939 Bom 464 (465) ** (1882) 11 Cal LR 581 (583) (DB).

(2) Executor can promise to pay the deceased's time-barred debts. A 1928 Bom 539 (544).

(3) A Hindu father or grandfather can pass a promissory note for a time-barred debt and such a note constitutes a binding contract under Section 25 (3) even on the sons and grandsons. A 1932 Bom 522 (523) ** A 1922 All 402 (402) (DB).

(4) A promise to pay a barred debt by a manager of a Hindu family who is not the father of the junior member is not binding on such junior member, S. 25 (3) Contract Act, does not apply to such a case. A 1937 Nag 327 (329) ** A 1950 PC 15 (16).

(5) A guardian of an infant cannot make a promise to pay a time-barred debt. A 1928 Cal 850 (852) (DB) ** A 1939 Bom 464 (465).

26. Agreement in restraint of marriage, void.— Every agreement in restraint of the marriage of any person, other than a minor, is void.

[Malaysian Contract Act 1950, S. 27.]

Section 25 — Note 11 (contd.)

(6) Agent to Court of Wards has no authority to bind a minor by promise under Section 25 (3) to pay debt barred by limitation. (1896) 19 Mad 255 (257) (DB).

(7) The Deputy Commissioner, acting on behalf of the Court of Wards, is not an agent authorised to pay a time-barred debt of the ward. A 1940 Oudh 107 (110) (DB).

(8) Pleader's statement in Court, promising payment of time-barred debts on certain conditions, does not bind his client in absence of special authority. A 1924 All 12 (15) (DB).

(9) A power of "mookhtarnama" to pay debts, or to secure debts, or otherwise to deal with debts, is prima facie a power to deal with existing debts, and it does not authorize the agent to revive time-barred debts. (1882) 11 Cal LR 581 (584) (DB).

(10) Where it is found that the 'account stated' is signed by a managing partner, who had actual power to act and sign on behalf of the firm, the firm is liable on it. A 1958 All 313 (315) (DB).

12. 'Debt', meaning of.— (1) The word 'debt' in Section 25 must be taken to have been used in its ordinary meaning of a sum payable in respect of money demand recoverable by action. A 1918 Mad 1145 (1146) (FB) ** A 1932 Lah 212 (213) (DB) ** 1971 WLN 570 (Raj).

(2) The word 'debt' in Sec. 25 (3) includes a judgment debt. (1881) 3 All 781 (785) (DB) ** A 1924 Cal 388 (389) (DB) ** (1890) 14 Bom 390 (391, 392) (DB) ** (1879) 4 Cal 500 (506, 508) (DB).

(3) The liability of a member of a joint family to have his property sold for a debt contracted by the manager for the joint family purpose and binding on the joint family property is a debt within the meaning of Section 25. A 1922 Mad 23 (24, 26, 27) (DB).

(4) A promise to pay an unascertained sum is not a promise to pay a 'debt' within the meaning of Sec. 25 (3). A 1952 Pat 73 (77).

(5) A promise to pay amount which might be found due by arbitrator on taking accounts of the partnership between parties does not amount to a promise to pay debt under this section. A 1918 Mad 1145 (1146) (FB).

(6) In order to attract the provisions of Section 25 (3) there must be an existing debt before the promise to pay. A 1952 Cal 443 (446, 447).

13. Explanation 1.— (1) The rule laid down in Expln. 1 applies as between a donee and persons claiming through the doner. A 1915 Low Bur 86 (87).

(2) Where a husband gifted away his property to his wife and land was changed to her name and then he mortgaged the property, held that question as to validity of gift should be determined by reference to Section 5, Punjab Laws Act, and not to Section 25 to the Contract Act. 1899 Pun Re No. 38, p. 186 (186, 187, 188) (DB).

14. Explanation 2.— (1) Under this Explanation inadequacy of consideration is not relevant unless it affects the question of free consent to contract. A 1943 All 63 (65) (DB) ** A 1923 All 590 (591) (DB) ** (1964) 30 Cut LT 377 ** 1966 BLJR 739.

(2) A party seeking to set aside a transaction on the ground of inadequacy of consideration must show such inadequacy as will involve the conclusion that he either did not understand what he was about, or was the victim of some imposition. (1878) 3 Cal 192 (196) (DB) ** A 1954 Pat 280 (284) (DB).

(3) Where the consideration for a promise is unreal as where the promisor gets nothing in return for his promise except that to which he is already legally entitled to, the promise cannot be enforced. A 1956 All 439 (444) (DB).

Section 26

(1) Sections 23, 26 and 27 do not exhaust all instances of agreements contrary to public policy. A 1924 Oudh 404 (405).

(2) Though Section 26 is in general terms, it is doubtful whether partial or indirect restraint on marriage is within scope of the section. A 1942 All 351 (353) (DB).

(3) Section 26 is not restricted to the case of first marriage only but also applies to a person already married. Hence, an agreement for repayment of money spent on the boy's education if he married another during the lifetime of his wife is void. A 1914 Low Bur 156 (1) (156) (DB).

[But see (1908) 4 Nag LR 86 (89).]

(4) Though a stipulation not to take another wife is illegal as being in contravention of Section 26, yet promises to live in wife's house and to work and support her, are good and lawful and therefore enforceable. (1913) 15 Ind Cas 915 (916, 917).

(5) Agreement to pay woman certain annual allowance only "until death or remarriage" or "during widowhood" is not illegal. (1912) 10 All LJ 185 (186, 187).

(6) Compromise between co-widows in mutation proceedings — Both to be entered in equal shares — Either on remarriage to forfeit her share: Held, compromise was not in restraint of marriage as no direct prohibition to remarry was imposed by it. A 1942 All 351 (353) (DB).

(7) A Kabinnamah by a Muhammadan husband authorising his wife to divorce him in the event of his marrying a second wife, is not void under Section 26. A 1916 Cal 761 (762) (DB).

(8) Wakf deed giving share of profits to widows contained condition forfeiting such share on widow's remarrying — Held condition was neither illegal nor improper and did not offend Section 26. A 1932 Oudh 108 (112) (DB).

(9) Promise to pay a bride price, while marrying a major girl, cannot be enforced as being immoral and in restraint of marriage. A 1920 Lah 357 (359) (DB).

(10) Contract restricting major girl's right of marrying according to her own choice is void. A 1934 Pesh 22 (22).

(11) The application of Section 26 must be governed by considerations connected with the country and the personal law of the parties

27. Agreement in restraint of trade void. —Every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.

Saving of agreement not to carry on business of which goodwill is sold.

Exception 1.—One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein, provided that such limits appear to the Court reasonable, regard being had to the nature of the business.

a[* * * * *]

[Malaysian Contract Act 1950, S. 28.]

[a] Exceptions 2 and 3 relating to agreements between partners upon, or in anticipation of, dissolution of partnership and during continuance of partnership, respectively were repealed by the Indian Partnership Act, 1932 (9 of 1932), S. 73 and Sch. II—see now Ss. 11 (2) and 36 (2) of that Act.

Section 26 (contd.)

concerned in each case as it comes up for decision of the question whether or not a particular agreement or condition is in "general" restraint of marriage, and therefore void under the section. (1908) 4 Nag LR 86 (89).

(12) Where a direction in the will was that if any person entitled to benefit under will married a non-Zoroastrian, interest going to him would lapse and go over to others, it was held that it could not be said that not marrying a non-Zoroastrian was contrary to law or public policy. A 1948 Bom 319 (320, 321) (DB).

SECTION 27 — SYNOPSIS

1. Agreement in restraint of trade.
2. Agreement for mutual benefit.
3. Service contracts.
4. Sale of goodwill — Exception.

1. Agreement in restraint of trade.— (1) Section 27 aims at contracts by which a person precludes himself altogether for a limited time or over a limited area from exercising his profession, trade or business and not at contracts by which in exercise of his profession, he enters into ordinary agreements with persons dealing with him which are necessary for carrying on his business. (1890) 13 Mad 472 (475).

(2) Agreement in restraint of trade is void — Section is exhaustive — Exceptions other than those enacted in statute cannot be engrafted — Restraint of trade imposed on employee after expiry of contract is void. A 1979 Delhi 232 (235) (DB).

(3) Contract in restraint of trade is not so tainted with illegality as to bring into operation the maxim "ex turpi causa oritur non actio", and, therefore, money paid or property transferred by one party to the other is recoverable. 1970 MPLJ 55.

(4) Restraint on trade whether general or partial may be good if shown to be reasonably necessary for freedom of trade. A restraint reasonably necessary for the protection of the covenantee must prevail unless some specific ground of public policy can be clearly established against it. **A 1967 SC 1098 (1102)** ** (1967) 1 Mad LJ 117.

(5) The test as to reasonableness of restraint is whether the primary object of the parties was in restraint of trade or was one to have a restrictive covenant in a sale. The reasonableness of the restriction must be judged by the character and the nature of the business or its customers. (1967) 1 MLJ 117.

(6) Onus is on party pleading that restrictions imposed in agreement in restraint of trade are reasonable. A 1980 Raj 155 (159) (DB) ** 1980 WLN 200.

(7) A covenant of restraint is designed to protect the legitimate proprietary interests of the covenantee. In no case will the law allow a covenant merely to avoid competition. Nor will law allow a restraint wider than the protection the proprietary interest requires. A 1962 Cal 61 (65).

(8) Where a claim is founded on tort, Section 23 and Section 27 do not apply. A 1931 All 83 (85) (DB).

(9) Every person has a right to a free course of trade and to conduct his business upon his own lines even though it results in an interference with the business of another person to his detriment. A 1931 All 83 (89) (DB).

(10) Whether an agreement is in restraint of trade within the meaning of Section 27 is a question of law. A 1934 Lah 110 (111).

(11) Per A. P. Sen, J.:— When a covenant or agreement is impeached on the ground that it is in restraint of trade, the duty of the Court is, first to interpret the covenant or agreement itself, and to ascertain according to the ordinary rules of construction what is the fair meaning of the parties. **A 1980 SC 1717 (1729) : 1980 BLJR 417.**

(12) A contract, which has for its object a restraint of trade, is prima facie void, Section 27 of the Contract Act is general in terms, and unless a particular contract can be distinctly brought within Exception (I), there is no escape from the prohibition. 1970 MPLJ 55.

(13) Where the restrictive clauses appear in the formal document of dissolution of partnership and no local limits are at all specified, it is not permissible to enter upon a consideration of what the parties were likely to have contemplated. A 1943 Sind 197 (210) (DB).

(14) To succeed under Section 27 one must establish that suit is one to enforce agreement whereby some one is restrained from exercising a lawful profession, trade or

Section 27 — Note 1 (contd.)

business of any kind. (1905) 29 Bom 107 (118) (DB).

(15) Burden of justifying covenant in restraint of trade lies on the party upholding it. **A 1934 PC 101 (104) ** A 1967 SC 1098 (1102).** (Once, this onus is discharged, onus of showing that restraint is nevertheless injurious to the public is upon party attacking contract.)

(16) Agreement in restraint of trade is governed not by lex loci contractus but by the law of the place of performance. ('76-78) 1 Mad 134 (143).

(17) Bare agreement in restraint of competition cannot be upheld — Restrictive clause must be ancillary to main transaction and necessary in interest of both parties — Restriction on outgoing partner not to do business, in which he had specialised in the whole world held not valid. A 1943 Sind 197 (210, 211) (DB).

(18) Defendants agreeing to remain subject to the orders of the head of their caste and not to carry on their profession of working in lead with assistance of any other persons than the caste people — Agreement cannot be enforced for want of consideration and being against public policy. (1878-1880) 2 Mad 44 (44, 45) (DB).

(19) Agreement not to set up a business in consideration of promise to pay a sum for life is void as in restraint of trade though partly executed. **A 1916 Low Bur 51 (54) (FB).**

(20) Defendant carrying on business as a carrier of passengers by boat agreed to pay large sum to the plaintiff in consideration that the latter should abstain from carrying on similar business, **Held**, that the contract was void and did not fall within the Exception 1 to Sec. 27 as the plaintiff had no goodwill in his rival business. A 1918 Cal 546 (551) (DB).

(21) Covenant giving person exclusive right to convey passengers to and fro on road between Ootacamand and Metupalaya is not contract in general restraint of trade and can be enforced. 1868 (69) 4 Mad SCR 77 (DB).

[**But see** A 1938 Pat 473 (475, 476): 17 Pat 255 (DB). (Contract purporting to be license granting defendant exclusive right to collect hides of animals in particular area in plaintiff's Zamindari amounts to granting monopoly to defendant and is therefore unenforceable.)]

(22) Contract between licensee for manufacture of salt with buyer whereby former agrees to sell all salt manufactured by him to buyer and not to any other and at fixed price is void in so far as it restrains the former from selling to any other. (1890) 13 Mad 475 (476, 477).

(23) In a contract between a manufacturer and a purchaser of salt a stipulation that the former should not sell to other people than the latter is not in restraint of trade. But the stipulation that the former should not manufacture more than the quantity specified amounts to restraint of trade but if it is separable from the rest it does not affect the validity of the other condition. (1892) 15 Mad 79 (80, 81) (DB).

(24) Agreement not to supply coolies to one of the rival cooly suppliers is void. A 1914 Mad 673 (674).

(25) Broker agreeing to give up admitted claim to brokerage in consideration of plaintiff selling like quantity of goods for future only through him — On failure, brokerage on whole to be paid by defendant — Agreement is not void as being in restraint of trade or for uncertainty. (1875) 23 Suth WR 146 (146) (DB).

(26) Agreement to supply silica sand for one year, with stipulation not to supply sand, during that period to four specified factories, is void only to the extent to which it restrained trade or business. A 1931 All 539 (540).

(27) If an agreement confers or amounts to a recognition of a party's exclusive right to perform religious services for the whole village it is in restraint of a trade, profession or calling. It can be enforced only if the restriction is reasonable. A 1951 Kutch 56 (58).

(28) It is impossible to treat the obtaining of a license from Government as in the nature of a trade or calling. A 1946 Mad 289 (290).

(29) A and B who were bus owners submitted tenders to the Government for securing license to carry mails, A withdrew the tender in pursuance of an agreement with B that B would, in consideration of the withdrawal make a monthly payment of a certain amount. It was held that A was entitled to enforce the agreement which was not void under Section 27. A 1946 Mad 289 (290, 291).

(30) An agreement between two bidders whereby one agrees not to bid at an auction sale of the right to recover market dues, in consideration of Rs. 500 can be enforced, when such an agreement does not result in restraint of trade and it is not suggested that these two were the only bidders. A 1949 Nag 113 (113, 114).

(31) Where a partnership contained a clause "that on termination of selling agency business, neither of the parties to the agreement shall take up the selling agency from the mills," it was held that the clause was one in restraint of business and the restriction was not enforceable under Section 27 of the Contract Act and Section 54 of the Partnership Act. A 1956 Punj 49 (54).

(32) Condition at auction among members of Senayar community to sell their betel leaves only to highest bidder at auction and to none else held valid. (1967) 1 Mad LJ 117.

(33) Section applies even when the restraint is for a limited period only or is confined to a particular area. Such matters of partial restriction have effect only when the facts fall within the exception to Sec. 27. A 1942 Sindh 114 (115) (DB) ** ILR (1951) 2 Cal 386 (388, 389) (Agreement between two sugar factories allocating zones for each for procuring sugar-cane — Undertaking not to appropriate cane from zones allotted to the other is in restraint of trade.) ** A 1937 Oudh 445 (445) (DB). ** A 1922 Upp Bur 9 (10) ** (1909) 9 Cal LJ 216 (225) (DB).

Section 27 — Note 1 (contd.)
(1892) 19 Cal 765 (770) (DB) ** (1890) 13 Mad 472 (474) ** (1874) 22 Suth WR 370 (375) (DB).
[But see 1969 WLN 570 (Raj) ** (1904) 6 Bom LR 23 (27) ** (1890) 17 Cal 320 (323) (DB) ** (1890) 13 Mad 475n (476, 477) ** (1882) 8 Cal 809 (818, 819) (DB).]

2. Agreement for mutual benefit.— (1) Agreement for a fixed period between two millers not to charge less than certain price for milling other people's rice and to work their respective mills during alternate weeks, and providing for fixed sum as penalty in case of breach, is not contract in restraint of trade. (1913) 18 Ind Cas 183 (184) (Low Bur).

(2) Rules framed for regulating use of market amounts to restraint of trade, if they are unreasonable and stifle trade — Restraint is reasonable if it affords fair protection to the parties and does not interfere with public interests. A 1944 Nag 73 (77) (DB).

(3) Agreement between neighbouring landowners that market for sale of cattle shall not be held on same day on lands of both is not void. A 1915 All 94 (95) (DB).

(4) Agreement between traders to carry on business among members of their private association is valid. A 1931 All 83 (85) (DB).

(5) The fact that the scheme of the agreement would limit competition and keep up prices does not necessarily bring it within the terms of Section 27. (1905) 29 Bom 107 (118) (DB).

(6) Where two branches of the legal profession (Barrister and Solicitor) are amalgamated in a particular place, a person who carries on both branches and is a legal practitioner in that place, may enter into an agreement not to practise for a reasonable time and such an agreement is valid. (1913) 17 Cal WN 215 (218) (PC).

(7) Agreement between ice factory owners to work one factory alone and to divide profits — Agreement is not "in restraint of trade." A 1934 Lah 110 (111).

(8) The abandonment of a bona fide claim is good consideration for a compromise even though the agreement on which the claim was based was void as being in restraint of trade. A 1914 Mad 673 (674).

3. Service contracts.— (1) Section 57 of the Specific Relief Act extends to agreements of negative character such as are necessarily implied from the contracts for whole time service and the operation of such contracts as contracts for service appear to prevent the application of Sec. 27 of the Contract Act to such negative agreements so far as they purport to impose restriction only during the period of affirmative agreement for service. (1903) 5 Bom LR 878 (882) ** A 1946 Bom 423 (425) (DB). ** A 1966 Guj 189 (192) (DB) ** A 1964 Guj 115 (119, 121).

(1A) Where an employee does not leave the service but is removed from service by the employer, the post service negative covenant prohibiting him from starting similar business of his own or joining service with other competitive firm will not be enforceable against him — Under Section 27 a service covenant extended beyond the termination of service is void. A 1980 SC 1717 (1721, 1728) : 1980 BLJR 417 (SC).

(2) Negative covenant that employee would not, during contract period, engage in trade or business or would not get himself employed by any other master for whom he would perform similar or substantially similar duties is not restraint of trade and hence not hit by Section 27, unless contract is unconscionable or excessively harsh or one sided. A 1967 SC 1098 (1104) ** A 1964 Guj 215 (217) ** A 1966 Guj 189 (192) (DB) ** 1973 Lab IC 336 (338, 339) (Cal).

(3) Courts have a wide discretion to enforce by injunction a negative covenant. A 1967 SC 1098 (1105).

(4) For severance of illegal from legal part of covenant — In the first place, the illegal portion of the contract must be capable of being separated from the remainder of the agreement. This is generally known as "blue pencil" rule, i. e. the severance can be effected with a blue pencil without affecting the meaning of the part remaining. Secondly, the illegal promise must not form the whole or part consideration of the contract. Thirdly, the Court will not sever the terms so as to alter the entire scope and intention of the agreement. 1970 MPLJ 55.

(5) The master is entitled to be protected in regard to his interests in trade secrets and secret process of manufacture. That protection is secured by restraining the employee from divulging those trade secrets or putting them to the use of the servant. The master is also entitled to be protected against invasion of his customers or clientele but the master is not entitled to be protected against competition. A 1962 Cal 61 (66).

(6) There is distinction between restraints applicable during the term of the contract of employment and those that apply after its cessation. A 1967 SC 1098 (1102, 1104).

(7) Contracts by which persons are restrained from competing after term of their engagement is over, with their former employers within reasonable limits, fall under the general prohibition contained in Sec. 27. (1885) 11 Cal 545 (549) (DB) ** A 1921 Low Bur 19 (22) (DB).

(8) Onus lies on the employer to prove that negative covenant restraining employee on termination of service from competing for certain period is necessary for protection of his goodwill. 1968 Lab IC 819 (823) (Ch D).

(9) Physician agreeing to serve as assistant stipulating not to practice as physician and surgeon for three years — Agreement is not void. (1899) 23 Bom 103 (117, 118) (DB).

(10) Where it is proved that the employer is justified in apprehending that the employee may, on joining the service of his competitor, divulge the special knowledge and secrets in business gained by him while in employer's service, after receiving special training, injunction to enforce negative contract which is restricted as to time, nature of employment and area, can be

28. Agreements in restraint of legal proceedings void.—Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.

Section 27 — Note 3 (contd.)
issued in order to protect employer's interests. **A 1967 SC 1098 (1105).**

(11-12) Agreement not to sell products in specified area after termination of service of employee working with plaintiff as sales representative — Agreement held went beyond the scope of protecting plaintiff's goodwill inasmuch as employee was precluded from selling to those who were not potential customers of plaintiff — If agreement included potential customers it was bad for uncertainty. 1968 Lab IC 819 (823) (Ch. D).

(13) Section 26 (2) of Bihar Shops and Establishments Act (8 of 1954) is not repugnant to existing law relating to contract of service. A 1958 Pat 442 (444) (DB).

4. Sale of goodwill — Exception.— (1) Contract selling real goodwill in the trade of plying ferry-boats between certain landing places — Contract does not amount to agreement contravening Section 27. **A 1922 PC 167 (168).**

(2) Restraint in a contract selling a goodwill can be said to be injurious to public if it is calculated to produce pernicious monopoly, prohibiting other persons to trade in the line, so as to enhance prices to unreasonable extent. **A 1941 PC 75 (84).**

(3) A bare covenant not to compete cannot be upheld, unless it is ancillary to main covenant and necessary to make it effective. It can be upheld only if it is reasonable and is consistent with interests of public. **A 1934 PC 101 (104).**

(4) When the Court is satisfied that restraint was reasonable as between the parties it must always be very difficult to prove in a case connected with the goodwill that public interest was affected. **A 1941 PC 75 (84).**

(5) Vendor company carrying on business in Canada transferring same to another company — Covenant restraining vendor from doing any similar business whatsoever in Dominion of Canada — Restriction as to space, held, not unreasonable — Holding of small shares by vendor company in another company, carrying similar business was not a breach of agreement. **A 1941 PC 75 (80, 84).**

(6) Sale of goodwill by retiring partner to other partners with covenant in restraint of trade within specified area of land in his possession — Transfer of land by retiring partner — Covenant held binding as conditions were reasonable. A 1980 Raj 155 (164): 1980 WLN 200 (DB).

(7) Where the vendor of a goodwill contracts not to "directly or indirectly engage" in similar business, the phrase is not void for uncertainty. **A 1941 PC 75 (80).**

(8) Where a person merely buys the whole or any part of the tangible assets of any person who has been using the same in his business the purchaser cannot be said to acquire any interest of any sort in the old business of the vendor nor can he be regarded as a successor of the old business nor is he entitled to any of the intangible privileges. But by purchase of the goodwill, he acquires the right to use the same or a similar name for his business or to canvass the old customers as against the vendor and becomes the successor in interest of the old business. A 1957 Bom 111 (113).

(9) The goodwill of a business is inclusive of positive advantages such as carrying on the commercial undertaking at a particular place and in a particular name and also its business connections, its business prestige, and several other intangible advantages which a business may acquire. A 1957 Bom 111 (115) ** A 1970 Raj 34 (41) (DB).

(10) Goodwill must always be understood in relation to facts. It represents business reputation which is a complex of personal repuation, local reputation and objective reputation of the products of the business. Except where the reputation of a business and where the product of the business more than its proprietor have won widespread popularity and universal approval and except in the case of well-known patents and manufacturing processes in which event the personal and objective reputation predominate, it is the local reputation or the attribute of locality which forms the largest content of goodwill in almost every other business. Specially is the attribute of locality the most important consideration in the business of an ordinary trader or a dealer. A 1957 Cal 280 (282).

(11) Contracts for payment of goodwill money need not always be express but there may be oral contract or a contract may be implied by law, which may be inferred from acceptance of payment and other circumstances. A 1968 Raj 278 (280).

(12) Goodwill of a business depends upon a variety of circumstances or a combination of them. The location, service, the standing of business, the honesty of those who run it, and the lack of competition and many other factors go individually or together to make up the goodwill. A 1968 Raj 278 (281).

(13) Plea of D that P had transferred to him only tenancy and not goodwill of business — When business run by P and D is same and premises are located in business locality, conclusion is that goodwill must have necessarily passed. **A 1968 Raj 278 (281).**

SECTION 28 — SYNOPSIS

1. **Scope and applicability.**
2. **Agreements affecting jurisdiction of Courts.**
3. **Agreements affecting limitation for enforcing rights under contract.**
4. **Agreements restraining enforcement of rights.**
5. **Exception 1.**

Saving of contract to refer to arbitration dispute that may arise.

Exception 1.— This section shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

a[* * * * * *]

Saving of contract to refer questions that have already arisen.

Exception 2.— Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration.[b]

[Malaysian Contract Act 1950, S. 29.]

[a] Second clause of Exception 1 was repealed by the Specific Relief Act, 1877 (1 of 1877). Act 1 of 1877 has now been repealed by the Specific Relief Act, 1963 (47 of 1963) (1-3-1964). This new Act extends to the whole of India except the State of Jammu and Kashmir.

[b] Cf. the Arbitration Act, 1940 (10 of 1940), and Companies Act, 1956 (1 of 1956), S. 389.

Section 28 (contd.)

1. Scope and applicability.— (1) No man can exclude himself from the protection of Courts by contract. **A 1917 PC 116 (118).**

[**See also** A 1925 Pat 487 (488). (Agreement by servant not to sue for wrongful dismissal is invalid.)]

(2) Agreement by which one party thereto is restricted absoluely from taking usual legal proceedings is void to that extent. A 1934 Sind 1 (3) ** A 1951 Sau 83 (85) ** A 1950 Lah 174 (176) ** (1876) 1 Cal 466 (468, 469) (DB) ** (1967) 10 Law Rep 342.

(3) Section 28 cannot be construed so as to exclude agreements to refer to arbitration without order of Court in a pending suit. **A 1927 Bom 565 (576) (FB).** ** A 1953 Cal 690 (692).

(4) Section cannot be applied to rights under a decree. (1885) 7 All 124 (125, 131) (DB).

(5) Compromise of doubtful rights arising out of a previous contract is not void. It is outside the scope of Sec. 28. A 1926 Sind 202 (206).

2. Agreements affecting jurisdiction of Court.— (1) It is a well settled proposition of law that litigants cannot, by private agreement, confer jurisdiction upon a Court which it does not possess nor can they divest a Court of jurisdiction which it possesses under the ordinary law. A 1955 Cal 161 (162, 163, 164) (DB) ** A 1954 Bom 176 (177) (DB) ** A 1954 Mad 845 (847) (DB) ** ILR (1947) 1 Cal 412 (418) (DB) ** A 1935 Nag 48 (49) ** A 1930 Bom 185 (186, 187) (DB). (Words "to that extent" mean that only the stipulation which ousts the Court's jurisdiction is void and not the whole agreement.) ** A 1960 Cal 155 (156) (DB).

(2) The principle that parties cannot by consent confer jurisdiction on Court or deprive Court of jurisdiction only applies to cases of inherent jurisdiction of a Court over the subject-matter of a suit, but the question of territorial jurisdiction is not a question of inherent jurisdiction. **A 1946 Lah 57 (60) (FB)** ** A 1955 Madh B 145 (145) ** A 1947 Pesh 48 (50).

(3) Section 28 makes void only those agreements which "absolutely" restrict a party to a contract from enforcing the rights under that contract in ordinary tribunals. It has no application when a party agrees not to restrict his right of enforcing his rights in the ordinary tribunals but only agrees to a selection of one of those ordinary tribunals in which ordinarily a suit would be tried. **A 1946 Lah 57 (59) (FB).** (A 1923 Lah 425, A 1929 Lah 605 and A 1943 Lah 295, **Overruled.**) ** A 1957 Cal 240 (241) ** A 1956 Trav-Co 200 (203) (DB) ** A 1955 J and K 26 (27) (DB) ** A 1954 Bom 176 (177) (DB) ** A 1954 Mad 845 (846) (DB) ** ILR (1947) 1 Cal 412 (420) (DB) ** A 1944 Mad 47 (48) ** A 1937 Nag 334 (335) ** A 1935 Bom 198 (199) ** A 1968 Pat 44 (45) (DB) ** A 1968 Raj 89 (94) (AIR 1956 Madh Bha 120, **Dissented from**) ** A 1966 AP 256 (258) ** A 1964 Mys 147 (151) (DB) ** (1968) 1 An WR 424 ** (1967) 2 Mad LJ 57 ** A 1962 Andh Pra 452 (454) (DB) ** A 1959 Cal 669 (671, 672) ** A 1979 Delhi 255 (256) ** A 1979 Orissa 126 (128) ** A 1977 Cal 20 (24). (Application under Section 31 Arbitration Act cannot be entertained by the other court.) ** (1974) 15 Guj LR 897. ** ILR (1973) 2 Cal 485 ** A 1973 J & K 86 ** ILR (1973) Kant 1132 ** ILR (1973) Kant 1401 (DB).

[**But see** A 1946 Cal 112 (112, 113) ** A 1956 Madh B 120 (121).]

(4) A clause in a bill of lading that "Bombay" Courts alone shall have jurisdiction in respect of any claims filed against the Company", is not void under Section 28. A 1954 Trav-Co 461 (462) (DB) ** A 1962 AP 452 (454) (DB) ** **A 1971 SC 740 (741)** ** A 1980 Raj 42 (47). (A 1975 Guj 72 **held not good law** in view of A 1971 SC 740.) ** A 1978 (NOC) 164 (Cal). (Inconvenience to the party cannot be a ground for resiling from such clause) ** 1978 Ker LT 248 (249). (Suit filed in the court other than the

Section 28 — Note 2 (contd.)
agreed court held not maintainable.) ** ILR (1977) HP 314: A 1977 (NOC) 332. (In such a case the suit will be maintainable in that court alone) ** (1976) 2 AP LJ 358 (360) ** ILR (1970) 2 Delhi 60.

[See also 1977 (1) Andh WR 105 (107) (A 1959 Mad 227 Diss.) ** (1963) 1 Mys LJ 194. (Where the words "subject to Bangalore jurisdiction" are printed in a sale note, which bears the signature of both the parties to the sale transsaction jurisdiction of other Courts is excluded.)

[See however A 1975 Andh Pra 32 (35). (Words printed on the bill were "subject to Calcutta jurisdiction" : held that the words did not amount to a contract conferring exclusive jurisdiction on Calcutta Courts to the exclusion of any other court.) ** (1975) 16 Guj LR 31. (Agreement affecting jurisdiction — One out of alternative forums fixed by agreement — Agreement not violative of Sec. 28 — Enforceable on ground of sancitity of contract — Jurisdiction of the other Court, however, cannot be excluded and may be exercised in its discretion to avoid injustice or inequity.) ** A 1959 Mad 227 (228, 229). (Words "subject to Bombay Jurisdiction" printed at top of the Bill — Jurisdiction of other Courts is not excluded.)]

(5) An agreement to exclude the jurisdictions of one court and to confer an exclusive jurisdiction on another court in whose jurisdiction also part of the cause of action arose should be clear, unambiguous and explicit. A 1979 Mad 16 (18) (DB) ** A 1975 Mad 103 (105).

(6) Agreement affecting jurisdiction of Court though permissible for the parties to a contract, it is a question of fact in each case whether the parties have so stipulated. Contract between the plaintiffs and defendant was entered into through brokers of the defendant, and it was only in the confirmatory letters of the defendant that the condition "subject to Calcutta Jurisdiction" was printed. While the letters did not expressly contain any stipulation excluding jurisdiction of the court at Katni some letters written by plaintiff contained the words "subject to Katni Jurisdiction."

Held, it could not be inferred that only the Court at Calcutta had jurisdiction to to entertain the suit. 1970 MPLJ 663.

(7) Invoice containing terms 'subject to Shimoga jurisdiction' — Transactions arranged by the brokers — Purchasers not proved to be aware of the said term — Term cannot be taken as a term of the contract. A 1974 Mad 186 (190).

(8) The validity of an agreement by which the parties prefer one of the two Courts depends upon the fact that both the Courts must have jurisdiction in deciding the matter. A 1957 J and K 7 (7).

(9) Parties cannot make agreement that suits relating to disputes will be brought only in a particular Court even if cause of action arose outside its jurisdiction. (1909) 3 Sind LR 45 (47) (DB).

(10) Where a receipt executed by A for the price of articles entrusted to him at X and to be returned at Y contained a printed note that all disputes were subject to the jurisdiction of the Courts at Z but the acceptance of that term by B was not proved or even alleged by A, held that the agreement as to jurisdiction was not binding on B and that the cause of action arose either at X or at Y and Courts at Z had no territorial jurisdiction over the dispute. A 1957 J and K 7 (7).

(11) Agreement that another Court to the exclusion of Court having jurisdiction shall have jurisdition to adjudicate upon the disputes arising under the agreement of the parties, is illegal. But if such an agreement specifies the place, where according to the facts stated in the agreement, the cause of action is deemed to arise, the agreement is legal. A 1930 Lah 611 (612) ** A 1956 Trav-Co 200 (203) (DB) ** 1967 All LJ 343.

(12) Where the parties agreed that the Court at a particular place shall have jurisdiction but the Court of that place is not the place for instituting the suit either as the place in which the cause of action has arisen or as the place where defendant lived, the agreement is illegal and Court at that place cannot be invested with jurisdiction by such agreement. 1969 Ker LT 957.

(13) Agreements affecting jurisdiction of Courts — Validity. Where the contract was expressed into Purnea district but the parties agreed that it should be deemed to have been entered in the City of Bombay it was held that Purnea Court had no jurisdiction to try the Suit. 1970 Pat LJR 162.

(14) Agreement restricting right to institute suit in particular Court — Strict proof that restriction applies to proceedings under consideration is necessary — In deciding whether such restriction prevents either of the parties from filing a suit in another Court regard must be had to the actual wording used in the agreement — Condition in agreement that proceedings arising out of "contract" be instituted in Court M — Offer not ripening into completed contract — Condition did not apply — Jurisdiction of other Courts otherwise competent to entertain suit not ousted. A 1947 Mad 99 (100).

(15) Agreement providing that in settling the rates for work done Chief Engineer's decision would be accepted as final by the contractors — Restriction held amounted to ousting jurisdiction of Court and as such agreement would be void under Sec. 28. (1951) 4 Sau LR 34 (43) (DB).

(16) Where the Courts at M and B have ordinary jurisdiction to try a suit but the parties contract to sue only at B the Court at M cannot entertain the suit filed by one of the parties to the contract. A 1950 Kutch 32 (33).

(17) If the suit is filed in a Court not agreed upon by the parties the proper course for it is to return the plaint for the presentation to the Court agreed upon by them. A 1949 Ajmer 44 (45) ** A 1955 Cal 161 (164) (DB) ** 1968 2 Andh LT 173 ** A 1964 Mys 147 (157) (DB) ** ILR (1973) 2 Cal 485.

(18) When parties enter into an agreement restricting their rights to institute suits except in particular Courts, it must

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be strictly proved that the restriction applies to the proceedings under consideration. In deciding whether such restriction prevents either of the parties from filing a suit in another Court regard must be had to the actual wording used in the agreement. A 1947 Mad 99 (100) ** A 1959 Mad 227 (228) ** A 1979 Orissa 126 (128). (Words "All subject to Calcutta jurisdiction" printed on purchase order — Ouster of jurisdiction of other Courts cannot be implied merely from these words.)

(19) Stipulation as to the choice of tribunal for adjudication of disputes — Choice of foreign tribunal is not absolutely binding. But the enforcement of such a contract by Courts in India is not imperative where the choice restricts them to a foreign Court. In cases of foreign jurisdiction clause the question is not so much of freedom of contract and the parties being bound by their choice as of expediency in the light of what may be called the rule of balance of convenience and the ends of justice in the particular circumstances of the case. (1970) 1 Mad LJ 548 ** A 1976 AP 103 (107) ** A 1973 Cal 526 (528) ** (1970) 74 Cal WN 803.

(20) Where in the case of a global tender the work under contract was to be performed by a foreign company at Baroda in India and there was therefore a specific term that the contract would be governed by Indian laws and that Indian Courts shall have jurisdiction to hear and determine all actions and proceedings arising out of the contract.

Held that in absence of any special circumstance like fraud, coercion etc. which go to vitiate a contract, the term was binding on parties. Section 28 would not militate against such term nor would it make the term void. ILR (1973) 2 Cal 485.

(21) When the plaintiff has an alternative cause of action in tort he is not obliged to sue on the basis of the contract and if he brings a suit in tort, a term embodied in the contract relating to institution of suits arising out of the contract in particular court does not apply. 1971 MPLJ 1052.

3. Agreements affecting limitation for enforcing rights under contract.— (1) Sec. 28 contemplates the suspension permanently of the usual remedies for the enforcement of legal rights. It aims at the prohibition of agreements which could only operate so long as rights were in existence. Sec. 28 is aimed only at covenants not to sue at any time and covenants not to sue for a limited time. A 1914 Bom 225 (2) (228) (DB).

(2) It is only when a period of limitation is curtailed that Section 28 of the Contract Act comes into operation. It does not apply when the term spells out an extinction of the right of the plaintiff to sue or spells out the discharge of the defendant from all liability in respect of the claim. A 1951 Bom 347 (352) ** A 1966 Pat 69 (73) ** A 1962 J and K 15 (16). * A 1980 Delhi 185 ** ILR (1974) 1 Delhi 790 ** 1973 J & K LR 150.

(3) Condition in life insurance policy that no suit shall be brought on the policy after one year from death of assured is void. (1911) 11 Ind Cas 756 (756) (Low Bur) ** A 1926 Rang 3 (3) (DB).
[**See however** (1912) 14 Bom LR 741 (743) (DB).]

(4) A claim cannot be time-barred under an indent providing that no claim can be recognised if not made in writing within 60 days from due date of payment, as such clause cannot take away plaintiff's statutory right to bring claim within prescribed time. A 1932 Lah 169 (172) (DB).

(5) Condition in contract that on happening of certain event one party shall lose his rights is not a condition limiting period within which he may seek relief in ordinary Courts — Condition is not void. A 1926 Rang 3 (4) (DB) ** A 1962 J & K 15 (16).

(6) Condition in fire insurance policy that company would not be liable for loss or damage after expiration of twelve months from happening of the loss or damage, unless claim was the subject of pending action or arbitration, does not contravene Section 28. A 1934 Rang 15 (16, 17) ** **A 1960 Punj 236 (240, 244) (FB).** (A 1932 Lah 169, **Overruled.**) ** **A 1976 SC 287 (293)** ** 1973 J & K LR 150. (The mere demands of his claim by the plaintiff without instituting a suit or taking any step for reference of matter in dispute to arbitration cannot constitute a pending action to take the case out of the clause in the policy.)

(7) A condition in contract providing for forfeiture of all benefits unless an action is brought within three months from the rejection of the claim does not infringe Section 28. A 1924 Cal 186 (187) (DB) ** A 1950 East Punj 352 (355) ** A 1924 Rang 351 (351, 352) (DB) ** A 1914 Bom 225 (229) (DB). (Phrase "thus enforce his rights" refers to enforcement by usual legal proceedings in ordinary tribunals — Per Batchelor J.) ** A 1968 J & K 39 (43) ** (1959) 61 Punj LR 114. ** **A 1976 SC 287 (293).** (A 1972 Delhi 182 **Reversed.**) ** A 1980 Ker 151 : 1980 Ker LT 170 (172) (DB).

(8) Stipulation in policy that risk is to last only for three days after arrival of train at destination and no liability for loss would attach unless notice is given within 10 days of said risk to company does not infringe Section 28. A 1966 Pat 69 (73, 74) (DB).

(9) Article III, Clause (IV) of the schedule to Carriage of Goods by Sea Act does not limit time within which holder of bill of lading may enforce his rights against carrier. It extinguishes the right itself and is irretrievably lost — Insertion of clause in a bill of lading incorporating the article is not void. A 1931 Sind 124 (126).

(10) It is not open to the Railway Administration to repudiate its liability if the claim is not made immediately to the clerk in charge and is not forwarded to the Traffic Manager forthwith in spite of the rule printed at the back of the Railway receipt to that effect. The observance of this rule would be contrary to Section 28. A 1953

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Nag 169 (172) (DB) ** A 1951 All 702 (702, 703) ** 1888 All WN 59 (60, 61) (DB).

(11) Father executing 'mashahara patra' in favour of his widowed daughter providing for monthly allowance of Rs. 10 — Grantee restricted from bringing a suit for arrears of more than one year — Restriction held to be void under Section 28. A 1932 Cal 720 (721) (DB).

(12) Condition in bill of lading that carrier and ship would be discharged from liability for loss or damage unless plaintiff brought suit within one year from date of delivery — No suit brought within one year — **Held**, that rights of plaintiff were extinguished — Section 28 did not help him. A 1932 Bom 330 (332).

(13) R. 102 of the Indian Post Office Rules framed under Section 35 of the Indian Post Office Act, in so far as it fixes a limit of one year for making the claim is ultra vires. 1966 All LJ 675 (DB).

(14) Suit filed within prescribed limitation cannot be dismissed on ground that it is filed beyond the time fixed by Revenue officer. Revenue officer has no jurisdiction to curtail period of limitation allowed by law for filing suit. A 1968 Punj 341 (343).

(15) Implied incorporation of policy conditions — Machine risk insurance policy — Condition of forfeiture in case of fraudulent claim or failure to bring action within stipulated time on repudiation — No reference made to such condition in receipt of first premium nor brought to the notice of insured before acceptance — Condition forms normal term of class of policies in question and is binding on insured — Condition does not violate Section 28 of Contract Act. A 1974 Bom 228.

4. Agreements restraining enforcement of rights.— (1) Section 28 contemplates the suspension, permanently or temporarily, of the usual remedies for the enforcement of legal rights. It aims at the prohibition of agreements which could only operate so long as rights were in existence. A 1914 Bom 225 (2) (228) (DB).

(2) Section 28 does not apply to cases where there is no absolute restraint against enforcing the rights. A 1951 Sau 83 (85).

(3) An agreement to fall within Sec. 28 must be one which restrains enforcement of "rights under or in respect of any contract." An agreement not to challenge the award or the order of the High Court in the earlier writ petition cannot be said to restrain enforcement of rights under or in respect of any contract so as to fall within Section 28. 1974 Lab IC 784 (787, 788) (Madh Pra).

(4) Agreement restraining transferee from enforcing in any way his rights under the transfer is void. **A 1921 Mad 599 (606) (FB).**

(5) Agreement restraining party to arbitration from raising objections to the award in any way is opposed to the spirit of Section 28 and is void. A 1916 Lah 89 (91) (DB) ** A 1928 Sind 81 (81) (DB) ** A 1917 Sind 38 (39) ** ('83) 6 Mad 368 (369, 370) (DB) ** A 1965 Pat 239 (240).
[**But see** A 1918 Sind 13 (21).]

(6) Where a clause in agreement was that all kinds of disputes shall be decided according to certain rules and the exclusive authority rested with a committee so to make its decision final, it was held that the parties can come to Court and question the finality of its decision, in spite of the agreement. (1910) 34 Bom 13 (27).

(7) Byelaw providing that a member wishing to proceed with litigation against Society in a Court of law shall first resign his membership, failing which his name shall be removed from roll of members is void. (1967) 1 Mys LJ 521.

(8) Agreement in writing between parties to refer disputes between them to arbitration filed in Court — Order of reference made — No award filed by arbitrators — Reference superseded by order of Court — **Held**, agreements to refer did not bar under Sec. 28 one of the contracting parties from filing suit after supersession of reference. 1876 Pun Re No. 37, p. 67 (71) (DB).

(9) Even if a barrister Advocate makes a special contract with his client that the latter would not be sued for fees such a contract would be void under Sec. 28. **A 1933 All 417 (420) (FB).** (25 All 509, **Overruled.**)

(10) Plaintiff agreeing to forbear to sue debtor at the request of defendant who agreed to indemnify plaintiff — Agreement so far as it restricted plaintiff's right to sue, held, void. 1879 Pun Re No. 120, p. 358 (360) (DB).

(11) Claimant under Order 21, Rule 58, Civil P. C., withdrawing claim and agreeing not to file suit under Order 21, R. 63, Civil P. C. — Decree-holder agreeing not to press petition for enquiry as to genuineness of hatchitta alleged by him to be forged; **Held**, (Per Wort J.) Section 28 was no bar to the enforcement of the above contract. A 1940 Pat 683 (689) (DB). (But such contract is invalid under Section 23.)

(12) Agreement not to appeal against decree is not a void agreement and is not prohibited by Section 28. A 1934 Pat 644 (645) (DB) ** A 1929 Oudh 451 (452) (DB). (Agreement by which parties agree as to procedure to be adopted by Court in deciding case on merits and also consenting that the decision will be binding on them is tantamount to saying that no right of appeal will be exercised by the parties.) A 1926 Sind 202 (207) ** (1882) 8 Cal 455 (458) (DB) ** ('75-77) 1 All 267 (270) (FB) ** A 1969 Bom 221 (224) ** A 1976 Kant 90.

(13) Where a condition in a bill of lading only exempts the company from liability in case a notice of the claim is not given within forurteen days from the due date, the condition is not void as it does not restrain a party from making a claim in a Court of law in respect of the loss or damage. A 1951 Sau 83 (85).

(14) Agreement that security deposit will be returned on furnishing no demand certificate is not hit by Sec. 28. A 1962 J & K 66 (67) (DB).

(15) Execution of eviction order under the Tamil Nadu Buildings Act (1960). Tenant agreeing not to take any legal proceedings against the order if time is given to

Section 28 — Note 4 (contd.)

him to vacate premises — Contract is valid. A 1980 Mad 99 (100) (DB).

5 Exception 1.— (1) Exception 1 only applies to class of contracts where parties have agreed that no action shall be brought until some question of amount has first been decided by arbitrators. (1875-76) 1 Cal 466 (469) (DB) ** A 1955 Punj 113 (114) (DB) ** 70 Cal WN 199 (DB).

(2) To make agreement conform to Exception 1, jurisdiction of Courts must be excluded in all respects except matter which is the result of arbitrator's award. Section does not forbid action for damages for breach of such agreement to refer to arbitration. **(1875-76) 1 Cal 42 (50, 51) (FB).**

(3) A person may not contract himself out of his right to have recourse to Courts of law; but lawful agreement to refer matter to arbitration can be made a condition precedent before going to a Court of law. (1910) 34 Bom 13 (23) ** A 1960 All 72 (78).

(4) An arbitration clause in a contract of insurance making arbitration award a condition precedent to the right of action in a court for recovery on the contract is valid. It does not oust the Courts of their jurisdiction whatsoever and no cause of action accrues until the arbitrator has made the award. A 1979 Cal 56 (62): 83 Cal WN 162. ** A 1977 Cal 492.

(5) In order to decide whether particular arbitration clause amounts to a condition precedent every contract must be determined according to the circumstances belonging to it. The court's jurisdiction is not excluded by such arbitration clause but the court is called upon to enforce the contract giving full effect to the condition precedent clause. 1969 Ker LT 721.

(6) An agreement restraining a party to arbitration from raising objections to the award in any way is opposed to the spirit of Section 28 and is void. A 1917 Sind 38 (39) ** A 1950 Lah 174 (176) ** (1883) 6 Mad 368 (370) (DB). (Exceptions 1 and 2 do not legalize agreement not to object at all to validity of award.) ** A 1965 Pat 239 (249) (DB) ** A 1960 All 72 (78).

(7) No question of limitation arises where agreement to refer to arbitration falls within four corners of Exception 1. A 1929 Sind 55 (57, 58) (DB) ** A 1955 J & K 36 (38) (DB).

(8) Exception 1 covers an arbitration clause in a contract. (1906) 33 Cal 1169 (1173).

(9) Suit will not lie to enforce agreement to refer to arbitration, even in the case referred to in the first exception to Sec. 28. (1875-76) 1 Cal 466 (468) (DB).

(10) A contract appointing arbitrators is a contract "uberrima fides" and unless there is a complete confidence between the tribunal and the parties it would be wrong to bind a party to his contract, when there is a probability that injustice would result from doing so. A 1933 Sind 347 (350).

(11) Agreement to refer disputes arising between parties out of various contracts, to arbitration and to abide by the award — No prohibition to taking proceedings thereafter in Court of law — Agreement is valid. A 1937 All 650 (652) ** A 1966 Andh Pra 256 (258). (Suit is not maintainable before steps are taken to refer matter to arbitration.)

(12) Deputy Commissioner engaging plaintiff as workman — Agreement providing that in case of breach workman was to accept amount given by Deputy Commissioner and to be bound by his decision in other matters — Suit by plaintiff for balance of wages after grant of amount by Deputy Commissioner — **Held**, suit fell within Exception 1 and was barred under Section 21, Specific Relief Act. A 1932 Oudh 265 (266) (DB).

(13) Agreement by servant of company, that Manager of Company shall be sole judge as to company's right to retain whole or part of wages for breach of rules and his certificate in writing in respect of the amount so retained, and the cause of such retention, shall be conclusive evidence between the parties in all Courts of justice was held to be an arbitration clause covered by Exception 1. (1885) 11 Cal 232 (234, 235) (DB).

(14) A clause in the grant under Crown Grants Act (1895) that in the event of any boundary disputes between lessees, they shall be bound to submit such dispute to the Commissioner, and that the decision of the Board of Revenue on appeal shall be final and binding on the lessees, such a clause is not affected by Section 28 by reason of Section 3, Crown Grants Act. A 1938 Cal 211 (215).

(15) Contract between person and company — Party agreeing that decision of engineers of company will be final in respect of the contract whose execution is put under their supervision. **Held,** that though the engineers are not arbitrators, they are persons exercising judicial functions and the party can come to Court to question the decision if there is remissness in the proceedings. A 1935 Mad 356 (359) (DB).

(16) Submission to arbitration clause in bill to lading — Arbitrators and umpires to meet in England — Submission to be made rule of High Court in England — Submission clause held not rendered illegal by Section 28. A 1932 Sind 111 (112) (DB).

[**See also** A 1962 Cal 601 (604) (DB) ** A 1960 Cal 155 (156, 157) (DB).]

(17) **Held**, on interpretation of, the clause conferring jurisdiction on foreign Court that the clause did not oust the jurisdiction of Indian Court. The clause could, however, be invoked for stay of suit and the Court has to find out whether taking into consideration the entire facts placed before it, the Court mentioned in the clause is the Court of convenience. A 1960 Cal 45 (46).

(18) Where a party to a contract agrees that in case of any dispute arising out of the contract or in any matter concerning the contract, he will abide by the decision of the other party, he cannot afterwards be allowed to say that such decision is not binding upon him, being a decision by a person in his own cause, unless it can be shown to be arbitrary or otherwise unjust A 1933 Sind 93 (99) (DB).

(19) Contract Act (9 of 1872), Sec. 28. Exception I — Auction sale of forest coupe

29. Agreements void for uncertainty.— Agreements, the meaning of which is not certain, or capable of being made certain, are void.[a]

Illustrations

(a) A agrees to sell to B "a hundred tons of oil". There is nothing whatever to show what kind of oil was intended. The agreement is void for uncertainty.

(b) A agrees to sell to B one hundred tons of oil of a specified description, known as an article of commerce. There is no uncertainty here to make the agreement void.

Section 28 — Note 5 (contd.)

— Agreement embodying a clause to the effect that in the event of dispute decision of Conservator of Forest shall be final — Held that agreement was not void. A 1979 Pat 40 (DB).

(20) An agreement to appoint one of the contracting parties as an arbitrator about matters arising out of the same contracts may not be ruled out completely in theory but in practice, that seldom happens, and if one of the contracting parties wants to set up a case of that nature, he has to prove it beyond any doubt. A 1964 Pat 326 (330) (DB) ** A 1964 Pat 326.

(21) If the parties choose to agree to abide by the certificate of the architects whom they have named in the agreement, then they must accept the decision of the architects, however wrong and erroneous it may be. Final certificate can be challenged only on ground of fraud, collusion or misconduct on the part of architect. A 1942 Bom 334 (335).

(22) Telephone hiring contract between plaintiff and the Governor-General provided for reference to arbitration of Director-General of Posts and Telegraphs in case of any dispute. Dispute arose and the plaintiff brought a suit. A 1949 Bom 359 (361, 362) (DB).

(23) A contract which is ab initio void cannot form the basis of a reference to arbitration. A 1954 Mad 528 (531) (DB) ** (1962) 64 Bom LR 113.

(24) Where the existence or validity of the entire agreement itself is denied, and if the denial is found to be correct, the arbitration clause goes along with the agreement. A 1958 All 26 (27) (DB).

(25) Applicability — Agreement containing provision for reference to arbitration is valid. If there is only a clause to the effect that the parties are to refer the matter to arbitration then a suit would still lie, and the remedy of the other party would be to apply under Section 34 of the Arbitration Act for a stay of the suit. If, however, the making of an award is made a condition precedent to a right of action, the suit would not lie and if such a suit is brought, it would be dismissed as a premature one and the party cannot be referred to a prayer for a stay in the suit under Section 34 as Section 34 would not apply, the right of the party to file a suit being staggered. A 1970 Cal 211 (224).

(26) A mere covenant making arbitration a condition precedent to an action at law does not create a special contract and even in cases where it is provided that no action shall be brought until an award is made, a party has still the right to bring an action. ILR (1953) Hyd 727 (728) (DB).

(27) In view of Sections 23 and 28, there cannot be any agreement between the parties not to launch criminal prosecution even if one of the parties is guilty of embezzlement. 1965 All LJ 538 (DB). (A 1937 Oudh 331, Overruled.)

(28) A policy of marine insurance which provided that all disputes must be referred to for settlement in England and all legal proceedings must be taken in England, was held to be covered by exception 1 of Section 28. A 1949 Ajmer 44 (45).

SECTION 29 — SYNOPSIS

1. Scope.
2. Contracts void for uncertainty or vagueness.
3. Contracts not void for uncertainty or vagueness.
4. "Capable of being made certain".

1. Scope.— (1) Section 29 contemplates that the meaning of an agreement shall be clear on the face of it. A 1945 Mad 10 (10) (DB). (An agreement to pay certain amount "after deductions as would be agreed upon" between the parties, held void for uncertainty.)

(2) It is impossible for a Court of justice to give effect to a contract, the meaning of which it is unable to find out with reasonable clearness. A 1915 Lah 328 (329) (DB).

(3) Where a reasonable meaning can be construed into the contract, the contract is not void for uncertainty. 1913 Pun LR No. 305, p. 1027 (1031) (DB).

(4) The construction of an ambiguous stipulation in a deed may be governed or qualified by a recital, but on the other hand, if the intention of the parties is clearly to be collected from the operative part of the instrument, that intention is not to be defeated or controlled because it may go beyond what is expressed in the recital. ILR (1880) 2 Mad 239 (257) (PC).

(5) Considerable latitude is allowed to parties in the construction of commercial documents; and phrases, which would be sufficiently vague and uncertain in other forms of contract to render them unenforceable, are frequently given effect to in commercial contracts. A 1951 Cal 10 (18) (FB).

2. Contracts void for uncertainty or vagueness.— (1) Where a contract is uncertain, performance of which would never be enforced, then it must be held that the contract is void for uncertainty. A 1951 Cal 10 (17) (FB) ** A 1967 Cal 168 (172) (DB) ** A 1971 All 494.

(2) Where the term in an agreement is vague in the extreme and might be interpreted in as many ways as there are interpretations thereof, the agreement is certainly one which must be considered as void because of uncertainty under Section 29. (1921) 4 Nag LJ 67 (69) ** A 1959 AP 551 (557) (DB). (Condition of defeasance must be clear and unequivocal so as to be operative.)

(c) A, who is a dealer in coconut-oil only, agrees to sell to B "one hundred tons of oil". The nature of A's trade affords an indication of the meaning of the words, and A has entered into a contract for the sale of one hundred tons of coconut-oil.

(d) A agrees to sell to B "all the grain in my granary at Ramnagar". There is no uncertainty here to make the agreement void.

(e) A agrees to sell to B "one thousand maunds of rice at a price to be fixed by C". As the price is capable of being made certain. there is no uncertainty here to make the agreement void.

(f) A agrees to sell to B "my white horse for rupees five hundred or rupees one thousand". There is nothing to show which of the two prices was to be given. The agreement is void.

[Malaysian Contract Act 1950, S. 30.]

[a] Cf. Evidence Act (1872), S. 93, which prohibits evidence to make certain or complete instruments which are ambiguous or defective.

Section 29 — Note 2 (contd.)

(3) Where a compromise petition stated :— 'the following five gentlemen shall decide (all matters) relating to our movable and immovable property and the said 20 bighas of land". Held, that the terms of the clause were so vague that it could not amount to an enforceable agreement or a contract. A 1950 Pat 445 (447) (DB).

(4) A contract for pre-emption entered into by the co-sharers for an unlimited period is unenforceable against the heirs and representatives of the co-sharers as being too vague and uncertain. But a contract for pre-emption between the co-sharers entered into at the time of the settlement, held must be presumed, in the absence of anything to the contrary to have been intended to hold good for the whole period of the settlement and not longer and therefore not uncertain. A 1924 All 400 (403) (DB).

(5) Agreement for pre-emption not mentioning price but making it clear that parties agreed to abide by price fixed by panchas — Absence of stipulation in regard to number of panchas to be appointed for fixation of price — Held agreement void for uncertainty. (1975) 1 Kant LJ 36.

(6) Certain persons describing themselves as residents of X, giving a bond for payment of money in which as collateral security they pledged "kul haq haquk" (their properties). Held, that the general hypothecation was too indefinite to be acted upon and no charge on their property situated in X was created. (1875-77) 1 All 275 (276) (DB).

(7) Iqramamah covenanting to grant land to society whenever required for building Mandir or Dharmshala and empowering to take it if refused — Held, covenant was personal but inoperative owing to vagueness. A 1916 Pat 226 (228, 230) (DB).

(8) An agreement to sell at a favourable or concession rate is indefinite and void for uncertainty. A 1929 Mad 243 (246) (DB).

(9) A covenant of partnership giving one party the right of specifying the share of the profits to be assigned to the other and affording no indication as to the proportion of losses which one party is to bear in the partnership is void for uncertainty. A 1915 Lab 328 (329) (DB).

(10) An agreement to pay rent in cash without the rate being definitely fixed is void for uncertainty. A 1920 Mad 115 (116) (DB).

[See also 1966 All WR (HC) 69. (Where tenant has taken possession of accommodation agreement of tenancy is not void for non-fixation of rent and Court has jurisdiction to compel tenant to pay reasonable rent.)]

(11) Agreement to lease — Commencement of lease not specified — Rent also to be fixed in future by mutual agreement — Agreement held was not concluded contract which could be specifically enforced. (1974) 76 Bom LR 584.

(12) Although an agreement may otherwise be definite if an essential element is reserved for future agreement of both parties, the promise can raise no legal obligation until such future agreement. Thus if a party agrees to pay a sum of money "after deductions as may be agreed upon" the essential element of the agreement viz., the determination of the amount to be deducted is left to future agreement. An agreement of this nature has been described as an agreement to enter into an agreement and declared to be too vague to create a legal obligation. A 1953 Sau 122 (124, 125) (DB).

(13) Where the conditions mentioned in the proposal asking for extension of time are so vague and uncertain that it is not possible to ascertain definitely the period for which the time for the performance of the contract was really intended to be extended, the agreement for extension must be held to be vague and uncertain and as such void under Section 29. A 1958 SC 512 (517).

(14) Agreement to purchase land — Purchase price to be paid in stages — "Proportionate part" of land to be conveyed on each occasion — No agreement as to selection of land to be so conveyed — Held contract void for uncertainty. (1976) 1 WLR 591 (605). (Buckley and Orr L. JJ. and Sir John Pannycnick.)

(15) An agreement requiring landlord to 'make all necessary repairs as and when desired' is vague and not enforceable. 1963 All WR (HC) 580.

(16) Covenant for renewal in lease — Lessee entitled to renewal on such terms and conditions as may be agreed — Contract is invalid for uncertainty. A 1961 Madh Pra 324 (328) (DB).

Section 29 — Note 2 (contd.)

(17) Where the contract does not specify a way of ascertaining the price, the contract is imperfect and incapable of being enforced. A 1966 Ker 311 (314) ** 1968 Raj LW 68.

(18) Agreeing to serve B — Fixing of remuneration left entirely at the discretion of B — Contract is unenforceable. A 1966 Mad 235 (239) (DB).

(19) Pronote providing for payment of interest at rate mentioned or at rate which may be fixed by creditor — Agreement to pay enhanced rate not void. A 1972 Mad 407.

(20) A stipulation viz. all disputes about contracts would be subject to jurisdiction of the courts within Maharashtra is not void. It is neither vague (for non-specifying particular court) nor nullified as being against public policy. A 1973 Punj 160 (162).

(21) Agreement to pay certain sum when able to pay — **Held** void. A 1978 Cal 221.

3. Contracts not void for uncertainty or vagueness.— (1) Where an arbitration clause in a contract provided that "all disputes between the parties arising out of contract shall be referred to the sole arbitration of A/B", it was held that in the absence of any provision with regard to the choice to be made between A and B, the clause was invalid as being vague and uncertain. A 1956 Punj 205 (205).

(2) Where the arbitration clause between the partners specifically provided that the partners might nominate arbitrators but the number should not exceed two and a partner appointed an arbitrator and called upon the other partners to nominate another person so that the two arbitrators so appointed might settle the differences, there was no element of uncertainty in the agreement and even if there was any such element, the same was removed by the subsequent conduct of the parties. It was open to the other partners to agree or not. ILR (1978) 2 All 173 : 1978 All LJ (NOC) 58 (DB).

(3) Where a contract provides for arbitration by the Superintendent Engineer for the time being the meaning of the said clause is that it must be the arbitration of the Superintending Engineer holding that office at the time when the dispute arose and had to be referred. That being so, it cannot be said that such an arbitration clause is void for uncertainty. ILR (1952) 1 Cal 324 (326) ** A 1958 Punj 19 (23).

(3A) Works Contract with Government — **Held** on interpretation of relevant clause therein that it did not amount to arbitration clause — Did not contain any express arbitration agreement nor could it be implied — The clause vested the Superintending Engineer only with supervision and administrative control over the work. **A 1980 SC 1522. (A 1947 Lah 215, Overruled.)**

(4) No contract is void merely because no time for performance is specified. A 1924 All 657 (658) (DB) ** A 1951 Mad 767 (768).

(5) A covenant for renewal without specifying period and rent must be presumed to be for the same period and rent as in the original and therefore not void for uncertainty on that ground. A 1917 Cal 509 (510) (DB) ** A 1961 Madh Pra 324 (328) (DB).

(6) Where there was a right of renewal in the agreement and the renewal clause is not bad for vagueness or uncertainty, Section 29 does not operate as a bar for its enforcement. (1979) 48 Cut LT 294 (305) (DB) (Orissa).

(7) A term in the agreement for reconveyance that the vendor was to take a resale for his family use and not for speculative purposes is neither vague nor uncertain. ILR (1950) All 32 (44, 45) (DB).

(8) Though the actual figure of the rent has not been determined, if there is no uncertainty regarding the way in which it should be fixed throughout the lease, the lease cannot be said to be unenforceable for uncertainty and would be a binding lease. A 1944 Mad 518 (523) (DB).

(9) A contract to sell land at a fair valuation, when there is no difficulty in ascertaining what a fair valuation would be, is valid and enforceable and not void for uncertainty. (1880) 5 Cal 175 (183) (DB) ** A 1966 Ker 311 (313).

(10) A contract is not void for uncertainty simply because the permission of the Khasmahal authorities sanctioning transfer has not been obtained. A 1951 Orissa 291 (294) (DB).

(11) Where the parties to the reference merely say that there was some dispute in regard to certain brick kiln and that the arbitrators were to decide the dispute in any manner they thought proper the arbitration agreement cannot be said to be so vague or uncertain as to be unenforceable. A 1957 All 406 (408).

(12) Where by a deed of assignment the goodwill as well as the assets of a business are transferred, there is no vagueness in the description of the property transferred. A 1954 Pat 280 (284) (DB).

(13) Where the terms of contract of guarantee, though oral, have been mentioned with sufficient precision in plaint, the contract cannot be held to be uncertain or void within the meaning of S. 29. A 1957 Pat 256 (258).

(14) A term in the contract of sale of goods which gives a party power to alter or postpone deliveries or to cancel any balance which might remain undelivered at the end of the contract period, does not render the contract uncertain and void under Section 29. ILR (1951) 1 Cal 420 (429).

(15) The absence of a term in the agreement as to what is to happen on plaintiff's failure to purchase the property is not a circumstance which would render the contract void for uncertainty. **A 1971 SC 2192 (2196, 2197).**

(16) Where a Nattukotai Chetty impliedly agreed to give something extra to his agent as remuneration for the collection of outstandings left uncollected by the agent's predecessor, but did not fix a rate of percentage : **Held,** that in view of the nature of the business of Nattukotai Chetties, the contract was enforceable and the agent was entitled to a resonable amount as remuneration. A 1915 Mad 931 (934) (DB).

(17) Where the contract for supply of goods did not mention the maximum limit of purchase, it was held that the contract was not uncertain. A 1916 Bom 315 (317) (DB).

(18) Plea that the agreement was void for uncertainty held could not be availed of where the parties themselves did not regard it as vague and had acted on it. A 1929 Nag 194 (197) (DB).

(19) Contract subject to 'usual force majeure clause' — Contract is not void for vagueness or uncertainty. **A 1961 SC 1285 (1292).**

(20) An agreement that rent should be paid on a certain date in advance would import that

30. Agreements by way of wager void.— Agreements by way of wager are void; and no suit shall be brought for recovering anything alleged to be won on any wager, or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made.[a]

Section 29 — Note 3 (contd.)
the term of lease started to run from the date of payment of rent and the agreement is not uncertain for non-mention of date of commencement of lease. A 1960 All 420 (423) (DB).

(21) Agreement to refer disputes to arbitration in accordance with Rules of Mill-Owners' Association, Bombay — There being provision for reference of dispute in the rules, objection that agreement was void for uncertainty was held not maintainable. A 1959 Cal 687 (688) (DB).

(22) A term in agreement to reconvey property on deposit of costs of execution of deed and 'other necessary and indispensable expenses', besides purchase price — Held, that the words 'other necessary and indispensable expenses' did not make the contract void for uncertainty — Such necessary and indispensable expenses having regard to expression 'other' should be construed 'ejusdem generis' and related to execution of deed. A 1963 Cal 325 (329) (DB).

(23) An agreement in compromise decree to the effect that "each party has to sell to the other, respective portions of the properties which have come to their share as above at a price fixed by two members of the panchas when either party wants to sell its share" is arbitration agreement and is not void for uncertainty as to the identity of Panchas. Having regard to provisions of Ss. 8 and 9 of Arbitration Act there is no distinction between such case and illustration (e) of Section 29. A 1967 Guj 81 (83, 84).

(24) Contract to reconvey in favour of four persons — Person to exercise first option not determinable — Contract not void for uncertainty. A 1964 Mad 219 (220) (DB).,

(25) Condition in a lease that lessee shall start construction of a house on leased plot within three years — It is specific enough to be enforceable. 1966 All WR (HC) 1.

4. 'Capable of being made certain".— (1) Under Section 29 an instrument is not void if it is capable of being made certain. (1913) 20 Ind Cas 812 (813) ** A 1969 Pat 114 (117) (DB) ** A 1967 Guj 81 (83).

(2) A contract which is otherwise good but omits to mention some term explicitly does not become void or uncertain for that reason if the uncertainty can otherwise be made certain id certum est quod certum reddi potest. A 1951 Orissa 291 (294) (DB) ** A 1979 Mad 374 (377) (DB). (Specific performance of contract — Suit for enforcement of — Defence of contract being void or uncertainty of meaning.)

(3) The non-fixation of the price and the time for the execution of a sale deed in a contract of sale of land, does not make the contract void for uncertainty under Section 29 if the parties have consensus ad idem with reference to any essential term of the contract. A 1951 Orissa 291 (294, 295) (DB).

(4) In arbitration agreements the actual points of dispute are seldom stated. Generally, references are made to arbitration where disputes arise and the parties thereafter formulate, when necessary, their disputes before the arbitrators and seek their decision on those points of differences. The meaning of such agreements is not in any sense uncertain, and even if there is any slight uncertainty, that is capable of being made certain at the time of hearing. A 1957 All 406 (408).

(5) A contract to execute a kabala "containing necessary stipulations" is not void for uncertainty as the "necessary stipulations" evidently mean the stipulations for sale implied under the law and contained in the Transfer of Property Act. A 1927 Cal 889 (893, 894) (DB).

(6) Where a written contract for sale of land is silent about the price and the time for performance, the contract is not void for uncertainty if it is one that can be made certain within the meaning of S. 29. A 1951 Orissa 291 (294) (DB).

(7) Where the mortgagors described the mortgaged property in the mortgage deed as "their property" and at the date of the mortgage the mortgagors had specific interest in the mortgaged property, it was held that the words were sufficiently certain, or at any rate were capable of being made certain. (1890) 12 All 175 (178, 179) (DB).

(8) A contract to grant a renewal of a lease on such conditions as shall be reasonable and proper at the time of such renewal is not void for uncertainty. A 1927 Mad 513 (515) (DB).

(9) Where the indigo cakes mortgaged were described as those to be manufactured from the crops to be grown on lands of the Pupri Factory from the date of the execution of the mortgage up to the date of its being paid off, held that there was no vagueness as to the indigo cakes. (1904) 31 Cal 667 (678) (DB).

(10) Agreement between landlord and tenant to adjust cost of new construction to be made by tenant against rent — Amount to be spent not fixed — Agreement not void for uncertainty. A 1963 All 248 (249).

(11) If there is no statement in contract regarding the price to be paid the law allows a standard of reasonableness. Accordingly a fair or reasonable price is recoverable on the basis of a term to be implied in the contract and contract is enforceable. A 1966 Ker 311 (313).

(12) In contract of sale of goods the parties may agree that the price of goods may be fixed by a third person who would be valuer — Such contract is valid since fixation of price by valuer makes it certain and enforceable. ILR (1970) 2 Delhi 92.

(13) A agreeing to serve B — Service not to be gratuitous — Remuneration to be fixed by B — Contract is enforceable and the rate of remuneration to be fixed must be fair and reasonable. A 1966 Mad 235 (239) (DB).

SECTION 30 — SYNOPSIS

1. Scope.
2. Wagering contracts.
3. Burden of proof and evidence.
4. Speculative contracts.
5. Satta transactions.
6. Teji Mandi transactions.
7. Badni transactions.

Exception in favour of certain prizes for horse-racing.— This section shall not be deemed to render unlawful a subscription or contribution, or agreement to subscribe or contribute, made or entered into for or toward any plate, prize or sum of money, of the value or amount of five hundred rupees or upwards, to be awarded to the winner or winners of any horse-race.

Section 294A of the Indian Penal Code not affected.—Nothing in this section shall be demeed to legalize any transaction connected with horse-racing, to which the provisions of Section 294A of the Indian Penal Code apply.[b]

[Malaysian Contract Act 1950, S. 31.]

[a] Cf. S. 18, English Gaming Act, 1845.

[b] See the Avoiding Wagers (Amendment) Act, 1865 (Bom. Act 3 of 1865) which has been extended to the then Bombay State (i.e. Maharashtra & Gujarat now) by Bombay Act 21 of 1959.

Section 30 — Synopsis (contd.)

8. Lotteries.
9. Chit funds.
10. Patta patti contracts.
11. Sale and purchase of shares.
12. Insurance contracts.
13. Nazarana transactions.
14. Other illustrative cases.
15. Wagering agreements are not illegal.
16. Promissory note given in consideration of wagering transaction.
17. Suits relating to recovery of deposit, winnings or losses.
18. Collateral agreements.
19. Wagering contracts by agents.
20. Pakka adatiya transactions.

1. Scope.— (1) There is no distinction between the expression "gambling and wagering" in the English Gaming Act 1845, and the earlier Indian Act XXI of 1848, and the expression 'by way of wager" used in Section 30 of the Indian Contract Act (9 of 1872). (1902) 29 Cal 461 (467) (PC) ** A 1917 Low Bur 18 (20).

(2) Section 30 makes a wagering contract void ab initio and to such a class of contracts Section 65 has no application. A 1918 Mad 163 (163) (DB) ** 1966 Jab LJ 399 ** ILR (1961) 11 Raj 390 (DB) ** A 1959 SC 781 (792). (Though wagering contracts are void they are not forbidden by law.)

(3) Section 30 requires that there must be at least two parties, the agreement between them must be by way of wager and further both sides must be parties to that wager. (1904) 28 Bom 616 (621) (DB) ** A 1925 Bom 79 (83) (DB).

(4) Section 30 is open to the reproach that it has in fact encouraged the precise evil it would strike at, for as long as the dishonest gambler knows that he can evade payment when he loses, he is certain to go on gambling with utmost recklessness. (1910) 7 Ind Cas 665 (668) (Bom).

2. Wagering contracts.— (1) A wager is a promise to give money or money's worth upon the determination or ascertainment of an uncertain event. There must be mutual chances of gain and loss and the parties must contemplate the determination of an uncertain event, as the sole condition of their contract. A 1935 Mad 135 (136, 137). (Quoted from Ansari's Contract.) ** A 1926 Oudh 202 (207, 208) ** (1913) 15 Bom LR 85 (93) ** (1910) 8 Ind Cas 500 (500) (Oudh).

(2) Wagering contract is a mixed one depending upon law as also on facts. ILR (1972) 1 Cal 647 (SB).

(3) The essence of gaming and wagering is that one party is to win and the other to lose upon a future event, which at the time of contract is of an uncertain nature. A 1923 Nag 291 (292) ** (1951) 2 Mad LJ 393 (394) ** (1904) 28 Bom 616 (621) (DB).

(4) The essence of wagering contract is that neither of the parties should have any interest in the contract other than the sum which he will win or lose. A 1935 Mad 135 (136) ** 1966 Jab LJ 399 ** A 1960 Punj 471 (473) (DB).

(5) To constitute a wager, the transaction between the parties must "wholly depend on the risk in contemplation" and neither must look to anything but the payment of money on the determination of an uncertainty. (1885) 9 Bom 358 (363) (DB).

(6) The test as to true character of a transaction is comparison between magnitude of transaction and capacity of person who seeks to have it declared a wager. (1910) 12 Bom LR 1062 (1066).

(7) To bring a contract under Section 30, it is necessary that the common intention of both parties was that no delivery or acceptance shall take place and that the mere difference in price shall be paid; but if only one of the parties intends that no delivery shall take place, the contract is not vitiated. A 1922 Pat 220 (221, 222) ** A 1917 PC 101 (102) ** A 1958 Andh Pra 438 (440) (DB) ** A 1958 Cal 703 (706, 707) (DB) ** A 1957 Madh Pra 194 (198) (DB) ** (1953) ILR (1953) 3 Raj 815 (823) ** (1951) 2 Mad LJ 393 (394) ** A 1942 All 170 (174) (DB). (Option to demand delivery or acceptance does not take the transaction out of wagering contract.) ** A 1937 Nag 345 (351) (DB) ** A 1934 Nag 129 (130) ** A 1930 Nag 273 (276) (DB). (Whether a contract is a wagering one depends upon the intention of the parties at the time of the contract.) ** A 1930 Nag 111 (113) ** A 1929 Bom 157 (170) (DB) ** (1910) 34 Bom 519 (523, 524) (DB) ** (1909) 11 Bom LR 997 (1004) ** (1908) 1908 Pun Re No. 74, p. 341 (342, 343) (DB) ** (1907) 9 Bom LR 125 (138) ** (1903) 5 Bom LR 503 (505) ** (1902) 29 Cal 461 (467) (PC) ** (1899) 1 Bom LR 263 (266). (Both sides must clearly understand not only that no delivery is ordinarily to be given or taken but that none could even be asked for under any circumstances — Mere guess is not enough.) ** (1894) 17 Mad

Section 30 — Note 2 (contd.)
480 (491) (DB) ** (1885) 9 Bom 358 (362) (DB) ** (1961) 2 Andh WR 304 : 1961 Andh LT 901. (Mere mention of time and place of delivery in the contract does not take the contract out of wagering contract.) ** A 1960 Cal 261 (262) : 63 Cal WN 745 ** A 1959 SC 781 (784) ** A 1959 Raj 27 (31) (DB) ** 1971 Raj LW 476 : 1971 WLN (Part I) 182. (The mere fact that the transactions were extravagantly out of proportion of one's own resources would not be enough to prove the wager.)

(8) The common intention of the parties may be express or may be implied from the course of dealings and other circumstances on record. A 1957 Madh Pra 194 (198) (DB).

(9) The intention of the parties is to be gathered from the position of the parties and the history of dealings. A 1925 Lah 564 (564) ** 1961 Andh LT 901.

(10) The question whether the transactions between parties were wagering transactions, is one of fact. A 1942 PC 19 (20) ** A 1938 Bom 44 (46) (DB) ** (1906) 30 Bom 83 (89) ** (1894) 17 Mad 480 (491) (DB).

(11) What has to be proved in order to establish that a transaction was a wagering one is the fact that it was agreed between the parties that no delivery was ever to be demanded or given. A 1954 All 789 (795) (DB) ** A 1956 Madh B 38 (39) ** Madh BLJ 1955 HCR 788 (789, 790) ** A 1954 Raj 24 (25) (DB) ** A 1950 All 352 (354) ** A 1924 Nag 290 (292).

(12) If a contract is wagering in its inception the mere fact that in certain contingencies delivery could be asked for would still not render the contract enforceable. A 1926 Mad 326 (331) (DB).

(13) The fact that in respect of some of the contracts goods were actually delivered is no ground for assuming that the other contracts were real transactions and not mere agreements to adjust differences. A 1926 Mad 326 (329) (DB).

(14) The mere fact that, on settlement of some contracts the differences were entered in the books does not establish that it was the intention of the parties not to call for and give delivery. A 1958 Andh Pra 427 (434) (DB).

(15) Where it appeared that the sale price was far beyond the means of the parties, and that no attempt was made to complete the transaction by delivery of goods; Held, that parties intended, not an actual transfer of goods, but a mere adjustment of prices according to fluctuation of market rate, and that the agreement was a wagering contract. A 1916 Lah 329 (330).

(16) That there has been no delivery but only payment of differences in numerous other transactions between the parties is not enough to rebut the evidence against the contract being a wagering one. A 1924 Nag 290 (291).

(17) The mere fact that during the course of dealings between the parties no delivery was actually made is not alone sufficient for holding that contracts were wagering. A 1953 Sau 141 (142, 143) ** A 1957 Madh Pra 138 (142) (DB).

(18) Where the terms of the contract between the parties have not been proved the mere fact that in the past delivery was never demanded is not a circumstance from which a necessary inference can be drawn that the differences only should become payable. A 1960 Punj 471 (472, 473) (DB).

(19) The mere fact that delivery was in fact not given in numerous other transactions, or in a particular case does not prove that it was not given because of an agreement to that effect or that there was a term in the original contract to that effect. In every case the terms of the contract or of the agreement have to be proved. A 1956 Madh B 38 (39).

(20) Where there is no evidence in the case that the parties did not intend to give or take delivery of specific goods sold, and where during a number of transactions the parties had actually given delivery and taken delivery and if towards some part of the goods there was no actual delivery but adjustment of claims — These circumstances would not vitiate the transactions as being by way of wager. A 1952 Hyd 95 (97).

(21) The parties will not be allowed to 'camouflage' their transaction by getting it up as 'delivery' transaction when, in fact, it was never their intention that it should be such. A 1954 All 789 (795) (DB) ** A 1960 Punj 471 (473) (DB).

(22) The mere fact that the parties unnecessarily proceeded to provide for the consequence of the breach namely, payment of loss by one party to the other in the case of fluctuations in the market price would be no indication that there was a wagering transaction. (1951) 2 Mad LJ 393 (394).

(23) Where the terms of a contract establish that delivery of goods was contemplated and in fact the buyer was called upon to take delivery of the goods and it was only when he failed to comply with that demand that the goods were sold at his risk and compensation claimed by way of difference between the prices, the contract cannot be held to be a wagering contract. A 1958 Andh Pra 216 (217) (DB).

(24) A subsequent agreement to the effect that buyer has no right to demand delivery and the seller is no longer obliged to give delivery does not make the contract a wagering one A 1930 Nag 111 (113) ** A 1958 Andh Pra 438 (440) (DB).

(25) There is no authority for the proposition that because under the terms of a contract an obligation to pay or receive differences may arise on the happening of a particular event, the contract is void as a wager if that event does not happen. Such a result would be inconsistent with the principle underlying S. 57 of the Contract Act. (1910) 34 Bom 519 (533) (DB).

(26) Persons in a position to carry out contract at the time of making contract or at the time of performance — Contract is not necessarily wagering contract even if contract provides for alternative of receiving or paying on differences instead of actual delivery. A 1922 All 360 (361) (DB) ** A 1925 Bom 115 (117) (DB).

Section 30 — Note 2 (contd.)

(27) A contract containing a condition that one of the parties becoming unable from pecuniary circumstances to perform the contract shall not put an end to it but if contract be beneficial to that party, damages shall be ascertained and paid then and there to the party, is not of the nature of gambling transaction. (1905) 7 Bom LR 154 (156).

(28) Although a contract may have the appearance of a wagering contract, if there was an intention on the part of one party to make delivery of the goods and an intention on the part of the other party to accept that delivery, they clearly bring themselves out of the mischief of S. 30. A 1944 All 196 (197).

(29) Seller may, technically speaking, be said to deliver goods to his buyer by giving him a delivery order on a certain person but just as mercantile contracts for payment of differences so also delivery orders may be used and passed from hand to hand amongst persons who have no other intention than that of adjusting differences amongst themselves. (1913) 15 Bom LR 750 (760, 761).

(30) There must be actual delivery or transfer of the commodity itself in order to take the transaction out of the definition of speculative transactions in Expln. 2 of S. 24 (1) of the Income-tax Act (1922). A 1968 Cal 253 (256) (DB).

(31) Mere agreement to engage in speculation on the rise and fall in prices of goods is not necessarily a wagering contract. A 1975 SC 1223.

3. Burden of proof and evidence.— (1) The burden of proving that a particular contract was a wagering contract lies on the party which alleges the contract to be a wagering contract. A 1954 Raj 24 (25) (DB) ** A 1957 Madh Pra 138 (141) (DB) ** A 1956 Madh B 38 (39) ** ILR (1954) 4 Raj 346 (351). (Absence of defendant is not enough for dismissal of case put forward by him, if Court is satisfied that transaction was of wagering nature.) ** (1951) 2 Mad LJ 393 (394) ** A 1937 Nag 345 (352) (DB) ** A 1934 Nag 129 (130) ** A 1924 Nag 290 (291) ** A 1923 Bom 458 (459) (DB) ** (1906) 30 Bom 83 (89) ** (1894) 17 Mad 480 (491) (DB) ** 1961 Andh LT 901 ** A 1961 Raj 52 (57) (DB) ** A 1960 Punj 471 (472) (DB).

(2) Person alleging a transaction to be a wagering contract must show that under terms of arrangements no goods were to be taken or delivered under the forward contracts but that the contracts were to result merely in the payment of differences. (1939) 182 Ind Cas 416 (417) (PC) ** A 1921 Sind 99 (99) (DB).

(3) To determine whether a contract is a wagering contract or not the substance of the matter is to be regarded and if there is no other purpose in the contract than that of wagering or gaming it is void. A 1935 Mad 135 (137) ** A 1925 Mad 330 (330, 331) (DB).

(4) In order to deduce the existence of wagering contract the proved or admitted facts must be of such a nature as to show that they are incompatible with a lawful contract. A 1934 Nag 129 (130).

(5) The whole transaction and its nature have to be looked at for the purpose of determining the question whether the contract is one by way of wager. (1951) 2 Mad LJ 393 (394) ** ILR (1961) 11 Raj 390 (DB).

(6) Court should lean towards a construction favouring the validity of the contract rather than its illegality. A 1925 Bom 115 (118) (DB).

(7) The Courts must look to surrounding circumstances besides the terms of original contracts indicating the original agreement between the parties. Common intention to wager must be established as also the common intention that there was to be no actual delivery but only payment of differences. A 1934 Nag 129 (130) ** A 1954 Raj 24 (25) (DB) ** A 1942 All 170 (174) : ILR (1942) All 289 (DB) ** A 1938 Bom 44 (46) (DB) ** A 1933 Cal 759 (766) ** A 1921 Cal 362 (362) (DB). (Court is bound to scrutinize with suspicion the defence of wagering contract set up by defendant, who has accepted payments in successful dealing but has recourse to plea of wagering contract when transactions end in loss.) ** A 1914 Bom 319 (320) : 38 Bom 204 (DB) ** A 1965 AP 136 (141) (DB) ** 1961 Andh LT 901 ** A 1960 Punj 471 (473) (DB) ** A 1960 Raj 296 (301).

(8) The party who sets up that an agreement is void by way of wager, should be allowed to let in oral evidence to prove that it is so. (1905) 32 Cal 437 (442) (FB) ** A 1938 Bom 44 (46) (DB) ** (1894) 17 Mad 480 (491) (DB)

(9) Court will not allow party, setting up defence of wagering, to interrogate his opponent generally as to his business transaction apart from the one in question. (1913) 37 Bom 347 (351).

(10) The Court must for itself find out what were primary intentions of the parties when they entered into transaction in question before it and must not be misled by the mere protestation of one of the parties as to his real intentions. (1907) 9 Bom LR 125 (137) ** (1913) 37 Bom 264 (277).

(11) If the terms of the contract have been proved and they show on their face that delivery was to be given or taken and it is alleged by the defendant that it was agreed that the term about delivery was not to take effect but that differences alone were to be paid, then the fact on non-delivery, coupled with certain other facts, may induce the Court to believe the defendant instead of the plaintiff. A 1950 All 352 (354) ** A 1954 All 789 (795) (DB).

(12) Where Court on consideration of entire evidence records clear finding that transaction was by way of wager question of burden of proof remains no longer material. A 1967 Cal 25 (29) (DB).

4. Speculative contracts.— (1) There is no law against speculation as there is against gambling. A 1922 Bom 66 (68) ** A 1958 Andh Pra 438 (440) (DB) ** 1947 Jaipur LR 283 (284, 285) ** A 1938 Bom 44 (46) (DB).

(2) Mere speculation, where it does not amount to wager, is not apart from special legislation, illegal. A 1954 Mad 699 (702) (DB).

(3) A speculative contract is not necessarily a wagering contract. A 1923 All 273 (276) (DB) ** A 1917 PC 101 (102) ** A 1938 Lah 781 (783) (DB) ** A 1922 Pat 220 (222).

(4) The mere fact that contracts are highly speculative is not sufficient in itself to render them void as wagering contracts; to produce that result there must be proof that the contracts were entered into upon the terms that performance of the contracts should not be demanded but that differences only should be-

Section 30 — Note 4 (contd.)

come payable. A 1928 PC 30 (32) ** 1953 Raj LW 110 (112) ** A 1952 Trav-Co 435 (436, 437) (DB) ** A 1934 Nag 129 (131) ** A 1929 All 890 (893) (DB) ** A 1929 All 134 (138) (DB) ** A 1961 Raj 52 (57) (DB) ** ILR (1961) 11 Raj 390 (DB).

(5) Speculation forms sometimes an element in many transactions relating to the sale and delivery of goods at a certain rate owing to market fluctuations. But existence of such an element does not make the contract void; as it may be accompanied by a real desire by vendor to sell and buyer to purchase. Where such an intention exists the contract is not a wagering contract. A 1924 Oudh 186 (186).

(6) Even if one party to a contract were a speculator who never intended to give delivery and that fact was known to other party, yet in the absence of any bargain or understanding express or implied that the goods were not to be delivered, that would not convert a contract otherwise innocent into a wager. A 1956 Madh B 38 (39) ** A 1938 Lah 781 (783) (DB).

(7) As far as the distinction between speculation and gaming is concerned, it makes but little difference whether the commodities are actually paid for and held with a view to selling again at a profit or whether the matter is arranged by a resale before the time of delivery. Such dealings are perfectly legitimate. Gaming and wagering contracts, on the other hand, are not really dealings at all. They may take the form of purchases and sales but they are in fact mere bets on the market prices on commodities at a future date. (1951) 2 Mad LJ 393 (394) ** A 1937 Nag 345 (351) (DB).

(8) The distinction between contracts which are legitimate and genuine trading transactions of a speculative character and contracts which are simply gaming and wagering transactions, is frequently a narrow one and difficult of determination even after the examination of the parties concerned, the course of the business and the nature of the contracts. A 1931 PC 136 (140) ** A 1921 Sind 99 (99, 100) (DB).

(9) If there existed an agreement between the parties at the time when the contract was brought about between them by the broker, the broker is the best person to give the best evidence as to what exactly were the terms of the contract, whether it was speculative or merely a wagering. (1951) 2 Mad LJ 393 (395).

(10) Every forward contract is to some extent speculative, but merely on that account it is not necessarily a gambling one. A 1956 Madh B 38 (39) ** (1955) 7 Sau LR 172 (175) ** A 1961 SC 268 (270) ** ILR (1961) 11 Raj 390 (DB).

(11) Forward contracts for purchase and sale of goods are legitimate commercial transactions though speculative. They may be wagering or gambling transactions. When there is bargain for differences they are wagering contracts, even if one party has option to demand delivery. In spite of the terms of the contract, extrinsic evidence may establish the common intention of both parties that there was to be no delivery but only to take differences according to rise or fall in prices on date of delivery. But when it is established that substantial parts of goods were actually taken delivery of, the transaction may be taken to be genuine commercial transaction. A 1941 Cal 341 (344, 345) (DB) ** A 1956 Madh B 38 (39) ** A 1956 Mad 110 (111) ** A 1965 AP 136 (139) (DB) ** A 1962 Andh Pra 350 (354) (DB) ** A 1961 Madh Pra 57 (60) ** A 1960 Punj 471 (473) (DB) ** A 1960 Ker 122 (123) (DB). (Transaction in nature of forward contract — Delivery of goods to pass under each sale and purchase — Held, transactions were not merely in nature of speculation on difference in prices.)

(12) An agreement of a forward sale containing a provision for delivery and resale to the first party of the same quantity as that of the previous transaction before the date of that transaction and at the rate prevailing on the date of the resale though highly speculative does not amount to a wagering contract. A 1956 Rang 319 (323) (DB). (Contract held highly speculative.) ** (1966) ITR 154 (169) (Cal).

(13) Vendor agreeing to sell what he has not and may never have — Price fixed upon calculation of risk taken by purchaser for sum for below real value — Contract is eminently speculative, not to say gambling one. (1967-69) 12 Moo Ind App 292 (308) (PC). (Purchaser retaining part of price until risk is determined — Risk contracted is pro tanto diminished and contract becomes incapable of being performed.)

(14) Pakka Adatia entering into forward contract which is banned by law — Amounts to breach of Section 15 of Forward Contracts (Regulation) Act (1952). A 1967 SC 986 (990).

5. Satta transactions.— (1) The transactions of the nature where parties speculate on the varying rate of the goods are not satta. A 1956 Hyd 131 (133) (DB).

(2) A satta transaction need not be a gambling transaction if either of the parties intends to make delivery of the goods in case of breach of contract. It can be a gambling transaction only if it is the common intention of both the parties that in no event would delivery take place and that only differences would be settled between them. A 1956 Hyd 131 (133) (DB).

6. Teji Mandi transatcions.— (1) Teji Mandi contracts are not presumed to be wagering contracts in the absence of evidence to the contrary. A 1926 PC 119 (120) ** A 1937 Nag 345 (352) (DB) ** A 1925 Bom 79 (82) (DB) ** A 1922 Bom 408 (409) (DB) ** A 1922 Bom 66 (70).

[But see (1913) 37 Bom 264 (272). (Teji Mandi transactions must be regarded as wagering ones. The onus of proving the contrary lies heavily on party alleging so.)]

(2) The transaction may be a bet on the rise of the market and if the intention of both parties was not to deliver but merely to pay the difference between the teji and the market rate on the day of settlement the contract would be void under Section 30. A 1914 Low Bur 183 (184, 185).

7. Badni transactions.— (1) In absence of common intention to wager there can be no badni or wagering transactions. Liabilities incurred on badni transactions are unenforceable. A 1928 Lah 420 (421, 422) (DB).

(2) Where transactions included sales and purchases by the same dealers for a fixed date coupled with failure to deliver in practically all cases: Held that the transactions were badni. A 1928 Lah 420 (421, 422) (DB).

Section 30 — Note 7 (contd.)

(3) Where the contract for sale of goods specifically provides that the goods would be delivered after weighing them and the purchaser asks for delivery and is not replied that delivery was not contemplated, the mere fact that the contract involved very large quantities of the goods does not make the contract a badni transaction though they are highly speculative forward contracts. A 1929 Lah 689 (690) (DB).

(4) Where the transactions which parties entered into are beyond their means and there is no intention on the part of either contracting party from the very beginning to give or to take delivery, the transactions are badni and so void. A 1929 Lah 375 (376).

8. Lotteries.— (1) Transaction between definite number of persons — Each to contribute rupee 1 for first week — On week end prizes drawn — A prize winner getting gramophone out of transaction — Remaining subscribing 4 annas more for next week and drawing made next week end — Prize winner getting gramophone and dropping out — Similar drawings continuing for 20 weeks — Remaining subscribers each then getting one gramophone — Held that no offence under Sec. 294-A, Penal Code was committed and since each one got his money's worth, though some got less and some more by lot and since there was no invitation to public to join, the transaction did not amount to wager. A 1934 Mad 136 (137).

(2) An agreement to decide a suit by lottery is void ab initio as being one by way of wager and opposed to public policy. (1909) 5 Nag LR 107 (110).

(3) Effect of Government sanctioning lottery is that no prosecution would lie in respect thereof. But the sanction does not affect civil law relating to lotteries — Agreement to purchase ticket of such lottery is void. A 1917 Bom 138 (140).

(4) Lottery and wagering contracts are two distinct things. A scheme may amount to a lottery though none of the competitors is a loser. If the subscribers have purchased a chance of winning a prize the scheme would be a lottery, whether the prizes are paid circuitously from the interest earned on the subscribers' contributions or are paid directly from those contributions. A lottery is not in British India unlawful in the sense that it is prohibited by law. It is only in relation to Sec. 294-A, Penal Code, that it becomes illegal. A 1936 Mad 225 (227, 228, 229, 244) (FB).

(5) Sale of a share in sweepstake ticket after that ticket has drawn a horse, for a definite amount, is not a wager and is not opposed to public policy and the vendee can enforce the payment of his share in the prize money. A 1914 Lah 72 (73) (DB).

(6) Lottery can come if at all, under the group 'wagering contracts' — Such contracts though void are not illegal — Hence a lottery ticket does not cease to be a valuable security merely because the winning is not possible to be recovered through Court of law. 1970 Ker LT 358 : 1970 Ker LJ 193.

9. Chit funds.— (1) Where an agreement provides that winners are to get prizes and subscribers to get refund of contribution without interest in the end and the promoter to retain only interest, it was held the chit fund is not a wagering agreement. A 1927 Mad 583 (585) (FB).

(2) Though kuri, as ordinarily conducted in Malabar is not lottery, yet if some subscribers obtain as prizes amounts which are in excess of the amounts subscribed by them, it comes within definition of lottery and suit to recover money paid for such lottery is not enforceable. A 1919 Mad 139 (139).

(3) Chit fund with arrangement for payment of prize every month by casting lots, was held illegal as lottery. A 1925 Mad 281 (282) (DB).

(4) Kuri transaction — Successful bidder executing mortgage under terms of kuriwari, for due payments of remaining instalments — Liability on mortgage, incurred on date of its execution — The mortgage bond cannot be regarded as only affirming the pre-existing liability of the successful bidders as subscribers to the kuri chit to pay their subscriptions according to the instalments fixed in the Kuriwari. A 1941 Mad 231 (233) (DB).

10. Patta patti contracts.— (1) The patta and patti contracts are highly speculative but not opposed to public policy as wagering contracts. A 1934 Nag 129 (130) ** A 1928 PC 30 (32).

11. Sale and purchase of shares.— (1) Quick purchase and sale of shares and commodities on the exchange market and earning or losing the difference is not itself illegal. There should be proof that there were actual particular commodities and shares to be purchased and sold. As long as there are particular shares to be transacted in, there was nothing illegal in that business. A 1950 Kutch 24 (27).

(2) A pronote for amount advanced by the share brokers on behalf of the defendants in the transactions of purchases and sales of shares which they made for the defendants is not for an illegal consideration although the purpose for which the advances might have been utilised may be unlawful. A 1950 Kutch 24 (27).

12. Insurance contracts.— (1) In India an insurance for a term of years on the life of a person in which the insurer has no interest is void as wagering contract under Section 30. ('99) 23 Bom 191 (210) ** A 1941 Lah 33 (35, 36) (DB). (Person effecting insurance on his younger brother's life, held had no insurable interest, and hence the insurance contract was void under Sec. 30 and Sec. 23.) ** A 1966 All 474 (477).

(2) Section 30 is applicable to insurance policies. A 1966 All 474 (477).

(3) Where under the terms of the Policy the insurer binds himself to indemnify the insured only when due to an accident the insured suffers and has to pay some money it cannot be said that the payment by the insurer is based on a stake. A 1973 All 357 (360).

(4) Insurance contract — Joint life policy — Suicide clause with stipulated period — Suicide committed after such period — Policy if becomes void — Claim by survivor if defeated as opposed to public policy. (1975) 79 Cal WN 246.

13. Nazarana transactions.— (1) The Nazarana or Gali transactions are by themselves not necessarily wagering transactions. They are similar to the Teji-mandi contracts. A 1957 Madh Pra 138 (140, 141) (DB).

(2) What are known as nazarana contracts in the Punjab are not necessarily wagering contracts. A 1932 Lah 356 (358) (DB).

Section 30 — Note 13 (contd.)

(3) The party who pleads that Gali and Nazarana transactions are wagering in nature has to prove this fact. A 1957 Madh Pra 194 (198) (DB).

14. Other illustrative cases.— (1) Where under a contract for purchase of rubber coupons the buyer was entitled to delivery of coupons purchased and formal tender of coupons purchased was in fact made to him: Held that the contract was not a wagering contract. A 1946 PC 63 (64).

(2) K owed money to N in respect of betting transaction. N demanded the money and on K's refusal threatened to post him under Rangoon Turf Act. K then gave N a cheque post-dated and requested him not to present it and promised to make the payment on a certain date. N did not post K as he could have done. Held that there had been good consideration for the passing of the cheque in the fact that N refrained from posting K and that there was nothing in Section 30 which made a promise based on such consideration illegal. A 1929 Rang 241 (242) °° A 1923 Cal 445 (448, 449).

(3) The sale of a growing crop for cash is not gaming or wagering. A 1923 Nag 291 (292).

(4) The tenant of a field agreed to allow another to pick the cotton crop of that field in exchange for a promise to deliver 2 3/4 khandis of cotton at the time of picking. Held, that this was not wagering contract. A 1923 Nag 291 (291).

(5) Contract to deliver certain documents to a party to a suit for a certain amount if the suit were compromised, but if the party won the suit, four-times the amount was agreed to be paid. Held, the transaction was not a wager but only a contingent contract and was enforceable. A 1935 Mad 135 (137).

(6) Where under a contract for purchase of rubber coupons the buyer was entitled to delivery of coupons purchased and formal tender of coupons purchased was in fact offered to him. Held that the contract was not a wagering contract. A 1946 PC 63 (64).

(7) Merchant buying goods in Japan and desirous of paying for them in Rupees and not in Yen, entered into contract with Bank — Contract taking form of purchase of Yen to be delivered during specified period at fixed rate — Bank covering itself by Yens purchased against Yens sold — It was held that transactions were genuine and not wagering contracts. A 1936 Rang 269 (271) (DB).

(8) Where two wrestlers agreed to play match on condition that party not appearing was to forfeit a certain sum and that winner was to receive certain amount out of gate money, the contract held was not wagering one. A 1931 Bom 264 (265) (DB).

(9) The purchase of option or right to call for shares is not necessarily wagering contract; test is whether in such contract, differences only are intended to be paid: so also double option is not more necessarily gamble than single option. Contract is not wagering contract unless neither of parties intends to give or take delivery. A 1914 Low Bur 183 (188, 189).

(10) Where a contract for purchase of salt successively transferred from one to another, every transferee paying the amount of profits, and delivery was likely to be much delayed and the actual date of delivery was doubtful: Held that contract was one by way of wager. A 1925 Lah 564 (564).

(11) Transactions of sale and purchase — No delivery — Only one khata for all transactions — Panchayat fixing artificial rates for a certain day — Khata not showing loss or profit — The transactions held wagering ones A 1934 Lah 85 (86) (DB).

(12) Where the parties to arbitration contract that neither they nor their witnesses shall give evidence and the arbitrators cannot fairly use judicial discretion in the absence of evidence, the submission merely amounts to wager and is invalid. (1913) 7 Sind LR 113 (115).

(13) A lent a sum of money to B on the risk or security of a ship belonging to B under sail to Nicobar from Negapattam. B stipulated that as soon as the ship returned back after its voyage he would repay the amount with interest. The ship having been lost in the voyage A sued B for recovery of the amount. Held that the agreement was one by way of wager and therefore the suit was liable to be dismissed. (1902) 25 Mad 561 (566).

(14) The transactions of kacha khandi are gaming or wagering. A 1929 Bom 157 (165) (DB).

(15) A contract entered into by a Sirdar as mentioned in Sec. 131 (a) of the U. P. Zamindari Abolition and Land Reforms Act (1 of 1951) to sell certain plots cannot be treated as contingent merely because he has given an undertaking to convert the Sirdari plots into Bhumidari plots by depositing ten times of their rent. A 1971 All 444 (447, 448).

(16) A permanent lease of waqf land by Mutawalli without the permission of Waqf Board is not void but voidable. Unless and until such a lease is avoided by the persons concerned, it is valid. Nor is such a lease void when its consideration or the object is unlawful under Section 24 of the Contract Act. Therefore the lessee in such a case has a right to transfer his lease rights to another. A 1972 All 553 (554).

15. Wagering agreements are not illegal.— (1) Wagers are not favoured by law and agreements by way of wager are void by Section 30 (1900) 24 Bom 227 (229) (DB) °° 1966 MPLJ 379.

(2) Betting is not illegal but law is unwilling to assist in enforcing obligations arising out of it or wagers. Section 30 expressly says that agreements by way of wager are void. A 1925 Cal 1007 (1008) °° A 1929 Rang 241 (242) °° (1904) 17 CPLR 63 (73) °° ('85) 9 Bom 358 (364) (DB).

(3) An agreement to enter into agreement by way of wager will be void only if the object or consideration is unlawful within the meaning of Section 23 of the Contract Act. A 1958 Cal 703 (707) (DB).

(4) Wagering contract cannot be regarded as repugnant to public morals and thus 'Avyavaharik'. 1971 Raj LW 476.

16. Promissory note given in consideration of wagering transaction.— (1) As between the original parties, a promissory note having for its consideration debt due on wagering contract is void and so not binding in the hands of the original payee. (1898) 22 Bom 899 (902) °° A 1967 Cal 25 (29) (DB) °° A 1964 Andh Pra 537 (539).

Section 30 — Note 16 (contd.)

(2) Where A gives to B a promissory note partly for his gambling losses and partly on other accounts and it is found that the part of the consideration represented by gambling debts cannot be separated from the rest a suit to recover money due on the promissory note is liable to be dismissed. (1913) 35 All 558 (559) (DB).

(3) Promissory notes in respect of transactions which were really intended only for payment of money by either party to other according to chances in market, though purporting to be agreements for actual purchase of goods, held to have been given in consideration of gambling transaction. (1900-02) 1 Low Bur Rul 107 (108) (DB).

17. Suits relating to recovery of deposit, winnings or losses.— (1) A deposit made by one gambler with the order as security for the observance of the terms of wagering contract can be recovered unless the amount has in fact been appropriated for the purpose for which it was deposited. A 1944 Mad 321 (321) (DB) ** A 1918 Mad 163 (164) (DB).

[But see A 1920 All 167 (167, 168) : 42 All 449. (Money deposited as security in respect of satta transaction (wagering contracts) cannot be recovered by suit. Section 65 does not apply.)]

(2) Claim for recovery of loss sustained in consequence of contract in nature of wager is not enforceable. Person entering into wagering contract with partner of firm as between principal and principal cannot recover losses from other partners. A 1930 All 525 (526) (DB).

(3) The words "entrusted to any person to abide the result of a game, etc." in Section 30 refer only to monies deposited with stakeholders. A 1918 Mad 163 (164) (DB).

(4) Plaintiff pledging diamond ring with manager of gambling house to obtain money for gambling — Plaintiff can recover ring by paying money advanced, agreement not being wagering agreement. (1872-92) Low Bur Rul 128.

(5) Where a person bets on a horse for himself and on behalf of another and the horse having won receives the winnings, so far as regards the share of the other man in it he receives it for the benefit of that other, and suit for recovery of this share is maintainable as a suit for the recovery of money had and received to his benefit. Section 30 is not a bar to such a suit. A 1936 Mad 486 (487).

(6) Paying over, which bars suit of person who has deposited moneys as wager and seeks to get it back means paying over upon event of wager, and does not cover application of money to other purposes. Where plaintiff in suit to recover money deposited with stake-holder does not repudiate wager but demands whole winnings he can get nothing, not even stake he had himself deposited. 1904 Upp Bur Rul 3.

(7) Deposit on a wagering contract can be recovered before it is paid over by the stakeholder. 1872-92 Low Bur Rul 30 ** A 1926 Rang 48 (48) ** A 1918 Low Bur 77 (81). (Money paid can be recovered before contract is carried out.)

(8) Suit for amount deposited by plaintiffs with stake-holder on wager is maintainable; but suit for amount deposited by both parties to wager is barred by Section 30 as it is based on wagering contract. (1903-04) 2 Low Bur Rul 271 (271).

(9) Section 30 is applicable to prevent a case only when the party suing is claiming the amount under the terms of the contract. A 1928 Mad 434 (435, 436) ** (1929) 30 Pun LR 596 (597) (DB). (A suit based on a wagering contract should be dismissed, though defendant confesses judgment.)

(10) Prohibition applies only to case of winners. Person, who has won wager or bet, cannot sue to recover amount deposited by loser with stake-holder. (1910) 12 Bom LR 590 (594) : 7 Ind Cas 665 (667).

(11) No suit lies for damages for breach of a wagering contract. A 1925 Mad 971 (972) (DB).

(12) A party who is not a party to fraud is entitled to get back the money which he left with another, for performance of a wagering contract. A 1918 Mad 163 (164) (DB).

(13) Money paid on wagering on Badni contracts is not recoverable. 1908 Pun Re No. 74, p. 341 (344, 345) (DB).

(14) Where person lends money for the purpose of paying of gambling debt with knowledge of its being applied for payment of such debt, there is nothing to disentitle him to recover back money. (1900) 22 All 452 (453) (DB).

(15) A provision in a kuri entitling the stakeholder to recover from the benefited subscriber the amount of all the instalments immediately on default in the payment of any one of them is not penal and is enforceable. A 1941 Mad 231 (234) (DB).

(16) If two parties bet, on the premium at which Government securities may sell in the market on a future date, and the one promises to pay certain sum of money to the other according as the actual market price on that date is, one way or other, such transaction is a gambling or the premium at which Government securities sell in the market from time to time and is forbidden by Section 30. No suit lies to recover anything won on the wager. (1894) 17 Mad 480 (483, 484) (DB).

18. Collateral agreements.— (1) A contract collateral to a wagering contract is not necessarily unenforceable. A 1944 All 196 (197) : ILR (1944) All 397 ** A 1919 Low Bur 71 (74, 75). (Difference between void and illegal transactions lies in their effect on collateral transactions. It is holding of lottery that is prohibited and not receiving prize money and agent receiving such money for winners is bound to account for the same.) ** (1904) 17 CPLR 67 (73) ** (1901) 23 All 165 (166) (DB) ** (1900-07) 1 Low Bur Rul 128 (130) (FB) ** A 1959 Raj 27 (31) (DB).

(2) Where two partners enter into a contract of wager with a third person and one partner has satisfied his own and his co-partner's liability under the contract, he can legally claim partner's share of the loss. Section 30 does not affect agreements or transaction collateral to wagers. A 1923 Nag 48 (49).

(3) Suit brought by agent or broker to recover his commission or brokerage is maintainable even though transaction in relation to which claim is made is by way of wager. A 1961 Raj 52 (58) (DB).

(4) The forbearance of a plaintiff to sue coupled with his forbearance to declare the de-

Section 30 — Note 18 (contd.)
fendant a defaulter constitutes a good consideration for the fresh agreement, though the original contract was wagering transaction, and the plaintiff is entitled to recover on fresh agreement. A 1938 Lah 781 (784) (DB).

(5) A party to a wagering contract can sue to set aside an award made in pursuance of arbitration clause contained in the wagering contract. A 1933 Cal 759 (761).

(6) Although wagering contract cannot be basis of cause of action, if the wagering contract be a collateral one or if the rights and liabilities of the parties stand altered by a novation, the contract although of a wagering nature in its original can be enforced in view of the altered rights and liabilities. A 1963 Madh Pra 323 (329) (DB).

(7) If there is a second contract collateral to the wagering contract, such a transaction is itself void, if it merely restates the earlier void agreement and is supported by no other consideration. 1966 Jab LJ 399.

19. Wagering contracts by agents.— (1) When the transactions are made through brokers who are mostly interested in earning their commission and are not concerned with the ultimate result the element of wager is absent. A 1957 Madh Pra 194 (199) (DB).

(2) In transactions entered through brokers according to usage of particular market, there is a strong presumption against intention to wager which can be rebutted by evidence of common intention to wager. A 1938 Bom 44 (46, 48, 49) (DB) ** 1940-2 Mad LJ 997 (1000) ** (1903) 5 Bom LR 768 (772, 776) ** ILR (1961) 11 Raj 390 (DB) ** A 1961 Raj 52 (58) (DB).

(3) Section 30 requires a common intention between contracting party and broker to wager and the burden lies on the former to show that the transaction is by way of wager. A 1920 Sing 29 (30) (DB) ** A 1950 East Punjab 92 (95, 96) (FB) ** A 1961 Raj 52 (58) (DB).

(4) Where the plaintiff, a commission agent, bets in his own name for the defendants and pays the losses, the plaintiff can recover from defendants the sums so paid. (1904) 17 CPLR 67 (73) ** A 1940 All 95 (96, 97) ** A 1935 Lah 761 (762) (DB). (Badni transaction.) ** A 1932 Lah 356 (358) (DB). (A set off or adjustment in the accounts of third parties should be treated on the same footing as cash payment by the agent.) ** A 1928 Lah 420 (421) (DB) ** A 1927 All 823 (824) (DB) ** A 1925 All 102 (102) ** A 1925 Rang 284 (285) (DB) ** A 1923 All 585 (585) (DB).

[But see A 1922 Lah 408 (409). (A suit by agent against principal for loss caused to him for having entered into wagering contracts on his behalf with third parties cannot lie and the plaintiff cannot be allowed to alter the claim to one for refund of losses paid upon wagering contract.)]

(5) An agent, who has received money on an illegal contract between him and the third party, cannot put forth the plea of illegality of the contract as a defence in an action by his principal to recover money from him. (1903) 25 All 639 (641) (DB) ** A 1929 Rang 244 (244) ** A 1927 All 795 (796) (DB) ** A 1927 All 238 (238, 239) (DB) ** 1901 Pun Re No. 46, p. 152 (154, 155).

(6) Section 30 does not bar suit by principal against agent in receipt of prize money on a lottery on behalf of his principal. A 1937 Cal 297 (301).

(7) Munim of firm of defendant entering into forward contract with plaintiff — Goods not delivered — Adjustment of accounts — Balance found due to defendant — Suit for balance — Defendant held bound by transaction entered into by munim but transaction being only for differences was wagering one and hence could not be enforced. A 1914 Bom 142 (144) (DB).

(8) Commission agent is not debarred from recovering his commission fees on the ground that they were earned in respect of services relating to wagering transactions. 1895 Pun Re No. 80, p. 380 (383) (DB) ** A 1951 Nag 392 (394) ** A 1960 Raj 296 (299, 300, 301) ** A 1959 Raj 27 (31) (DB).

[But see (1900) 24 Bom 227 (230) (DB).]

(9) Where there is no proof of the contract being a wagering contract, the fact that the plaintiff has not proved that he had made payments to third parties on behalf of the defendant or entered into enforceable liability on his account does not disentitle the plaintiff from recovering from the defendant the amount of the loss sustained in such a transaction. A 1932 Lah 273 (274) (DB).

(10) If commission and losses are agreed to be paid to broker, presumably the transaction is not a wagering one. A 1920 Sind 29 (30) (DB).

(11) Where broker acts on behalf of his customer and the customer gambles, the customer cannot set up a plea of gaming and wagering against the broker's claim. A 1941 Cal 125 (127) ** (1963) 65 Pun LR 1054.

(12) Wagering contract between agent and third party — Agent cannot claim immunity on the ground that he is only an agent for another. A 1933 Cal 759 (765).

(13) Where an agent has paid losses arising from wagering transactions to third parties on behalf of the principal in pursuance of the authority conferred upon him, his right to indemnity can be enforced by a suit. A 1954 SC 500 (502) ** A 1960 Ker 122 (122).

(14) An agent authorised to enter into wagering contracts can claim indemnity from the principal only upon proof of actual payment. He cannot say that he has become liable to third parties because there is no legal liability upon him in respect of wagering transactions. A 1951 Nag 392 (393).

(15) If money won in a lottery is paid to third person as agent for the winner the taint would be purged by its passing into the hands of a person who is bound to account and winner can sue for recovery from the agent. A 1917 Low Bur 18 (21).

(16) Where grain pit was purchased by plaintiffs as commission agents on behalf of defendants and latter not being able to pay purchase-money former sold it at loss and sued defendants for loss: Held, that case did not come under Section 30, even though the probabilities to the knowledge of the plaintiffs were that the defendants would resell the contents of the grain pit through plaintiffs as commission agents getting the benefits of any rise in prices or suffering any fall. A 1914 All 321 (322) (DB).

(17) Where the documents show an ordinary commercial transaction, and in conformity with them one of the parties incurs personal obliga-

CHAPTER III

OF CONTINGENT CONTRACTS

31. "Contingent contract" defined.— A "contingent contract" is a contract to do or not do something, if some event, collateral to such contract, does or does not happen.

Illustration

A contracts to pay Rs. 10,000 if B's house is burnt. This is a contingent contract.

[Malaysian Contract Act 1950, S. 32.]

Section 30 — Note 19 (contd.)

tions on a genuine transaction with third parties so that he himself is not a winner or loser by the alteration of price, but can only benefit by his commission, the inference of betting is irresistibly destroyed. In such cases, the fact that no delivery is required or tendered is of practically no value. Ordinary speculation conducted on the stock exchange through a broker who makes himself by the rules personally liable to the other members of the stock exchange for the performance of the contract cannot be a bet. A 1942 PC 19 (21).

20. Pakka adatiya transactions.— (1) Pakki Adat dealings are legitimate modes of conducting commercial business in Bombay market. A 1917 PC 101 (102) ** A 1935 Sind 38 (41) (DB). (Pakki Adat contracts are almost necessarily of a speculative nature and bordering upon wager.) ** A 1927 Bom 125 (127) (DB) ** A 1960 Raj 296 (301).

(2) Adatia does not make contracts with third parties as agent but as principal, the constituents having no right to be brought into contract with third parties. Thus in a suit against his constituents for recovery of losses incurred by pakka adatia — On contracts entered by him with third parties for his constituents — In order to win, the defendants must prove that there was an understanding between them and the plaintiff, (i) that they were not only speculating but gambling, (ii) that there was no intention of effecting any delivery of goods, (iii) that if the plaintiff incurred losses he would be indemnified, (iv) that differences would be received and paid. A 1921 Bom 238 (243) (DB).

(3) Pakka adatia contracts as principal, his constituent having no right to be brought into contract with third parties, while broker contracts agent for client who himself is personally responsible to person with whom broker contracts. A 1921 Bom 238 (242) (DB).

(4) In the case of 'Pakka arhat' transaction the real question is to ascertain what, as between the parties, was the real intention when they entered into the contract. A 1954 All 789 (795) (DB).

(5) The contract of Pakka Adatia may like any other contract, be shown to be a wagering contract. The burden of proof is on the constituent who contests his liability on that ground. A 1954 Sau 99 (102) (DB) ** ('13) 37 Bom 347 (350) ** A 1960 Raj 296 (300).

(6) Contract between pacca arhtiya and his constituent providing that there should be no delivery but that only difference should be paid, held wagering contract and so void. A 1940 All 182 (184) ** A 1962 AP 350 (354) (DB).

(7) Wagering contracts between pakka adatia and his constituents are not valid if pakka adatia has entered into other contracts to shield first contract. A 1920 Bom 88 (89) (DB).

(8) Where the correspondence between the parties showed that the plaintiff who was pakka adatia knew that defendant was gambling and not merely speculating and where he assisted the defendant in carrying on the wagery and delivery was never intended to be given or called for and where even the constituents of plaintiff knew that the transactions were to be closed either before or at the 'vaida' by payment of differences only, the transactions were held to come within the purview of Section 30. A 1921 Bom 238 (243) (DB).

(9) Pakka adatia incurring personal obligations on the transactions with third parties — He himself not a winner or loser by the alteration in price but getting only the benefit of commission — Though delivery has not been actually taken or given and the transaction had been squared up by adjustment of claims that fact will not vitiate the transactions. A 1954 Sau 99 (102, 103) (DB).

(10) If the contract between pakka adatias and their constituents is a contract of employment it is not wagering contract and the pakka adatia must win unless constituent brings contract within the provisions of Bombay Act, III of 1865. A 1921 Bom 238 (239) (DB).

(11) A entering into wagering contract with Pucca Arhatia — A from time to time depositing with Pucca Arhatia cover or margin money — Transaction resulting in a loss — A cannot recover amount of cover money from Pucca Arhatia. A 1947 All 14 (15).

(12) Contract of cutcha adatia agency is not a wagering contract. A 1926 PC 119 (120).
[See also A 1961 Raj 52 (57) : ILR (1960) 10 Raj 1304 (DB).]

(13) Where owing to default of his client on one side or the other, the pukka adatia has been compelled either to find goods or money, and he seeks to recover from the defaulting client the amount he has been obliged to pay, it is impossible to say that as between him and his client any defence of wagering can succeed. (1913) 15 Bom LR 85 (97, 98).

(14) Mere use of words "pakka Adat" is not enough to attract incidents of Pakka Adat business so as to found plea of wager. A 1960 Raj 296 (300).

Section 31

(1) Person contracting to buy shares if appointed sole agent of company — Contract is contingent. A 1925 All 658 (661, 662).

(2) Agreement between plaintiff and one of defendants that if plaintiff succeeded in suit with regard to certain land in defendant's possession, plaintiff should purchase same for Rs. 300. Agreement held to be contingent contract. (1900) 2 Bom LR 118 (119) (DB).

Section 31 (contd.)

(3) Guardian of minor entering into agreement to sell land for fixed price contingent upon leave of Court — Court sanctioning sale but at higher price — **Held,** contract was never completed contract at any time as it was contingent upon Court's permission which did not extend to whole contract as agreed. (1886) 12 Cal 152 (155) (DB).

(4) A contract of insurance is a contingent contract within the meaning of Section 31 of the Contract Act. **A 1957 SC 669 (673, 676).**

(5) Life insurance in a broader sense comprises any contract in which one party agrees to pay a given sum upon the happening of a particular event contingent upon the duration of human life in consideration of the immediate payment of a smaller sum or certain equivalent periodical payments by another party. **A 1967 SC 816 (818).**

(6) Where a person took the sub-lease of a rice-mill during the pendency of suit by lessor against lessee for restraining lessee not to sub-lease, but the lessor allowed that sub-lessee to remain in possession of factory, machinery, etc., out of grace even though the sub-lease was invalid, it could not be said that the sub-lessee had no insurable interest and the policy taken by him was void ab initio. 1971 Tax LR 362 (Mad).

(7) Court must read a condition in a fire insurance policy in a sensible way and not assume that the general insurance companies intended to entrap their policy-holders and to destroy the value of the contract of indemnity by reason of the accidental contract of somebody else, which had no connection with the subject-matter of the contract, or with the price paid for the insurance. 1971 Tax LR 362 (Mad).

(8) Fire insurance — Question of contribution arises only in cases of double insurance — Conditions for invoking right of contribution stated. 1971 Tax LR 362 (Mad).

(9) Hindu undivided family — Life policy and personal accident policy distinct — Compensation received by son on death of assured caused by accident under personal accident policy — It was individual property of the son and not of the Hindu undivided family of which he was Karta. 1980 Tax LR 778 (784): (1980) 123 ITR 58 (DB) (Delhi).

(10) Where under a compromise decree the plaintiff agreed to recover by suit a certain property transferred by him pendente lite and relinquish it to the defendant it was held that the defendant under these terms got only contingent and not a vested right in the property and therefore, no claim at all to the property when the plaintiff's suit for recovery failed. A 1954 Hyd 185 (189, 190).

(11) Where an agreement provided that the agent appearing in the case in the Supreme Court would be paid the taxed costs if the case was successful it was held that the obligation which was contingent would ripen into an absolute obligation in the event of the success of the case. **A 1954 SC 26** (28). (Such an agreement is not a champertous one where the client is bound in the alternative to pay out-of-pocket expenses of the agent and a fixed remuneration in any case.)

(12) An agreement to sell a property within a specified time coupled with a separate oral agreement to the effect that the former agreement is subject to the condition that the vendor is able to persuade the lessee to surrender possession within the specified time constitutes a contingent contract and hence if the vendor fails to secure the agreement of the lessee the contract fails to create any obligation. A 1954 Trav-Co 10 (19, 24). (Such oral agreement is capable of being proved under Sec. 92, third proviso.).

(13) A wrote a letter to B as security for the repayment of a loan of Rs. 1½ lakhs advanced to him. The letter ran as follows "In consideration of your having at my request acceded to the proposal to advance Rs. 1½ lakhs, I hereby bind myself to procure a loan, within two weeks, of Rs. 11 lakhs on the first mortgage of the Mill property and to pay to you thereout the said sum of Rs. 1½ lakhs agreed to be advanced by you." B sued A for breach of contract contained in the letter. **Held,** that the contract was not a contingent contract but it amounted to a substantial undertaking by A that a loan of Rs. 11 lakhs should be procured and that out of the loan Rs. 1½ lakhs would be repaid to B. **(1912) 36 Bom 387 (395): 39 Ind App 152 (PC).**

(14) Where a contract provides that the goods are to be delivered when they arrive, the word "when" cannot be read as "if" and the contract was not a contingent contract but an absolute one, the obligation undertaken by the seller not being conditioned by or contingent upon the arrival of the goods in India. A 1949 Bom 356 (357, 359) (DB).

(15) Where a contract between seller and buyer contains the provision 'The goods have been purchased by me as for January delivery and will be shipped to your friends as soon as delivered to us,' it was held that the obligation was not conditional but also absolute, and the mode of performance consisted of the fact that delivery could be given as soon as the goods were delivered to the seller, and that partial shipments could be made. A 1956 Bom 151 (153, 155).

(16) Where a stipulation in a sale deed in respect of certain property in the Punjab provided that the amount of Rs. 25,000 which remained payable out of consideration money would be paid by the vendee to the vendor 'as soon as possible but at a time when the former is in a position to make the payment' the true import of the stipulation was that the balance consideration would be payable within a reasonable time by virtue of Sec. 46. The agreement to pay Rs. 25,000 could not be regarded as contingent contract within the meaning of Sec. 31. A 1964 Punj 123 (125, 127) (DB).

32. Enforcement of contracts contingent on an event happening.— Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.

Section 31 (contd.)

(17) Agreement to sell immovable property — Saleable unless agreement provides to the contrary — Not a contingent contract — Can be attached and sold in execution of a decree. **A 1980 All 36 (41): 1979 All LJ 1324 (FB).**

(18) A term in the lease that the lessee would not transfer his interest without the previous consent of the landlord would cease to operate against the lessee when there is a further condition that the landlord cannot withhold his consent unreasonably and that condition has not been complied with by the landlord. **(1949) 53 Cal WN 329 (334) (DB).**

(19) Where by a statute property is not transferable without the permission of the authority, an agreement to transfer the property must be deemed subject to the implied condition that the transferor will obtain the sanction of the authority concerned. **A 1970 SC 546 (547).**

(20) Specific performance — Agreement for sale of leasehold rights purchased at Government auction — Term that the sale will be completed after obtaining necessary permission from Government — **Held** that the agreement could be specifically enforced under the Specific Relief Act and O. 21, Rule 35, Civil P.C. ILR (1971) 2 Delhi 249.

(21) R. having imperfect title agreeing to sell his leasehold right in plot to A — Condition of lease requiring R to obtain sanction of authority for transfer — R forfeiting earnest money and cancelling contract without applying for Sanction — Suit by A for specific performance — A's readiness and willingness to perform his part of contract — **Held** on facts A was entitled to a decree for specific performance. **A 1971 SC 1238 (1242, 1243) (1965 Punj LR (Supp) 251 Reversed).**

(22) Agreement for sale of land — Vendor in possession of surat akuan — Application made for title — Held it was conditional sale to be completed when the vendor's application was approved by the State. The contract is clearly enforceable in law. **(1976) 2 Malayan LJ 64 (65).**

(23) Where a contract for sale of leasehold in khas mahal contained a provision that application for sanction for transfer should be presented to authorities in due course it was held that such a contract was as between the lessor and lessee not a contingent contract but a concluded one and the alienation was valid until terminated by the Collector who alone had the option to terminate the lease and eject the lessee. **A 1951 Orissa 291 (294) (DB).**

(24) The conditional transfer of a business with the police permit necessary for carrying on the same becomes an unconditional and irrevocable transfer when the police permission stipulated for is given. Even if the police subsequently refuse to alter or reissue the permit in the name of the transferee unless and until another distinct condition relating to the issue of permits is complied with, the completed contract of transfer would in no way be affected. **A 1949 PC 118 (120).**

(25) A clause in a contract, which, instead of providing for contingencies subject to which alone it could be enforced, confers an absolute and arbitrary power on one of the parties to say that it is unenforceable is void. **A 1957 Mad 82 (85) (DB).**

(26) A licensee may take the risk of putting a huge sum as a license fee with the Government on the assumption that certain quantity of liquor will be regularly supplied to him and on that basis he is likely to make huge profit; but the license fee even if calculated on the basis of certain estimated supply and even though payable monthly, cannot be said to be the price of the liquor supplied to him. It cannot be said that the contract is a contingent one inasmuch as the payment of fee depended on the continuance of supply. **A 1959 Assam 75 (91).**

(27) Agreement for sale of evacuee property on condition that execution of sale deed to take place after obtaining certificate from Custodian under Section 40 of Administration of Evacuee Property Act (1950) is a contingent contract. **A 1970 Guj 12 (23): 1970 Cri LJ 32 (DB)**

(28) Auction sale of leasehold rights in Government forest — Auction sale notice containing number of terms and conditions — Contract held was not contingent. **A 1971 Mad 28 (32).**

(29) Power-cut in Haryana on the orders of the State Government — Right of State Electricity Board (following two-part tariff System) to charge demand charges in accordance with Schedule of Tariff not affected. Section 31 of the Contract Act has no applicability as the agreement to pay minimum demand charges between the parties is not a contingent contract. **A 1976 Punj 59 (64) (DB).**

(30) Agreement by assessee undertaking to pay to her younger son in the event of failure by elder son to pay — Effect — Valid family arrangement creating liability of mother — Liability was debt deductible under the Wealth Tax Act (27 of 1957) — **Held** that consideration was a good consideration and Section 25 of the Contract Act did not hit such an agreement. Even assuming, it was a contingent contract within Section 31, it became enforceable under Section 32 of the Contract Act. **A 1979 SC 982 (983, 984).**

Section 32

(1) There is a clear difference between a contract under which a present obligation is created but the performance is postponed to a future date and a contract under which there is no present obligation at all and the obligation arises by reason of some condition being complied with or some contingency occurring. A promise by a person to buy certain shares himself in the event of his not being able to sell those shares on behalf of its owner within a stipulated time creates no present obliga-

If the event becomes impossible, such contracts become void.

Illustrations

(a) A makes a contract with B to buy B's horse, if A survives C. This contract cannot be enforced by law unless and until C dies in A's lifetime.

(b) A makes a contract with B to sell a horse to B at a specified price, if C to whom the horse has been offered, refuses to buy him. The contract cannot be enforced by law unless and until C refuses to buy the horse.

(c) A contracts to pay B a sum of money when B marries C. C dies without being married to B. The contract becomes void.

[Malaysian Contract Act 1950, S. 33.]

Section 32 (contd.)

tion to buy the shares but only an obligation contingent upon the failure to sell the shares within the stipulated time and therefore falls under the second category of contracts. A 1956 Bom 74 (75).

[See also A 1952 Kutch 27 (29) (Agreement creating absolute and unconditional obligation to pay debt — Clause stating that payment was to be made from specified source which would become available on accounts being made merely indicated mode of performance — Non-making of accounts and hence non-availability of source cannot render suit for enforcing the absolute liability untenable.)]

(2) The law allows the enforcement of a contingent contract after the event upon which it was contingent has happened. (1932) 33 Pun LR 207 (208) (DB).

(3) A conditional obligation is a quasi-obligation consisting in the chance or possibility that a real obligation may already exist or may come into existence in the future. The fulfilment of the condition is the transformation of that potentiality into actuality. Conversely the failure of the condition is the failure of that chance to become a fact. A 1956 Bom 74 (76).

(4) Where the execution of a further contract is a condition or a term of the bargain, there cannot be an enforceable contract unless the condition or the term is fulfilled. A 1942 Pesh 33 (34, 35) (DB).

(5) Co-sharer in undivided land contracting with person to sell certain land adjoining person's land — Co-sharer promising in sale deed to get specified land measured out and to hand it over to purchaser — Purchaser's suit for specific performance on failure of promise — Contract held depended on contingency not yet happening, hence suit premature — Contract held within Section 32 — Hence purchaser not entitled to compensation. A 1936 Sind 26 (28) (DB).

(6) Clause in agreement that in event of vendor not being in possession of goods, contract to be deemed to have been cancelled does not render the contract void. A 1964 Punj 230 (231).

(7) Ante-nuptial agreement to give land in consideration of marriage is contingent contract and becomes enforceable on marriage. A 1928 Rang 286 (287).

(8) Where the buyer agreeing to buy goods as might be ready for delivery or as might arrive and be deliverable, the use of the words "as might arrive" rendered the performance of the contract conditional upon the arrival of the goods. Hence if the goods do not arrive the seller would be absolved from delivering the goods. A 1949 Cal 407 (413).

(9) Sale of property in Punjab — Stipulation in sale deed that balance of consideration would be paid "as soon as possible but when vendee would be in position to make payment" cannot be regarded as contingent contract. A 1964 Punj 123 (126) (DB).

(10) Merely because a contract is "for forward delivering" of goods ordered from a foreign country it cannot be said that the performance of it will depend upon the arrival of the goods at the port in India Hence even if the goods have not been shipped from the foreign country the seller cannot avoid the consequences of his failure to supply according to the terms of his contract by raising a plea of impossibility of performance. **A 1948 PC 217 (220).**

[See also A 1968 SC 522 (528 529).]

(11) The question whether the obligation of the seller to perform under an F. O. R. contract for sale of goods is absolute or contingent upon the availability of wagons must be decided upon the facts of each case. Where at the time of entering into the contract itself the happening of the contingency of the non-availability of wagons must have been present to the minds of the parties and yet they have not expressly provided for such contingency the Court should not imply any such condition into the contract. A 1949 Cal 472 (473, 474)

(12) Where a contract to supply certain bales of cloth within a stipulated time contained a statement that the supply of goods under the contract would go on as soon as the bales were delivered by the mill to the seller it was held that the statement was intended only to indicate a mode of delivery and not a condition on which the delivery to the buyer was made contingent. Hence the seller cannot escape the consequences of his failure to supply the goods according to his contract by pleading that the mill had failed to deliver the bales in sufficient time. **A 1952 SC 9 (11).**

(13) Although the law would not permit implying into a written contract or grant a condition which would alter or modify the written terms of the contract or grant there is nothing in it to prohibit implying a condition that the contract or the grant would cease to operate if a pending litigation goes a particular way. In such a case

Section 32 (contd.)

the contract or the grant is not left to operate subject to any modification or alteration introduced by the condition but the whole contract or grant is struck down as a result of the happening of the event contemplated. **A 1957 SC 489 (493).**

(14) Law of frustration has been incorporated in Sections 32 and 56 of Contract Act and Courts cannot go beyond them on analogy of principles of English Common Law or otherwise. **A 1963 Punj 49 (63) (FB). (Overruled** on another point in A 1968 SC 1024.)

(15) Where the contract itself, as a matter of construction, contains impliedly or expressly a term according to which it would stand discharged on the happening of certain circumstances the question of dissolution of the contract according to its terms falls to be determined under Section 32 or other similar provisions and not under Section 56. **A 1954 SC 44 (48) ** A 1968 SC 522 (527) **** A 1959 Assam 75 (95) (DB). **(Held** on facts that contract was not contingent.) ** (1972) 76 Cal WN 528.

(16) If the performance of contract is rendered unlawful either for determinate or indeterminate period of time, the contract would not stand discharged unless the ban on its performance existed on the day or during the time in which it has to be performed. **A 1965 SC 1523 (1526) ** A** 1959 Cal 576 (579) (DB).

(17) The doctrine of discharge by frustration cannot be available where the contract makes full and complete provision, so intended, for a given contingency. The reason is that where there is an express term the Court cannot find, on construction of the contract, an implied term inconsistent with such express term. **A 1968 SC** 522 **(528).**

(18) A party suing to enforce an obligation which is conditioned upon the occurrence of an event has to establish that the event had occurred in the manner contemplated by the contract for the obligation to arise. A 1958 Madh Pra 297 (299).

(19) A plea that contract is a contingent contract has to be alleged and proved by the party who sets it up and it is futile to argue that it is bounden duty of the trial Court to go into a matter like this suo motu. A 1965 Raj 132 (138).

Contract void if future event becomes impossible :

(20) Contingent contract depending upon future event is void if the event becomes impossible. A 1915 Nag 15 (16).

(21) Where the intention was that in case the named arbitrator neglected or refused to act or was incapable of acting or died no other arbitrator would be appointed, Section 8 shall have no application. Such an agreement would be rendered incapable of performance in case the arbitrator named therein neglects or refuses to act or becomes incapable of acting or dies. Consequently the agreement would become void under Section 32 of the Contract Act and therefore would be non est in the eye of law. 1978 Kash LJ 203 (207) (J & K)

(22) So far as India is concerned the law relating to avoidance of contract on the ground of impossibility is embodied in Sections 32 and 56 and the doctrine of frustration will be of no avail to a party in default when neither of the sections is applicable to his case. **A 1952 SC 9 (11) **** A 1957 All 143 (146, 151) (DB).

(23) Where by an agreement or compromise a party undertook to pay a certain sum of money to another and created a charge for the debt on an estate in his possession as a mode of discharging the liability and there was nothing in the transaction to show that the obligation was conditioned on the continued existence of the estate it was held that the acquisition of the estate by the Government under the Zamindary Abolition Act did not in any way render the agreement impossible of performance. 1955-2 Mad LJ 339 (355) (DB).

(24) Agreement to sell land — Vendor agreeing to pay Government dues and obtain necessary Sanad — Contract is not contingent — Vendee entitled to specific performance. A 1975 Raj 73 (76, 78).

(25) Agreement for sale of land — Vendor in possession of Surat akuan — Application made for title — **Held** it was conditional sale to be completed when the vendor's application was approved by the State. The contract is clearly enforceable in law. **(1976) 2 Malayan LJ 64 (65) (FC).**

(26) R having imperfect title agreeing to sell his leasehold right in plot to A — Condition of lease requiring R to obtain sanction of authority for transfer — R forfeiting earnest money and cancelling contract without applying for sanction — Suit by A for specific performance — A's readiness and willingness to perform his part of contract — **Held** on facts, A was entitled to a decree for specific performance. **A 1971 SC 1238 (1242, 1243). (1965 Punj LR (Supp) 251 Reversed.)**

(27) Pleader retained by plaintiff to appear in certain suit — Plaintiff paying fees in advance — One S agreeing to pay further fees if plaintiff obtained decree — Suit compromised without pleader's advice and in his absence — **Held** that case was of contingent contract within Section 32 and event having become impossible contract was void. 1879 Pun Re No. 155, p. 440 (441) (DB).

(28) Where the forward contracts in respect of cotton were not void ab initio but become void and unenforceable due to prohibition of law (Cotton Control Order, 1945), there is no bar to its enforcement when the inhibition is lifted by the repeal of that law A 1961 Raj 52 (59) (DB).

(29) An agreement to sell land held on restricted tenure the performance of which is contingent on sanction of revenue authorities being obtained under Section 73-A of the Bombay Land Revenue Code, cannot, on refusal of such sanction, be enforced specifically or an action for damages maintained for breach thereof. A 1928 Sind 63 (65, 66).

(30) Where the possibility of completing a contract is dependent on the will of a third person, a defendant who has entered

33. Enforcement of contracts contingent on an event not happening.— Contingent contracts to do or not to do anything if an uncertain future event

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Section 32 (contd.)

into the contract to the performance of which such consent is necessary will not, if such consent cannot be procured, be decreed to obtain it and thus perform an impossibility. A 1915 Nag 15 (17).

(31) An agreement entered into by the parties on the clear understanding that some other party should also become a party to the contract cannot become a perfect agreement until and unless the third party joins the agreement. **A 1949 FC 211 (217).** (It is necessary in such cases that there should be a clear understanding between the parties as to the condition. It is not sufficient to say that the parties acted in the 'faith' that the third party would join the agreement.)

(32) Where the parties to a contract for the sale of a property within a specified time stipulated by an oral agreement that the performance of the contract by the vendor will abide by the result of his efforts to persuade the lessee in possession to surrender the property within the specified time it was held that the vendor's failure to obtain possession from his lessee within the time made the contingent contract for sale fall through. A 1954 Trav-Co 10 (19, 24) (DB). (The oral agreement itself could be proved under the 3rd proviso to Section 92. Evidence Act as it was only a condition precedent on the happening of which alone the contract could be enforced and not one in defeasance of the contract.)

(33) Contract to purchase shares on being made sole agent of Company — Company going into liquidation before appointing purchaser as sole agent — Latter is not liable as a contributory. **A 1925 All 658** (661, 662).

(34) Where a contract stated that certain conditions therein would be void if there should be any fluctuation in the rates issued by a certain syndicate: **Held**, that the non-issue of the rates by the syndicate due to its ceasing to exist did not bring into operation the condition rendering the contract void. **A 1921 PC 46 (47).**

(35) Agreement for sale of evacuee property on condition that execution of sale deed to take place after obtaining certificate from Custodian under Section 40 of Administration of Evacuee Property Act (1950) — **Held**, since condition of obtaining certificate became unnecessary in view of property being restored free from any such restrictions under Section 16 (1) of Act of 1950, contract did not depend upon condition which could not be enforced by law or which had become impossible of performance so as to render it void. A 1970 Guj 12 (23): 1970 Cri LJ 32 (DB).

(36) Agreement between the State and a promoter of company, for return of land in case of winding up of the company — A clause in the agreement providing for service of notice on company for removal of plant, machinery, etc., within 24 months — Company wound up — Land vested in the State no sooner than winding up proceedings started — Notice served on provisional liquidator for handing over of possession — Notice held was sufficient compliance of the fourth proviso to Cl. 6 (a) of the agreement — State was therefore entitled to take possession pursuant to the agreement. **(1970) 2 SCJ 278.**

(37) Where the Government of Hyderabad purchasing plaintiff's book of medicinal prescriptions, with a view to start limited company for manufacture and sale of unani medicine, held that though the book was bought for the company to be floated this did not make the contract contingent. The Government chose to carry out the contract piece-meal and proceeded to buy the book and make an advance of Rs. 50,000. The balance of Rs. 1,50,000 according to the firman had to be invested on his behalf in the capital of the company. But if the company could for some reason not be floated, the plaintiff did not lose his right to enforce the contract. As far as the book "Tohfa-e-Osmania" was concerned, it was clear that the Government in part-performance of the agreement, took delivery of the book and accordingly must pay the price mentioned in the agreement. **A 1970 SC 1089 (1092, 1093).**

(38) Submission of tender by a contractor — Letter accepting tender on behalf of President of India requiring the contractor to execute a formal agreement — Terms of formal agreement objected to by the contractor — Formal agreement not executed —**Held**, there was no concluded contract between the parties. A 1972 Delhi 110.

(39) Agreement by assessee undertaking to pay to her younger son in the event of failure by elder son to pay effect — Valid family arrangement creating liability of mother — Liability was debt deductible under Wealth Tax Act (27 of 1957). **Held** that consideration was a good consideration and Section 25 of the Contract Act did not hit such an Agreement. Even assuming it was a contingent contract within Section 31, it became enforceable under Section 32 of the Contract Act. **A. 1979 SC 982.**

(40) Hindu undivided family — Life policy and personal accident policy distinct — Compensation received by Son on death of assured caused by accident under personal accident policy — It is individual property of the son and not of the Hindu Undivided Family of which he is Karta. 1980 Tax LR 778 (784): (1980) 123 ILR 58 (DB) (Delhi).

Section 33

(1) Acceptance by telegram with condition that it would be confirmed by post if mistake found in telegram — Condition is, what is known as condition subsequent — Contract is complete subject to the "uncertain future event" which is possible discovery of telegraphic mistake. A 1922 All 219 (221, 222) (DB).

does not happen can be enforced when the happening of that event becomes impossible, and not before.

Illustration

A agrees to pay B a sum of money if a certain ship does not return. The ship is sunk. The contract can be enforced when the ship sinks.

[Malaysian Contract Act 1950, S. 34.]

34. When event on which contract is contingent to be deemed impossible, if it is the future conduct of a living person.— If the future event on which a contract is contingent is the way in which a person will act at an unspecified time, the event shall be considered to become impossible when such person does anything which renders it impossible that he should so act within any definite time, or otherwise than under further contingencies.

Illustration

A agrees to pay B a sum of money if B marries C. C marries D. The marriage of B to C must now be considered impossible, although it is possible that D may die and that C may afterwards marry B.

[Malaysian Contract Act 1950, S. 35.]

35. When contracts become void which are contingent on happening of specified event within fixed time.— Contingent contracts to do or not to do anything if a specified uncertain event happens within a fixed time become void if, at the expiration of the time fixed, such event has not happened, or if, before the time fixed, such event becomes impossible.

When contracts may be enforced which are contingent on specified event not happening within fixed time.— Contingent contracts to do or not to do anything if a specified uncertain event does not happen within a fixed time may be enforced by law when the time fixed has expired and such event has not happened or, before the time fixed has expired, if it becomes certain that such event will not happen.

Illustrations

(a) A promises to pay B a sum of money if a certain ship returns within a year. The contract may be enforced if the ship returns within the year, and becomes void if the ship is burnt within the year.

(b) A promises to pay B a sum of money if a certain ship does not return within a year. The contract may be enforced if the ship does not return within the year, or is burnt within the year.

[Malaysian Contract Act 1950, S. 36.]

36. Agreement contingent on impossible events void.— Contingent agreements to do or not to do anything, if an impossible event happens, are void.

Section 35

(1) In contracts under Section 35 the specified event as a rule is independent of will of either party. There is no question of breach of any agreement. A 1923 Rang 26 (26).

(2) Where in surety bond surety undertook to get judgment-debtor to deposit decree amount before certain date or to pay amount himself in case of default, and judgment-debtor died before specified date. **Held,** that Section 35 (2) applied to case and not para. (1). Specified uncertain event was the payment of the decretal debt by the judgment-debtor and as that event did not happen before the specified event the contingent contract became enforceable (1910) 8 Ind Cas 985 (986) (Low Bur).

(3) Sale contingent on not repaying amount within certain time is contingent contract and becomes void if payment is made within that time. A 1926 Bom 107 (107, 110) (DB).

(4) Where in a contract for purchase of plot of Land containing a term 'subject to purchaser's lawyer's approval of title there is no reference to the time within which the lawyer's approval had to be obtained, it is fair to both sides to assume that the intention was that the approval should be obtained within a reasonable time. It has been held that even where a particular time is fixed for the completion of a contract of sale of land. the Courts of equity may ignore the time and give relief where justice requires it. A 1959 Andh Pra 256 (262).

Section 36

(1) 'A' agreed to sell land to 'B' making it clear that she was not the owner of the land but had applied to government to accept her title to the land, and promised to complete the deal after his title was confirmed. 'B' asked for specific performance of the contract. Held as the sale

whether the impossibility of the event is known or not to the parties to the agreement at the time when it is made.

Illustrations

(a) A agrees to pay B 1,000 rupees if two straight lines should enclose a space. The agreement is void.

(b) A agrees to pay B 1,000 rupees if B will marry A's daughter C. C was dead at the time of the agreement. The agreement is void.

[Malaysian Contract Act 1950, S. 37.]

CHAPTER IV

OF THE PERFORMANCE OF CONTRACTS

Contracts which must be performed

37. Obligation of parties to contracts.— The parties to a contract must either perform, or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provisions of this Act, or of any other law.[a]

Section 36 (contd.)
was conditional to be completed after title of A was confirmed, the contract was enforceable. (1976) 2 Malayan LJ 64 (65).

SECTION 37 SYNOPSIS

(1) General.
(2) Waiver.
(3) "Other law," excusing performance.
(4) Legal representative.
(5). Assignee.

1 General.— (1) S. 37 of the Indian Contract Act, covers also cases of partial performance. A 1946 Nag 336 (339).

(2) A concluded and completed contract, though it is deficient in some requirement as to form, will bind the parties in equity when they have acted upon it and some material terms of it have been performed. A 1934 Cal 235 (238) (DB) ** 1969 Ker LT 587. (Party cannot avoid contract retaining benefit under it — Contract must be avoided as a whole.)

(3) It is not obligatory under Sec. 37 to make a decree according to the terms of the contract and on no other terms. **A 1939 Pat 55 (60) (FB).**

(4) The tenant of a house, who, under the rent deed executed by him, deposited a certain sum as rent in advance for the last month of the tenancy and also agreed to pay the rent of the other months by a specified date in each month, cannot without paying the rent of any such previous month in the agreed manner and by merely unilaterally adjusting the advance which had already been appropriated towards the last month's rent claim to be not in default in the payment of rent for that month. A 1953 Trav-Co 70 (71).

(5) A party to an agreement who has failed to perform his part of the agreement is not entitled to the performance under the agreement by the other party. A 1924 Oudh 425 (426).

[See also A 1933 Pat 579 (581). (Suit for ejectment — Defendant in default of agreement — He cannot rely on the agreement which was for granting him permanent lease against ejectment).]

(6) Contract to institute a suit to prevent waste of properties due to a reversioner — Suit filed — Contract not unconscionable or champertous — Premature termination of suit does not disentitle the party who has filed the suit from claiming benefits under the contract. ILR (1960) 2 Cal 538 (DB).

(7) Agreement permitting defendant reimbursement of 130 parahs of paddy for payment of Rs. 50 as revenue — Price of paddy increasing seven-fold — Agreement becomes unconscionable and extortionate — Plaintiff can be relieved from it. 1967 Ker LT 607.

(8) The parties are bound by the terms of the agreement and when there is nothing in the contract which provides for a contingency the party cannot claim extra consideration on the ground that because of the contingency he had to expend more money. A 1963 Andh Pra 216 (221) (DB).

(9) Where two parties to a contract settle accounts and release each other from mutual obligations, the point of time at which such settlement and release take place would be the time at which the contract terminates. A 1960 Mys 150 (153) (DB)

(10) Suit for specific performance of contract — Plaintiff must plead that he has been and is still ready and willing to specifically perform his part of agreement. **(1970) 2 SCJ 703.**

(11) Building contract — Alterations in specifications for which no rates were fixed — Contractor informing about rates to be charged therefor by notice as per term — Under term of contract Government could cancel order for changed work — **Held:** Until rates are settled, contractor is under no obligation to carry out altered work and the mere fact of non-exercise of liberty to cancel given by the contract does not result in an agreement as to rates, proposed by contractor. **A 1975 SC 763 (765, 766)** ** A 1975 Cal 8 (11).

(12) Subsequent performance of the agreement even if true, cannot absolve the tenant of the penal consequences arising therefrom. The duty to repair is an inalienable condition in the agreement and that goes along with the tenant's right of enjoyment. So when the tenant failed to carry out the repair as was undertaken by him, the cause of action had arisen on the part of the landlord and that is not lost to him even if

Promises bind the representatives of the promisors in case of the death of such promisors before performance, unless a contrary intention appears from the contract.

Illustrations

(a) A promises to deliver goods to B on certain day on payment of Rs. 1,000. A dies before that day. A's representatives are bound to deliver the goods to B, and B is bound to pay the Rs. 1,000 to A's representatives.

(b) A promises to paint a picture for B by a certain day, at a certain price. A dies before the day. The contract cannot be enforced either by A's representatives or by B.

[Malaysian Contract Act 1950, S. 38.]

[a] See, Law Reforms (Miscellaneous Provisions) Act, 1970 (1970, C. 33) Ss. 1 to 5; S. 65 of the Presidency Towns Insolvency Act, 1909.

Section 37 — Note 1 (contd.)

repairs were effected by the tenant subsequently. 1972 Ren CR 421 (Ker).

(13) The question whether an agreement of sale made by several persons, some of whom did not sign it, is binding at least on those who signed it depends on the intention of the parties, that they wanted to leave the agreement incomplete and unenforceable against the executing parties. This intention has to be established by those who signed it by showing that they would not have executed the agreement if the person not signing it had not joined. A 1972 Mad 222 (227).

(14) Plea that lease is benami transaction — Not open to parties to the lease. A 1978 Pat 91 (DB).

(15) In an order of an allotment of a plot the allottee was asked to furnish a receipt for Rs. 11,000/- then the allottee must deposit the amount. If the order does not specify the time, it means "reasonable time" within which needful was to be done. 1979 Kash LJ 334 (342) (DB) (J & K).

(16) Transfer of entire interest in land by lessee with reservation to take back possession on failure of transferee to discharge lessee's liability towards lessor within stipulated time. Lessor accepting part payment from transferee without however recognising him as debtor. Failure of transferee to discharge debt of lessee within stipulated time entitles lessee to recover possession according to agreement, in absence of privity of contract between lessor and transferee. **A 1973 SC 2065 (2068).**

(17) Option — Option to purchase — Plaintiffs exercised option through defendant's solicitor — No consideration paid — Claim for specific performance of agreement resulting from exercise of option — Defendants alleged option had expired — When no time is fixed option must be exercised within a responable time or it will lapse. For want of consideration the option was also void. (1976) 2 Malayan LJ 177 (183).

2. **Waiver.**— (1) Where before goods were delivered under a contract to sell which can be said to contain only an assurance that the goods supplied would be of marketable quality the buyer wrote to the seller intimating his determination to refuse acceptance of the delivery if a guarantee that the goods contained in the package were according to sample shown was not forthcoming it was held that he had thereby excused performance of the promise made to him by the seller. A 1950 Orissa 42 (46) (DB).

(2) Where a vendee, who had leased back the property for a specified number of years, stipulated by a separate agreement to reconvey the property if the vendor paid the annual rent on the stipulated dates each year regularly but subsequently accepted the belated payments on the clear understanding that the agreement to reconvey had however become inoperative owing to the default of the vendor it was held that there was no waiver on his part of the default by his acceptance of belated rent. A 1946 Mad 47 (48) (DB).

(3) A new promise made by the obligor and accepted by the obligee in lieu of the promise contained in the original contract between them discharges the obligor from his liability to perform the promise under the original contract. A 1951 Pat 621 (623) (DB).

3. **"Other law" excusing performance.**— (1) As Section 37 of the Contract Act itself sanctions and recognises the existence of laws which might dispense with or excuse the performance of an act which is binding or valid under the Contract Act it cannot be postulated that the U. P. Agricultural Tenants (Acquisition of Privileges) Act, 10 of 1949, which is one such law, could fail on the ground of it being in conflict with or repugnant to the Contract Act which is an earlier Central law. A 1957 All 644 (646).

(2) Any law which dispenses with or excuses performance under an agreement relating to tenancy of premises will also be treated as supplementary to the T. P. Act and the parties to the agreement can take advantage of that law. Such a law cannot, in view of the provisions of Section 37 of the Contract Act which envisages interference with agreements by validly made law, be struck down on the ground of repugnancy with the provisions of T. P. Act. A 1954 Raj 252 (256).

(3) Section 13 of the Rajasthan Premises (Control of Rent and Eviction) Act 17 of 1950 must be deemed to be "any other law" excusing the performance of the terms of the contract of tenancy relating to ejectment. ILR (1955) 5 Raj 575 (580). (Hence Rajasthan Act cannot be struck

Section 37 — Note 3 (contd.)
down as being inconsistent with the provisions of the Contract Act.)

(4) The Hindu law rule of "dam dupat" is "other law" within the meaning of Section 37 and that section therefore does not affect the operation of the rule of damdupat. A 1946 Nag 210 (212) (DB).

4. Legal representatives.— (1) Legal representatives have right to require specific performance or are bound by promise to perform contract in absence of contrary intention. A 1926 Bom 97 (100) (DB) ** **A 1967 SC 744 (746, 747).**

(2) Under Section 37 promises bind representatives of promisors before performance. Hence registered contract of lease by Hindu father would bind his son, especially if he has possession of property, subject of lease, during the period for which rent is claimed. 1902 Pun Re (Rev) No. 4, p. 7 (8).

(3) A contract for pre-emption can be enforced against the representatives of the parties to the contract and also against a person who has taken the property affected by the contract with notice of the contract. A 1924 All 657 (658) (DB) ** **A 1967 SC 744 (746)** ** A 1961 Cal 152 (154) (DB).

(4) Partition between two brothers — Agreement that if share of one is sold, the other would be entitled to buy for certain price is enforceable against sons of parties. Section 14, Transfer of Property Act, does not invalidate agreement. A 1944 Nag 187 (187, 188).

(5) A universal legatee is the legal representative of the deceased testator and is liable for the debts of the testator to the extent of property of the testator in his hands. A 1936 Oudh 7 (9) (DB).

(6) Covenant for good title cannot be enforced against persons who are in possesion of part of property of deceased vendor as legatees from universal legatee of vendor. A 1961 Andh Pra 29 (31).

(7) Where certain co-sharers agree to divide profits in particular manner, the agreement is binding on their heirs until it is terminated. A 1934 All 139 (141) (DB).

(8) Vendee undertaking to pay off mortgage — On default sale of mortgaged property effected — Mortgagee becoming owner after final foreclosure decree — There is breach of contract and after vendee's death sons are liable. A 1928 Oudh 148 (151) (DB).

(9) Section 37 applies to an agreement to pay a certain sum of money to a near relation out of natural love and affection as it is a contract under Section 25. Hence, it would in the absence of any contrary intention appearing from it bind the legal representatives of the promisor also. A 1952 All 564 (576) (DB).

(10) Where the contract is one which has relation to the personal conduct of both the contracting parties, the death of either of them puts an end to the contract. A 1954 Orissa 241 (243) (DB). (Contract of personal service.)

(11) Personal contract by manager of joint Hindu family — Other members are not his representatives and cannot enforce it after his death. A 1923 Pat 589 (589, 590) (DB).

(12) Lease for building and residential purposes does not fall within the class of personal contracts contemplated by Sec. 37. Upon death of lessee tenancy is not determined, but vests in his legal personal representatives who are entitled to give or receive the usual notice to quit. (1910) 37 Cal 377 (381) (DB).

5. Assignee.— (1) In contract except where they depend on personal factors of the contracting parties or the like assignability is the rule and the contrary is exception. A 1961 Cal 152 (153).

(2) As a rule obligations under a contract cannot be assigned except with the consent of the promisee, and when such consent is given, it is really a novation resulting in substitution of liabilities. On the other hand, rights, under a contract are assignable unless the contract is personal in its nature or the rights are incapable of assignment either under the law or under an agreement between the parties. **A 1962 SC 1810 (1817).** (A 1960 Cal 86, **Reversed.**)

(3) Assignment contract — Parties may agree that one of them should drop out and third person assume benefit and liabilities of contract — Third party's consent need not be express. A 1940 Cal 466 (469).

(4) Only privy to a contract has a right to sue for breach of the contract. The benefits of a contract are assignable but the assignee of the benefits does not get a right to sue the other contracting party for breach of the contract itself except in the case of a person who is claiming through a party to the contract by operation of law A 1966 Guj 6 (13) (DB). (The proposition that the transferee of a benefit under the railway receipt will have a right to sue the railway administration cannot be accepted absolutely.) (A 1957 Nag 31, **Dissented from.**)

(5) Where there is an assignment of the rights of a mortgagee under the mortgage and the assignment deed contains a stipulation to indemnify the assignee in case of dispute, the stipulation for indemnity can be enforced by the transferee from assisgnee under Section 37 of the Indian Contract Act. A 1950 Kutch 84 (86).

(6) A person who wishes to obtain decree on the basis of assignment must allege and prove a valid assignment in order to show that he has a cause of action. A 1958 Punj 52 (53).

(7) An arbitration clause does not take away the right of a party to a contract to assign it if it is otherwise assignable. **A 1962 SC 1810 (1818).** (A 1960 Cal 86, **Reversed.**) ** A 1962 Cal 441 (442).

(8) Where K entered into agreement with plaintiff's father that the latter has right to rest his rafters on the western wall of K's house and where K sold that house to defendant. **Held** that the defendant having purchased the house in question from K is

38. Effect of refusal to accept offer of performance.— Where a promisor has made an offer of performance to the promisee, and the offer has not been accepted, the promisor is not responsible for non-performance, nor does he thereby lose his rights under the contract.

Every such offer must fulfil the following conditions :—

(1) it must unconditional;

(2) it must be made at a proper time and place, and under such circumstances that the person to whom it is made may have a reasonable opportunity of ascertaining that the person by whom it is made is able and willing there and then to do the whole of what he is bound by his promise to do;

Section 37 — Note 5 (contd.)
bound by the aforesaid agreement to which his predecessor in title K was a party. 1974 (1) WLN (UC) 205 (Raj).

SECTION 38 — SYNOPSIS

1. Scope.
2. Tender.
3. Tender by cash.
4. Tender in part.
5. Tender must be unconditional.
6. "Able and willing."
7. Reasonable opportunity of inspection.
8. Tender to one of joint promisees.
9. Refusal or acceptance of offer.
10. Waiver of tender.

1. Scope.— (1) Section 38 requires, in case of payment, a genuine and unconditional offer to pay unconditionally at a proper place, made by person in a position to pay. (1880) 5 Cal LR 105 (107).

(2) Section does not apply to a case of principal and agent. A 1923 Pat 464 (465) (DB).

(3) In construing Section 38, rule of English law as to tender should not be relied on. A 1939 Cal 131 (133).

(4) Section 38, deals with consequences which flow from an offer of performance which has been refused, but does not deal with the legal consequences of the offer which has been accepted. The section is therefore not helpful in deciding the question whether payment to one of joint creditors is binding on the other creditors. A 1948 Nag 279 (282) (DB).

(5) Oral agreement of reconveyance of property — Suit for specific performance of — Defendant in written statement offering to reconvey part of the property at stated price — No acceptance by plaintiff — No decree can be passed on the basis of such an offer — For granting a decree of specific performance, contract pleaded must be specific one and it should be established by convincing evidence. (1970) 2 SCJ 703.

2. Tender.— (1) If the amount due is validly tendered to the creditor by the debtor or by his agent, on the debt becoming payable, the creditor is bound to accept the money. A 1955 All 350 (351) (DB).

(2) According to the law of contract, the performance is said to be complete when there is a legal tender on the part of the promisee. It may sometimes happen that a person who is to perform a promise has been ready and willing to perform and has also offered to perform his promise at the proper time and proper place. A 1958 Orissa 125 (130) (DB).

(3) A tender to be valid under Section 38, Contract Act, should be open, unconditional and should be made under circumstances giving the promisee opportunity to know that the tender is real and bona fide. A 1947 Pat 208 (212) (DB).

(4) There must be either an actual offer of the money by one party or a dispensation of such offer by the other. But the mode of payment is also determined by the previous conduct of the parties. A 1958 Orissa 125 (130) (DB).

(5) Where the course of conduct between the parties has evolved a different mode of payment than that contemplated by a statute, the obligor cannot be held to be defaulter if for no fault of his the obligee refuses to accept payment when payment is offered according to that mode. 1950 Trav-Co LR 434 (436) (DB).

(6) It cannot be laid down as a general rule that in order that it may be legal tender actual money must be produced under all circumstances. If the creditor by his conduct dispenses with the production of the money, he cannot afterwards object that there was no valid tender. A 1952 Raj 72 (73).

(7) A tender may be of a greater sum of money than the amount due. It is open to the creditor, in such case, to accept so much of it as is due and reject the rest. A 1949 Mad 535 (538) (DB).

(8) A valid tender on a contract of debt is as much a performance and discharge of a debtor's duty as an actual payment. A 1928 Cal 68 (79) (DB).

(9) A bona fide tender amounts to payment unless there is a suggestion that the applicant was not in a position to make the payment at the time when he filed the tender in Court. 1966 All LJ 1108.

(10) Offer of performance is not discharge of obligation. (1910) 20 Mad LJ 709 (713) (DB).

(11) Where payee does not agree to accept payment to third party as equivalent to payment to himself there is no proper tender. A 1925 Lah 180 (181).

(12) A formal tender is unnecessary when its refusal is quite evident. A 1923 PC 26 (28) •• 1949 Bur LR (HC) 58 (61) •• A 1962 SC 77 (78). (Sale with an agreement to repurchase — Offer of repurchase by vendor — Purchaser repudiating agreement to reconvey — Formal tender of price by vendor not necessary.)

(13) Where condition in contract that notice should be given of arrival of goods is not essential part of it, failure to give such notice or mistake in notice given, is not breach of contract entitling one party to avoid it — Nor can that notice by itself be deemed to be offer of performance within meaning of Section 38. Where on receipt of notice of arrival of goods

(3) if the offer is an offer to deliver anything to the promisee, the promisee must have a reasonable opportunity of seeing that the thing offered is the thing which the promisor is bound by his promise to deliver.

An offer to one of several joint promisees has the same legal consequences as an offer to all of them.

Illustration

A contracts to deliver to B at his warehouse, on the 1st March 1873, 100 bales of cotton of a particular quality. In order to make an offer of a performance with the effect stated in this section, A must bring the cotton to B's warehouse, on the appointed day, under such circumstances that B may have a reasonable opportunity of satisfying himself that the thing offered is cotton of the quality contracted for, and that there are 100 bales.

Section 38 — Note 2 (contd.)

one party has to apply for delivery of goods but fails to do so, he commits breach and is liable in damages. A 1916 Mad 1066 (1067) (DB).

(14) Promisor, after he makes a tender is not responsible for non-performance and will not be required to pay interest from date of tender. (1910) 20 Mad LJ 709 (713) (DB).

(15) It would make no difference in principle whether the contract itself fixed a particular date as the date for performance or whether it gave the option to one of the parties to fix the date for the performance. When once the option is exercised and a date is fixed it is as if the contract itself has fixed that date as the date for performance. A 1953 Mad 380 (387) (DB).

(16) Where, according to the Rent Controller's Order the arrears of rent have to be paid to the landlord on or before a particular date, a mere remittance of money-order within the time limit would not be a proper tender. The tenant must prove that the amount was actually taken to the landlord and offered to him for payment within the time limit. 1954 Ker LT 599 (601).

(17) Where the vendor agrees to execute a conveyance, without specifically agreeing also to have the conveyance registered, even in such a case the agreement would not be fully performed until the vendor has done all that he is required to do to have the document duly registered. This is because an agreement to execute a conveyance necessarily implies an agreement to execute a valid conveyance. A 1960 Mad 33 (36) (DB).

3. **Tender by cash.**— (1) The currency in any particular country must be determined by the law of that country and that law is naturally in terms limited to defining what is legal tender in that country. But when that is fixed by the local law, it determines what is the legal tender of that country for purposes of transactions in any other country, so that a foreign Court will, when such questions come before it, give effect to the proper law of legal tender so determined. **A 1938 PC 26 (32).**

(2) Agreement entered into in London — One party employed by the other in New Zealand on certain remuneration of £700 sterling. The word, "sterling" held, referred to English Currency and not to New Zealand one. **A 1938 PC 136 (138).**

(3) Where there is an obligation to pay a foreign unit of account, the form must be regulated by the municipal law of the country whose unit of account is in question and what would be a legal tender must depend upon the law in force at the time when the tender should have been made. **A 1939 PC 74 (77).**

(4) Mortgage in one country covenanting repayment of given number of notes of different country — Tender of equivalent of such notes in currency of former country according to market rate in such country held proper. **A 1943 PC 69 (71).**

(5) In the case of money claims, in order to stop the running of interest a tender before suit must be followed by payment into Court. A 1932 Mad 109 (111) (DB).

(6) The tender of a cheque for the amount due is not a valid tender, especially when the cheque tendered could not be accepted by reason of the defects therein. (1950) 28 Mys LJ 36 (61) (DB).

(7) Tender by cheque will be valid tender if the person to whom it is tendered is willing to receive payment by a cheque. A 1929 Mad 230 (232) (DB) ** A 1950 Bom 166 (170) (DB).

(8) A payment by cheque to the Rent Controller to the credit of the landlord is not payment in current coins of the realm, till the cheque is actually cashed into current coins and the cash is put into the landlord's account. A 1954 Cal 459 (459).

(9) Debtor sending hawala to creditor to be presented to debtor's debtor and get payment — Creditor not presenting it due to his own laches — Debtor's debtor becoming insolvent — Debt can be deemed satisfied. A 1936 Rang 164 (165) (DB).

(10) Payment by voucher — Creditor accepting voucher and presenting it at treasury — Voucher not cashed due to mistake of creditor in endorsing it — Tender held valid. A 1938 All 15 (16) (DB).

(11) Valid tender of a debt can only be in the currency of the country which is recognised as legal tender. An insured cover cannot be treated as legal tender. The creditor is not bound to accept the insured cover merely because it is insured for a sum larger than the debt due. A 1955 All 350 (351) (DB).

(12) Whether a tender is sufficient would depend upon the facts and circumstances of each case. If the party to whom the tender was to be made would have been prepared to accept the tender in that particular form that would be sufficient, even if it is not strictly a tender in accordance with law. Since any objection to the form of the tender is being capable of being waived, so long as the particular form of tender itself is not objected to, it is not open

Section 38 — Note 3 (contd.)
to the party later, to contend that the tender was bad for that reason (Objection not raised in written statement — Held it was not open to defendant to urge it in second appeal). ILR (1971) 1 Ker 494 (510).

(13) It would be purposeless to deposit the amount in court, when the defendant flatly refuses to have anything to do with the agreement for sale. A 1971 Mys 217 (223, 224).

(14) A creditor is not bound to accept a cheque, but if a cheque is tendered and received, the creditor or his agent objects only to the amount or makes no immediate objections at all, he cannot afterwards object to the nature of tender. (1979) 92 Mad LW 32 (35).

4. Tender in part.— (1) Creditor is not bound to reduce costs of proceedings by accepting tender of part payment and thereby bringing suit within pecuniary jurisdiction of less costly tribunal. A 1939 Cal 131 (134).

(2) Rule treating tender of part of debt as nullity applies only when tenderer admits that more is due than is tendered. (1892) 16 Bom 141 (150).

(3) Part payment is no valid tender — Its acceptance will not preclude a creditor from claiming the residue unless under a condition of tender, he accepted it in full discharge — If there are several distinct debts, the tenderer should make appropriation specific or it will not be good for any debt. A 1923 Cal 527 (530) (DB).

(4) Refusal of cheque on the ground that it was for less amount and not that it was not in cash is wrong — The tender is valid. A 1931 Bom 118 (120) (DB).

(5) Where tender made by the lessee is not for the full amount which was due and the name of the sender is not disclosed, the tender is invalid. A 1940 Nag 140 (141).

(6) Tender to be proper must be of whole amount due — This applies to mortgages also. A 1923 Oudh 241 (242) (DB).

(7) Tender of principal only where interest is expressly stipulated is not a proper tender. A 1916 Mad 1040 (1040).

(8) Mortgage deed providing for payment by yearly instalments and also delivery of possession — Mortgagee held could not refuse tender of the yearly instalment on the ground of the breach of the condition for delivery of possession. A 1923 PC 26 (28).

(9) Where only for one consideration, a party to contract undertakes to do number of things which constitute only one contract, contract cannot be enforced piecemeal. A 1943 Nag 266 (269).

(10) Plaintiff, employee of defendant, claiming arrears of his remuneration — Defendant stating that amount due was much less than claimed and sending cross-cheque for amount found due in full satisfaction of his claim — Plaintiff accepting cheque in part satisfaction and suing for balance — Held that if plaintiff was not willing to accept on terms proposed by defendant he should have returned cheque. 1948 Oudh WN 357 (358) (DB).

5. Tender must be unconditional.— (1) A tender to be effective must be unconditional and of the full amount due. A 1954 Mys 168 (169) (DB) °° 1968 MPLJ 451 (DB).

(2) Incomplete or conditional tender is not equivalent to payment. A 1922 PC 347 (349).

(3) Deposit in Court not good if made with condition — But if accepted by Court and upon objection by decree-holder, petitioner withdrew condition, it cannot be held as invalid. A 1923 Pat 418 (419, 420) (DB).

(4) If the offer is accompanied by a condition which prevents it from being perfect or complete in itself, it is not equivalent to payment, and the promisee is under no obligation to accept it. Where the plaintiff sends a single cheque for two items, only one of which was due at the time while the other was payable after some time the cheque being one and indivisible can be accepted as a whole or not at all, and hence the tender of one of the items by that cheque is not good and the promisee is therefore within his rights in rejecting it. A 1936 Lah 168 (175, 176) (DB).

(5) Conditional tender of rent demanding receipt that tenant paying rent was kaimi raiyat is not good tender. A 1919 Cal 332 (333).

(6) Debtor tendering portion of debt and asking creditor to take that in full satisfaction — This is tender with condition — Creditor is entitled to reject it. A 1924 Bom 264 (272) °° A 1954 Mys 168 (169) (DB).

(7) Sending of a cheque for a smaller amount than the amount claimed by creditor along with a letter to the effect that it was in full settlement does not amount to a discharge of the entire debt, nor does it amount to payment or tender of the amount on any condition that acceptance of that amount is in full and complete discharge of the entire debt. Further, the fact of keeping the cheque is not conclusive in law. A 1965 Cal 541 (545).

(8) Where tenant tendered reduced amount of rent and interest on arrears, on plea that not having been in possession of entire area he was entitled to abatement of rent, but no ground was made out for such abatement, tender is not good tender. (1914) 41 Cal 493 (513) (PC).

(9) Tender is not valid pro tanto if larger sum is in fact due and if tender is accompanied by demand for cancellation and delivery of mortgage deed. A 1915 Mad 402 (404).

(10) Tender of goods priced higher than at the contract price cannot be a performance of the contract. A 1922 Mad 28 (30) (DB).

(11) There cannot be tender or agreement to waive tender of unascertained sum. Offer to pay amount found due on settlement of accounts if payee undertook to execute indemnity bond, is not valid tender. (1911) 34 Mad 320 (322) (DB).

(12) A tender made "under protest" is not bad in law. Similarly the tender of more than what is due is also good. A 1936 Lah 168 (175) (DB).

[See however A 1953 Punj 70 (71) (DB).]

(13) However ready and willing to pay a party may have been, there will not be a tender in law unless there is, following the offer outside Court an unconditional deposit into the Court of money due. A 1957 Trav-Co 216 (217).

(14) Where a party insists that before performance of his part of contract the other party complies with the condition which does not form part of the terms of contract, there is no free and voluntary tender. A 1960 Andh Pra 178 (181) (DB).

(15) It is always a question of intention of parties whether a bill or note taken on account

Section 38 — Note 5 (contd.)
of a debt, operates as an absolute discharge of the debt or only as a conditional payment of it. Generally speaking, bill or note can never go in discharge of a debt, unless it is part of the contract that it shall be so; for, a mere promise to pay cannot be regarded as an effective payment. 1962 Ker LT 316.

6. "Able and willing."— (1) One of the requisites of a valid tender is that the party making the tender must always be ready and willing to fulfil the obligation whenever called upon, or, as it is otherwise expressed, a tender in order to be valid must be kept good in accordance with the requirements of the law. A 1928 Cal 874 (875) (DB).

(2) A person cannot be said to be able and willing to do what he has promised when he is not in position to do the same. 1968 MPLJ 451 (DB).

(3) Offer made by promisor through solicitor to pay debt with interest due thereon on date of offer does not of itself afford reasonable opportunity to promisee of ascertaining whether promisor is able and willing to perform his promise — Offer to representatives of creditors stands on same footing. A 1939 Cal 131 (133).

(4) Mere offer by postal letter to tender expenses of sale and registration by vendee is not legal tender. A 1915 Mad 546 (547) (DB).

(5) Offer to perform — Must fulfil all requirements regarding delivery. A 1918 Low Bur 97 (100).

(6) In order to be considered to be ready and willing to deliver, a seller need not be in physical possession of the goods. A 1925 Mad 971 (972) (DB).

(7) Vendor to notify on arrival of goods from Mills and vendee to take delivery at vendor's godowns — Vendor need not prove presence of goods at godowns. A 1925 Mad 1290 (1291) (DB).

(8) Contracts of purchase — Defendants offering to deliver goods to plaintiff though they themselves had not taken delivery from their own vendors — Plaintiff refusing though repeatedly asked — Tender held valid and plaintiff held committed breach. A 1925 Mad 888 (889).

(9) Mere expression by letter of willingness or readiness to deliver is not proper offer nor willingness to execute release deed without having document ready for delivery. A 1915 Mad 210 (216) (DB).

(10) If a party is in a position to perform his part of the contract and expresses his willingness to perform it, either personally or through his agent, or representative, that is sufficient evidence of readiness and willingness, though the offer of performance may not amount to tender. A 1954 Cal 179 (186).

(11) Before decreeing claim for specific performance of contract for sale, it must be established that buyer was ready and willing to carry out his part of contract. (1954) All WR (HC) 446 (448).

(12) Where an employee is ever ready and willing to perform his part of the contract, his services cannot be terminated before the expiry of the contract period unless the employee is at fault. A 1957 Madh Pra 144 (145) (DB).

7. Reasonable opportunity of inspection.— (1) Section 38 only requires reasonable opportunity to be given to buyer to examine goods sold. A 1918 Low Bur 144 (144) °° A 1927 Mad 62 (65) (DB).

(2) Natural place of inspection is place of delivery unless such place of inspection is postponed to another destination to vendor's knowledge and inspection at that place is unsuitable or unreasonable. A 1932 Cal 879 (883).

(3) Though joint survey would be, by itself, reasonable opportunity, yet it is not essential element to constitute reasonable opportunity. Also it cannot be taken that purchaser is entitled to continue inspecting and examining goods until expiration of period for delivery. Reasonable opportunity afforded for examination is reasonable limit alike for vendor and purchaser. (1881-82) 6 Bom 692 (698, 699).

(4) Vendor not bound to see that purchaser takes delivery in time when he has accepted tender of delivery and drawn samples. A 1916 Sind 35 (36) (DB).

(5) Tender of money locked up in box or of goods enclosed in case, which other party is not allowed to open is not sufficient tender and plea of tender as an answer to action is incomplete unless accompanied by tender in Court. A 1915 Mad 210 (216) (DB).

8. Tender to one of joint promisees.— (1) Co-heirs of a single promisee are not joint promisees within the meaning of Section 38. (1909) 1 Ind Cas 219 (219) (DB) (Mad).

(2) Assignees of mortgagee are not joint promisees within Section 38 — Receipt by co-assignee of his share of mortgage debt, is not on behalf of others — His liability to account for amount realised cannot be enforced. A 1939 Mad 818 (822) (DB).

(3) Mortgagees must be regarded, unless contrary is shown, as to be in position of tenants-in-common. Payment to one of two mortgagees is not discharge of mortgagor's liability to the other. A 1921 Pat 27 (28) (DB) °° A 1918 Low Bur 19 (21).

(4) Section 38 deals with the consequences which flow from an offer of performance which has been refused but does not deal with the legal consequences of the offer which has been accepted. The section is, therefore, not helpful in deciding the question whether payment to one of joint creditors is binding on the other creditors. A 1948 Nag 279 (282) (DB) °° ILR (1953) 3 Raj 318 (327) °° A 1945 All 311 (315, 316) (DB) °° A 1917 Lah 443 (445, 446) (FB). (Payment of mortgage money to one of several co-mortgagees, without consent of other mortgagees is not discharge that will bind all mortgagees. Section does not deal with case of offer accepted by one of several joint promisees but refers only to case of offer which has been rejected.)

[See also A 1928 Bom 420 (421) (DB). (Collusive and fraudulent payment of rent to one does not mean payment to whole body of landlords.) °° (1912) 35 Mad 685 (687) (DB). (Do.)]

[But see ('13) 36 Mad 544 (545) (FB) °° A 1957 Madh Pra 5 (6) °° A 1954 Mad 473 (475) (DB) °° A 1937 All 527 (527) °° (1909) 1 Ind Cas 219 (219) (DB) (Mad). (Payment to one of joint mortgagees discharges mortgagor.) °° 1893 Pun Re No. 60, p. 267 (271) (DB). (Adult co-owner of house is competent to demand rent payable jointly to himself and to minor co-owners, and grant valid discharge, so as to bind minors.)]

39. Effect of refusal of party to perform promise wholly.— When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

Illustrations

(a) A, a singer, enters into a contract with B, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and B

Section 38 — Note 8 (contd.)

(5) Obiter — Acceptance by one of joint promisees absolves debtor from liability to the other where postal money order is addressed to both. A 1923 All 465 (466).

(6) Section 38 will not at all be attracted in a case where a question arises as to whether the payment made in discharge of a liability to one of the joint promisees has the effect of discharging the promisor from the entire liability under the promise. A 1974 Bom 164 (168, 169).

9. Refusal or acceptance of offer.— (1) Mortgagee's reply to equity of redemption that no tender need be made as mortgagor's right has vested in him but also mentioning the amount due on the mortgage, is not a refusal of a tender, so as to stop running of interest. A 1923 PC 26 (28).

(2) Interest ceases to run when valid tender is improperly refused. A 1926 Cal 310 (311) (DB) ** A 1955 All 350 (351) (DB) ** A 1929 Mad 230 (232) (DB).

(3) Debtor ready to pay dues under contract — Creditor dead — No legal representative — Interest ceases to run till there is a proper representative capable of giving valid discharge. (1908) 4 Mad LT 335 (339).

(4) Where in execution proceedings a decree was tried to be executed on the ground of default in paying the instalment due, and it was found that the judgment-debtor had tendered the amount due which was refused by the decree-holder, it was held that the tender was valid and operated to invalidate immediate execution of decree. A 1947 Pat 208 (212) (DB).

(5) Where A makes an offer of performance to B, the promisee, but the offer is not accepted by B, A is not responsible for the non-performance within the meaning of Section 38, nor does he thereby lose his primary rights under the contract. A 1958 Andh Pra 504 (507) (DB).

(6) Building contract — Alterations in specifications for which no rates were fixed — Contractor informing about rates to be charged — Non-exercise of liberty by Government to cancel the order does not mean that there was a concluded contract between the parties on contractor's terms. A 1975 SC 763.

10. Waiver of tender.— (1) An objection to the form of a tender may be waived by the creditor either expressly or impliedly. If the creditor rejects the tender on other grounds he is deemed to have waived the objection as to the form of tender. A 1949 Mad 535 (538) (DB).

(2) Contract of repurchase — Production of cash only is strict compliance but vendee's conduct may amount to dispensation with literal compliance. A 1925 Oudh 533 (534) (DB).

SECTION 39 — SYNOPSIS

1. Scope and applicability.
2. "Disabled himself from performing".
3. "In its entirety".
4. "Promisee may put an end to the contract".
5. Waiver.
6. Promisor's insolvency — Effect.
7. Contract of service.
8. Compensation for breach.
9. Rescission — Plaintiff's default — Effect.
10. Restitution.

1. Scope and applicability.— (1) Section 39, Contract Act, applies to cases of what are called "executory" contracts and not to "executed" contracts. A 1944 Pat 3 (5) (DB) ** A 1957 Pat 408 (412). (Reversed on another point in A 1970 SC 1717.) ** A 1953 Mad 380 (386) (DB).

(2) Section 39 does not apply to transaction which is an actual conveyance of immovable property. (1877-78) 2 Bom 547 (548) (DB) ** A 1917 Pat 514 (515) (DB) ** (1912) 34 All 273 (277) (DB).

[See also A 1930 All 506 (508) (DB).]

(3) The word "anticipatory" nowhere occurs in the section. This section applies to all breaches which occur before the expiry of the last date on which the contract can be performed in the whole or in part though it also covers all earlier breaches. A 1927 Lah 693 (695, 696) (DB).

(4) Section 39 only enacts what was the law in England and the law in India before the Act was passed. The illustration (a) is not quite happy and is likely to lead to misapprehension. (1879) 4 Cal 252 (256) (DB).

(5) Remedy in Section 39 is not only remedy to party who has done his part of contract; he can also sue other party to recover debt, arising from part of contract done by him. (1910) 34 Bom 192 (198) (DB).

(6) A party to a contract is entitled to have it performed in its entirety; a breach of a part is a breach of the contract and, unless the parties waive the breach, the contract is at an end. A 1919 Mad 379 (382) (DB).

(7) Suit for specific performance of contract — Vendee paying part of consideration and taking possession of property — Suit by vendor maintainable. A 1977 SC 1517.

(8) Determination of rights under an agreement — It is to be as on the date of the application. A 1973 Cal 268.

2. "Disabled himself from performing".— (1) Where a party has by his own conduct made it impossible for himself to perform his contract in its entirety within the stipulated time, the other party is legally entitled to put an end to the contract without incurring any liability for damages. (1931) 32 Pun LR 593 (597) (DB).

(2) East Africa Order, 1897, Part IV, Article 11 (b) — Party bound to convey timber by wagons, selling off wagons and oxen and disabling himself from performing his promise in its entirety — Promisee may put an end to the contract. A 1919 PC 190 (192).

engages to pay her 100 rupees for each night's performance. On the sixth night A wilfully absents herself from the theatre. B is at liberty to put an end to the contract.

(b) A, a singer, enters into a contract with B, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and B engages to pay her at the rate of 100 rupees for each night. On the sixth night A wilfully absents herself. With the assent of B, A sings on the seventh night. B has signified his acquiescence in the continuance of the contract, and cannot now put an end to it, but is entitled to compensation for the damage sustained by him through A's failure to sing on the sixth night.

[Malaysian Contract Act 1950, S. 40.]

Section 39 — Note 2 (contd.)

(3) Where a widow enters into a compromise with the sole person entitled to the estate, whereby she obtains a life estate in the property on condition that she would not exercise the right of adoption conferred by her husband, she cannot take any advantage under the compromise if subsequently she adopts in pursuance of the authority of her husband. A 1927 Oudh 265 (275) (DB).

(4) Contract of affreightment — Demand by shipper for space as per terms of contract — Fact that shipper had no goods to ship and was attempting to obtain advantage due to rise in freight does not entitle the shipowner to repudiate the contract — On the date of demand it cannot be said that shipper had disabled himself from performing his part of the contract under Section 39. A 1941 Sind 146 (150).

(5) Party not to cut trees more than he had paid for — Cutting in breach — Promisee entitled to rescind. A 1922 Oudh 259 (263) (DB).

(6) The defendant agreed to sell to plaintiff property, for a certain sum which he had received from plaintiff, after buying the property at an auction sale. The defendant bought it, but by collusion with a third person put it out of his power to perform his part of the contract. The plaintiff sued for the refund of his money — Held, that a suit lay for cancellation of the contract under Section 39, and was triable by Small Cause Court for the refund of the amount. A 1929 All 62 (62).

(7) Agreement between landlord and tenant — Tenant to use specified area for grove — Tenant breaking condition by using small portion for other purposes — Zamindar is entitled to eject the tenant if he had not acquiesced in the breach. A 1928 All 117 (118).

(8) When the vendor is not in a position to give possession of the property agreed to be sold by him to the purchaser, the purchaser will be entitled by virtue of S. 55 (1), T. P. Act and under Section 39 to rescind the contract and claim the advance that has been paid. A 1951 Mad 470 (471).

(9) In absence of service rules, employer is entitled to put an end to the contract of employment for long continued absence without leave as in that case, employee would be deemed to have refused to perform his part of the contract or disabled himself from performing his part. A 1962 Pat 452 (456) (DB).

3. "In its entirety".— (1) Right of rescission arises only when other party fails to perform contract in its entirety. (1912) 6 Sind LR 103 (106) (DB).

(2) Where the question is whether the one party is set free by the action of the other, the real matter for consideration is whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether refuse performance of the contract. (1906) 33 Cal 477 (482) (SB) •• A 1966 Mys 154 (156) (DB).

(3) Repudiation must be total, absolute and clear. A 1924 Bom 247 (251) •• A 1931 Rang 126 (126).

(4) Where there was contract to deliver goods in two instalments and plaintiff failed to tender for, or take delivery of, first instalment although market was in his favour, but, as regards second instalment, made tender which defendants refused to recognise because of such failure, held, under circumstances, conduct of plaintiff had not amounted to renunciation, to absolute refusal to perform contract, such as would amount to rescission and therefore defendant could not accept it as reason for not performing his part. (1906) 33 Cal 477 (482, 484) (SB).

(5) Where a party to a contract complains about delay in carrying out the contract and protests against the other party's right to put an end to it, it cannot amount to a refusal to perform. A 1924 Cal 427 (431) (DB).

(6) Mortgagee failing to pay part of the consideration — Section 39 does not apply. A 1930 All 506 (508) (DB) •• A 1927 Oudh 527 (527) (DB) •• (1906) 10 Cal WN 932 (933) (DB).

[But see 1906 Pun Re No. 103, p. 363 (366) (DB). (Mortgage — Part of consideration left with mortgagee who undertook to pay off prior encumbrance with it — Default by mortgagee — Mortgage contract never came into existence owing to non-payment of consideration as agreed — Even if there was a completed contract it came to an end owing to mortgagee's default to carry out its terms — This was a case of rescission under Section 39 — Mortgagee cannot claim repayment.)]

(7) Property mortgaged for 15 years in consideration of mortgagee paying mortgagor's decree-holder — Mortgagee making default, mortgagor pays off decree-holder — Mortgagor entitled to redeem before expiry of 15 years as mortgagee breaks condition. A 1927 Oudh 12 (14) (DB).

(8) Contract for supply of goods contained condition regarding cash payment on delivery of railway receipts but credit had for long been allowed to purchaser — Rescission of contract on ground of purchaser's refusal to pay cash on one occasion cannot be sustained under Section 39. A 1914 Lah 298 (301) (DB).

Section 39 — Note 3 (contd.)

(9) Defendant in Madras agreed to take goods to be supplied by plaintiffs by monthly shipments from England. There was also proviso in agreement by which plaintiffs were excused from monthly shipments if space in ships sailing for Madras was not available. Second shipment was not made within one month from first, though ship was available few days earlier for such shipment. (1895) 18 Mad 63 (70, 72) (DB).

(10) The defendants who contracted to purchase 25 bales of yarn from the plaintiff and take delivery of the bales one day after notice of arrival, took delivery of three bales and did not take delivery of seven bales, though notice was given about their arrival as well: The plaintiffs treated this as a repudiation of the entire contract and did not give notice of arrival as regards the remaining 15 bales. In a suit by plaintiffs for damages for breach of contract in respect of 22 bales, held, the plaintiffs were not entitled to treat the conduct of the defendant as a repudiation of the entire contract and were bound to give the notice. A 1925 Mad 1290 (1291) (DB).

(11) Talking of refusing to perform but asking for further information and speaking of sending definite reply when it arrives is no repudiation. A 1922 Mad 28 (29) (DB).

(12) Unreasonable postponement will entitle vendor to terminate contract for sale of land. A 1921 Mad 141 (142) (DB).

(13) Where, in contract, under which defendants agreed to deliver certain goods to plaintiffs, to be paid for, on delivery, defendants made part delivery for which, however, plaintiffs declined to pay until certain cross claims of theirs had been adjusted, and defendants, thereupon, refused to deliver remainder and cancelled contract, it was held that there was not such refusal on part of plaintiffs to perform their part of contract as to entitle defendants to rescind under Section 39. (1879) 4 Cal 252 (256) (DB).

(14) Contract for sale — Vendor unable to make out good title — Vendee can repudiate contract under Section 39 or treat the case as one of want of mutuality. A 1927 Bom 195 (202, 203) (DB).

(15) Sale of house — Possession not delivered forthwith — Vendee can rescind contract. 1932 Mad WN 122 (125) (DB).

(16) Agreement by B to supply goods to A — Ready delivery within one week — Delivery of all the goods within one week not asked for by A — A held had impliedly refused to perform the contract in its entirety and Sec. 39 applied. (1911) 10 Ind Cas 18 (20) (Oudh).

(17) Promise of indemnity is an implied term of the contract of agency, hence the refusal of the principal to indemnify the agent for any act done by him in the course of agency, justifies him to rescind the contract of agency under Section 39. A 1915 Sind 30 (32) (DB).

(18) Parties to a contract agreeing to substitute old contract by a new one, by payment cash down of Rs. 500 and by execution and registration of a mortgage bond for balance — Cash not paid — Assuming that registration receipt was offered to promisee and he refused to accept it, held that promisor refused to perform his part of the contract in its entirety as cash payment was part of agreement of passing liability for balance on mortgage bond — Section 39 applied and parties were relegated to their own position under the old contract — There was no novation under Section 62. A 1940 Pat 121 (124) (DB).

(19) Promisee is not bound to accept part performance. (1921) 3 Lah LJ 141 (144) (DB).

(20) The party repudiating the contract is entitled before the date fixed for completion of the contract to withdraw his repudiation, unless and until the other party has accepted the repudiation and elected to treat the contract as terminated, and to insist upon the contract being performed in its entirety. A 1925 Lah 217 (220) (DB) •• A 1927 Lah 693 (695, 696) (DB) •• A 1963 Pat 254 (260).

(21) Under a contract for sale, yarn to be delivered on steamer at Madras in July, August and September, in three shipments — No yarn shipped in July and August, but ten bales shipped together in September — Defendant not complaining of even delays in deliveries but just before tender of the goods gave notice to plaintiffs of his intention to put an end to entire contract — Defendant was not entitled to rescind entire contract but plaintiffs should be awarded damages in respect of the bales allocated for the September shipment. A 1921 Mad 675 (676) (DB).

(22) Tripartite agreement under which C agreed to take over A's liabilities to B, on several accounts — Agreement to be given effect by entering into four different transactions — All transactions separate — Repudiation by B of three transactions does not affect validity of one which is duly completed. **A 1950 FC 21 (38). (A 1947 Bom 217, Reversed.)**

(23) An agreement can be repudiated either by words expressive of an intention not to perform the contract or the conduct from which the said intention can be gathered. Mere failure to perform a contract without more cannot be said to be a repudiation of it. A 1953 Mad 300 (306).

(24) Where by the collapse of the chitty, the stakeholder disables himself from performing his promise in its entirety the subscriber to the chitty who has made a successful bid at an auction is entitled to go back to his right to claim the paid up subscriptions. ILR (1951) Trav-Co 685 (688, 689) (DB).

(25) Where there has been a renunciation or disclaimer of a contract, the renunciation or disclaimer takes place when and where it is communicated to the other party to the contract. A 1956 Nag 118 (120) •• A 1949 Pat 270 (276) (DB).

(26) Contract for sale of property — No vacant possession of property in possession of tenants possible — Vendee can rescind contract. A 1960 Punj 51 (53). (Auction purchaser informed of occupation of portion of property by tenants, in the course of bidding, cannot rescind the sale on ground that no vacant possession is given.) •• A 1964 Raj 240 (240, 241).

(27) Insistence of buyer on performance of condition not forming part of contract — It amounts to refusal to perform promise — Seller can put an end to the contract. A 1960 Andh Pra 178 (181) (DB).

(28) Where the contract was for the supply of 19 bales of yarn in the manner indicated in the contract but what was delivered was only 14 bales and even then the said 14 bales were not sent in the manner indicated in the con-

Section 39 — Note 3 (contd.)
tract, it was held that the seller had not performed the contract. A 1958 Mys 10 (13) (DB) ** A 1968 Ker 310 (312, 313) (DB).

(29) Contract of employment — Change in essential terms of contract by employer — Held, change amounted to refusal by employer to perform previous contract in its entirety and employee could put an end to it and sue for breach. 1968 MPLJ 846.

(30) If a contract is validly cancelled by the lessor, the motive behind the action even if bad would not convert it into an illegal act and furnish a cause of action to the lessee under the contract to sue for damages or compensation for breach of contract. Motive is absolutely irrelevant. A 1959 Andh Pra 551 (554) (DB).

(31) It is open to canvass the grounds urged in justification of a cancellation of a contract in a Court of law. It is quite competent for a Court to review bona fides, go into the motive underlying such an action and if the Court is satisfied that they are inadequate or insufficient it will set them aside. A 1959 Andh Pra 551 (559) (DB).

(32) Bailee mixing his own goods — Offer to return goods without sorting out such goods — Bailor is entitled to refuse delivery in toto and claim compensation for conversion. (1961) 27 Cut LT 340.

(33) Where promisee not only fails in repaying due instalments but also acquiesced in the contract by asking for further money which the promissor in his discretion under the contract refused to pay, it cannot be said that the promissor failed to perform the promise. "in its entirety". Hence promisee was not entitled to terminate the contract. A 1973 Cal 268 (275).

(34) The words in its entirety which occur in Section 39 do not find place in Section 60, Sale of Goods Act. The words "repudiates the contract" in Section 60 show that the repudiation must be in its entirety. It is only in that event that the right to put an end to the contract as provided in Section 39 can arise. (1965) 4 Law Rep 663 (688) (Mys). (Partly Reversed on another point in A 1976 SC 626 : 1976 Tax LR 1458.)

4. "Promisee may put an end to the contract".— (1) Repudiation by promisor before time of performance — Promisee may at once accept repudiation and bring his action as on a breach of it, or he may treat notice of intention as inoperative and await the time for performance and then hold the other party responsible for all the consequences of non-performance — Contract is not necessarily broken by the mere notice of intention to break the contract. A 1926 Mad 778 (781) (DB) ** ILR (1955) Mad 528 (546) (DB) ** ILR (1948) 2 Cal 11 (47) ** A 1925 Lah 217 (220) (DB) ** (1912) 6 Sind LR 187 (189) (DB) ** 1963 All WR (HC) 580 ** A 1959 Madh Pra 30 (DB) ** (1970) Raj LW 597.

(2) Seller not accepting buyer's repudiation of contract, is not entitled to damages unless he has offered the delivery of goods in time. A 1975 Andh Pra 169 (175 to 177).

(3) Where the promisee treats the notice of intention of promisor not to perform the contract as inoperative, the promisee keeps the contract alive for the benefit of the other party as well as his own, he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it. A 1926 Mad 778 (781) (DB) ** A 1922 Bom 303 (312) (DB) ** (1911) 1 Mad WN 265 (266) (DB).

(4) Where in a contract for delivery of goods by instalments there was default in respect of delivery of certain instalments and the buyer did not rescind the contract the contract remained subsisting both for the benefit of the buyer and also for the benefit of seller. (1965) 4 LR 663 (Mys) ** 1963 All WR (HC) 580.

(5) Repudiation before time of performance — Acceptance determines the contract — Party repudiating cannot turn round and insist on performance or sue for damages for non-performance. A 1925 Lah 217 (220) (DB).

(6) Per A. P. Sen, J. — An employee submitting his resignation from service — Resignation, unless accepted by the employer, does not operate as discharging the contract by bringing it lawfully to an end. 1969 MPLJ 879.

(7) Where one party to contract has not merely offered to cancel the contract but has definitely expressed an unalterable resolve to refuse to perform it, the other party to the contract may accept the termination several months after the offer after making vain efforts to induce the buyer to change his mind. This is to be distinguished from the case where one party to a contract makes a definite offer to put an end to the contract and that offer has been definitely rejected by the other party, in which case it will not be open to the latter party to cancel the contract several months afterwards by merely accepting the offer to terminate the contract. A 1925 Lah 217 (220) (DB).

(8) On renunciation of a contract by one party, the other party will be justified in regarding himself as discharged from all liability. A 1916 Cal 136 (147) (DB).

(9) A, party to contract informing his intention not to perform contract to B, the other party to contract — Contract terminates when B exercises his option of treating the contract as cancelled, and so, breach takes place when A receives letter of cancellation. A 1934 All 740 (764) (DB). (Reversed on a different point in A 1938 PC 165.)

(10) Contract for sale — Defect in vendor's title — Vendee cannot be compelled to rescind contract or accept the title without investigation. A 1920 Mad 859 (861) (DB).

(11) Contract for lease of toll — Default by contractor in payment of kist — Re-sale of toll — Sale postponed for want of bidders — Subsequent sale and suit for loss incurred — Held, that notice of re-sale put an end to contract — Section 39 applied and not Ss. 107 and 63 — Limitation for suit for loss ran from date of re-sale and not date of sale. A 1933 Mad 704 (706).

Section 39 — Note 4 (contd.)

(12) Per Scott, C. J. — The fact that party to contract under Section 39, when other side has refused to perform it, may put an end to it and sue for compensation for breach, does not oblige him to take that course at his peril; he may, if he prefers it, sue to recover any debt due to him which has arisen from his execution of his part of contract. (1910) 34 Bom 192 (198) (DB).

(13) Repudiation of the contract by one of several joint promisors entitles the promisee to rescind the contract as against others. (1909) 19 Mad LJ 28 (31) (DB).

(14) The renunciation of a contract by one of the parties before the time of performance does not of itself put an end to the contract; there must be two parties to a rescission. A 1952 Bilaspur 6 (8) °° A 1965 Ker 187 °° A 1963 Andh Pra 370 (373) °° A 1963 Pat 254 (260) (DB).

(15) Failure to fulfil an obligation under Clause (1) of Section 55, Transfer of Property Act amounts to a refusal to perform the contract for sale within the meaning of Section 39 and will entitle the other party to repudiate or to put an end to the contract. A 1957 Madh B 23 (26).

(16) Where a seller agrees to sell a certain property at price agreed to by the buyer and the buyer is put in possession of the property and the buyer fails to execute a sale deed, a notice given by the seller to the effect that if the buyer fails to pay the price within eight days the seller will put an end to the contract entitles the seller to rescind the contract and resell the property. ILR (1952) Madh B 410 (415, 416) °° A 1960 Andh Pra 178 (182, 184) (DB).

(17) Breach of the substituted agreement does not revive what has been discharged. Further complaint must be founded on the substituted agreement and not on the original contract. If the substituted agreement is put an end to under Section 39 of the Act on account of such breaches, the original contract is not thereby revived. A 1953 Cal 642 (645).

(18) New agreement substituting old one — Agreement not relating merely to mode of payment — First part of agreement acted upon by promisors — Second part not fulfilled — Promisee cannot repudiate whole agreement. A 1969 Raj 278 (279).

(19) The Film distributors agreed to release a picture for exhibition to one theatre on a particular date. But later on the distributors wanted to postpone the exhibition of that picture at the said theatre. They informed the theatre by a letter that it was not possible to exhibit the picture at the theatre on the date agreed. It was held that the letter amounted to repudiation of the contract and the other party had a right to cancel the contract. A 1953 Trav-Co 90 (97, 98) (DB).

(20) Where a contract is repudiated, it survives for the purpose of measuring the claims arising out of the breach and the arbitration clause contained in it survives for determining the mode of settlement of the claims. The repudiating party is not prevented from invoking the arbitration clause in the contract for the purpose of settling all questions to which his repudiation has given rise. It is not correct to say that the arbitration clause will not be given effect to when the contract is ended by something dehors the agreement A 1947 Sind 57 (58).

(21) In a C. I. F. Contract the buyer must accept the documents which represent the goods. Refusal to accept documents amounts to a breach of the contract. The seller, on refusal can treat the contract as at an end and sue for damages. A 1954 Mad 268 (270) (DB).

(22) Where no part of the contract remains unfulfilled, it cannot be suggested that the contract is continued in terms of Section 39. 1953 AMLJ 136 (137).

(23) Judgment-debtor executing decree obtained by him against decree-holder — Claim under decree wiped off by adjustment — No right accrues to decree-holder to enforce his decree on account of action of the decree-holder. A 1966 All 556 (558).

5. Waiver.— (1) Promisor refusing to perform his part of the contract in its entirety — Promisee not rescinding contract but acquiescing in its performance — Promisee not entitled to demand price under the contract before the date due under the contract. A 1925 PC 188 (193).

(2) Contract to construct building on land within 2 years — Resumption of land if there was breach of the condition — Breach of contract — Acquiescence in breach for 12 years — Presumption that the right of resumption was waived. A 1969 Mys 310 (311).

(3) Legatee agreeing to pay guzara to testator from date of execution of will — Will executed — Legatee making default in payment of guzara — Will not revoked by testator — Legal representatives of testator cannot revoke will and rescind contract. A 1946 Oudh 193 (209, 210) (DB).

(4) Mortgage suit — Preliminary decree — Subsequent agreement — Plaintiff agreeing to take property at valuation less than amount fixed by preliminary decree — Judgment-debtor agreeing to pay additional sum — Security for latter offered — Default — Plaintiff asking for personal decree for amount due on preliminary decree and also praying execution against surety — Plaintiff is not estopped by acquiescence from proceeding with preliminary decree from the mere fact that the plaintiff mistakenly pursued both the remedies at the same time. A 1938 Rang 353 (355) (DB).

(5) Contract for sale of property — Portion of purchase money left with vendee — Vendor being unable to give possession of property sold, vendee obtaining possession of other equivalent property but making default in payment to creditor — Held, that vendee having waived his right to put an end to the contract, was bound to return the balance of the purchase money as agreed. A 1934 All 617 (618).

(6) Contract of agency continuing — Principal is liable to pay agents' commission according to agreement till their dismissal in spite of all shortcomings in discharge of their duties as there was acquiescence, in the continuance of managing agency. A 1929 All 87 (94) (DB).

(7) Contract to sell timber — Vendor insisting on payment of full price before vendee can be allowed to remove timber — Vendor selling part of contract timber to third party — Vendee keeping contract alive has no cause of action to sue for damages if he claims credit for value of timber sold. A 1930 Lah 979 (982) (DB).

Section 39 — Note 5 (contd.)

(8) Contract of insurance — Payment of premium condition precedent to policy taking effect — Though premia not paid policy issued — On demands being made for payment of premia assured agreeing to pay same and further renewing policies — Condition held had been waived and there was concluded contract of insurance between parties. A 1954 Mad 520 (521) (DB).

(9) Waiver of past breaches — Lessor is not precluded from enforcing forfeiture in terms of contract in case of subsequent breach of the same condition or other condition. (1959) 25 Cut LT 376.

(10) Charterers hiring ship under charter-party — In default of payment of monthly hire shipowner entitled to withdraw ship after seven days notice — Payment of hire after making unlawful deductions held amounted to default — Failure to withdraw ship immediately on expiry of seven days notice as ship was engaged in unloading and appropriation of payment under protest towards other dues held did not amount to waiver of right of withdrawal. ILR (1974) 2 Delhi 650.

(11) Charterers hiring ship under charter-party — In default of payment of monthly hire in advance shipowner entitled to withdraw ship after seven days notice — Notice served — Amount not paid within that period — Demand for payment is not necessary before withdrawal. ILR (1974) 2 Delhi 650.

(12) Contract to supply charpoys to Army authorities within stipulated period — Conduct of authorities in accepting delayed short supplies signifies their acquiescence in continuance of contract. A 1978 J & K 102 (DB).

6. Promisor's insolvency — Effect.— (1) A bare notice of insolvency does not necessarily and in all cases amount to a declaration of intention not to fulfil obligation under the contract. It is a question of fact in each case. A 1914 Sind 53 (55) (DB).

(2) The plaintiff under a contract was to take delivery of the goods on a certain date; he filed an application for insolvency before that date. The interim receiver who was appointed in the insolvency proceedings also did not act immediately or even within a reasonable time to adopt the contract of the plaintiff. It was held that the insolvency was equivalent to a notice by the insolvent that he did not intend to perform his obligation. A 1953 Nag 345 (349) (DB).

(3) Contract by insolvent after initiation of insolvency proceeding but before adjudication is not per se void. A 1964 Andh Pra 299 (301 to 304) (DB).

7. Contract of service.— (1) Ss. 39 and 64 and justice, equity and good conscience require that servant who quits his master's service in India before expiry of contract period, should be ordinarily paid for full period he worked under master deducting the damages caused by breach. (1912) 23 Mad LJ 680 (682).

(2) Where, the resolution of a Municipal Committee under which an employee agreed to serve, did not contain any stipulation in regard to the period of employment, nor were there any terms laid down on which the employee should be reverted if necessary Held, that there were no contractual or statutory provisions which governed the rights of parties. That being so, the Municipal Committee enjoyed an absolute power to put an end to the personal relations created by the employment at any time without giving the employee any reason for doing so or any opportunity for showing cause against the proposed action. A 1956 Punj 220 (222).

(3) An employee submitting his resignation from service — Resignation, unless accepted by the employer, does not operate as discharging the contract by bringing it lawfully to an end. 1969 MPLJ 879.

8. Compensation for breach.— (1) If the buyer gives notice that he will not take delivery or disables himself entirely from performing his part of the contract the seller is entitled to rescind the contract and may at once sue for damages. The eventual non-performance may be treated as a cause of action and damages may be assessed and recovered in respect of it, though the time for performance may yet be romote. (1912) 6 Sind LR 187 (189) (DB) ** A 1968 SC 1361 (1364) ** A 1965 Ker 187 (188, 189) ** A 1963 Cal 70 (72) (DB). (Reversed on another point in A 1967 SC 378.)

(2) If a promisor performs his promise after the time fixed for performance and the promisee accepts the performance, the promisor is not liable to damages unless at the time of accepting performance the promisee gives notice of his intention to claim compensation. (1912) 14 Ind Cas 129 (130) (All).

(3) Contract to pay debts of another — Breach — Starting point of limitation for suit for damages for breach — Time does not begin to run against the promisee from the date of repudiation of agreement by the promisor — Fact that promisee himself paid the debts in itself gives him no cause of action — If the promisee paid them before the expiry of a reasonable time after the agreement, the defendant may plead want of reasonable time to perform and that consequently there was no breach — If the plaintiff (promisee) waited till the expiry of a reasonable time, defendant's breach of contract would give him cause of action, whether he himself paid the debts or not. (1912) 22 Mad LJ 207 (210, 211) (DB).

(4) Contract of sale not by sample — Refusal of buyer to accept goods unless they accorded with sample — Performance held dispensed by buyer — Seller treating contract cancelled — Buyer held responsible for breach and not entitled to compensation. A 1950 Orissa 42 (46) (DB).

(5) Copyright Act (1957), Section 55 — Agreement between author and publisher — Breach in respect of payment of royalties and rendition of accounts — Discharge by breach can be implied — Remedy is by way of a suit for damages. A 1970 Madh Pra 261 (276 to 279).

(6) Where the terms of a contract clearly showed that the contract would continue to remain in force till the completion of the work or till its abandonment and the contractor failed to complete it in time, he would be liable to compensate delay for every day; the right to rescind would accrue to him only when compensation due exceeded his security deposit. 1979 UJ (SC) 247 (256).

(7) See also under Section 73.

9. Rescission — Plaintiff's default — Effect.— (1) Contract for sale of immovable property —

By whom contracts must be performed

40. Person by whom promise is to be performed.— If it appears from the nature of the case that it was the intention of the parties to any con-

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Section 39 — Note 9 (contd.)
Defect in title — Vendor cannot sue for rescission of contract. A 1920 Mad 859 (861).

(2) Party committing breach cannot require other party to perform his part of the contract. A 1934 Lah 474 (475).

(3) Where the parties agree between themselves as to who could rescind the contract the rescission could be made by that designated instrumentality. This is the position especially where the contract is either with the State or the Union Government. (1965) 4 Law Rep 663 (Mys).

(4) Works contract — Time mentioned as of essence of contract — But contract enforceable till completion of work or its abandonment — Rescission of contract and consequent forfeiture of security deposit held proper within terms of contract. A 1979 SC 1339. (Appeal No. 534 of 1960, D/- 11-7-1968 (Bom), Reversed.)

(5) Auction of liquor shop — Highest bidder at auction withdrawing the bid — Re-sale of shop occasioning loss — Such short fall occasioned owing to the default in paying advance instalment is not obviously an excise revenue — Therefore even assuming that there was a concluded contract between the parties, damages accruing from the breach thereof could not be recovered as arrears of land revenue — Damages could be recovered through a civil suit only. 1979 Tax LR 2451 (2453) (All).

10. Restitution.— (1) The party putting an end to the contract under Section 39, is liable under Section 64 to restore to the other party any benefit received by him under the contract. A 1943 PC 34 (39). (Case of contract coming under Section 39 comes under the phrase 'voidable contract') •• A 1957 Madh B 53 (55) (DB) •• ILR (1955) Mad 528 (546) (DB).

(2) It cannot be said that the earnest money is a benefit under the contract for sale within the meaning of Section 64. The seller is not, therefore, liable to refund the earnest money to the buyer on his rescinding the contract on account of the failure of the buyer to pay the purchase money. A 1955 Orissa 20 (23) (DB) •• (1963) 2 Mad LJ 153. (Defaulting buyer is entitled to the part payment.)

(3) Neither Section 39 nor Section 64 is applicable to a case where under the original contract one party has advanced some money to the other and the contract is subsequently varied by consent of parties. But that is no reason why the party advancing the money should not get back the money on breach of contract by the other party in the absence of any contract to the contrary. A 1950 Cal 236 (238) (DB).

(4) Where in an executory contract the plaintiff has performed his part of the contract and the defendant repudiates the contract itself, the plaintiff is entitled to treat the contract as void within the meaning of Section 65. It becomes void when the plaintiff exercises his right to rescind it under Section 39. The defendant's liability then is to restore to the plaintiff any advantage the defendant has received under that contract or to make compensation for that is independent of the statutory right accrued to the plaintiff under Section 75. The rights are not necessarily alternative, they can be cumulative. ILR (1955) Mad 528 (547) (DB).

(5) Discharge of temporary servant without due notice — Servant is only entitled to pay for notice period — Discharge is not rendered invalid. A 1959 Pat 192 (194).

(6) Contract to institute a suit to prevent waste of properties due to a reversioner — Premature termination of suit does not disentitle the party who has filed the suit from claiming benefits under the contract. ILR (1960) 2 Cal 538 (DB).

(7) Contract of service by P with X company — X was being managed by Y company under managing agency agreement — Termination of service of P by Z, who was director of X company and managing director of Y company — Held, Z could not be made liable either in tort for procuring breach of contract with managed company, his position in relation to managed company being that of an agent or for breach of contract, by terminating service of P. 1968 MPLJ 846.

(8) Once the contract is repudiated it ceases to have any legal effect from the date of repudiation but there is no reason why a party to it cannot bring a suit for a period prior to the termination of contract. (1959) 25 Cut LT 376.

(9) Agreement for sale of land reciting that Rs. 2,000 was paid as advance — Vendor cancelling agreement alleging that vendee had in fact paid only Rs. 350 and balance amount was not paid within 3 days as orally agreed — Suit for specific performance by vendee — In view of recitals in deed it is not necessary for plaintiff vendee to lead evidence as to source from which he obtained money — Held, on evidence that allegation of vendor was untrue and had been set up as an excuse for resiling from agreement. A 1970 SC 1942 (1944).

(10) For a fuller discussion, see under Sections 64 and 65.

Section 40

(1) When one of the persons liable under a mortgage has acquired the interest of others, the liability for the repayment of the mortgage debt cannot be said to be transferred by contract to one who is not already liable. Hence a suit for accounts on a usufructuary mortgage at his instance is maintainable. A 1948 All 55 (56).

(2) A contract in the absence of contrary intention express or implied, will be enforceable against parties and their legal heirs and representatives including assignees and transferees. A 1967 SC 744 (746).

(3) In contracts of personal service the question of performance of the contract is one of ascertaining the true intention of the parties. A 1954 Orissa 241 (243) (DB).

(4) It is an implied condition of an agreement for personal service that the death of either party will dissolve it. A 1954 Orissa 241 (242) (DB) •• A 1957 Andh Pra 643 (649) (DB).

(5) A contract to sell goods can be assigned by the seller so as to enable assignee to sue for damages for breach of contract on tender of performance by him. A 1947 Mad 258 (258) •• A 1954 Mad 87 (87).

tract that any promise contained in it should be performed by the promisor himself, such promise must be performed by the promisor. In other cases, the promisor or his representatives may employ a competent person to perform it.

Illustrations

(a) A promises to pay B a sum of money. A may perform this promise, either by personally paying the money to B or by causing it to be paid to B by another; and if A dies before the time appointed for payment, his representatives must perform the promise, or employ some proper person to do so.

(b) A promises to paint a picture for B. A must perform this promise personally.

[Malaysian Contract Act 1950, S. 41.]

41. Effect of accepting performance from third person.— When a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor.

[Malaysian Contract Act 1950, S. 42.]

Section 40 (contd.)

(6) Assignment of a contract to sell goods is not transfer of mere right to sue for damages but a transfer of the rights under a contract which is still to be performed on both sides. A 1947 Mad 258 (259).

(7) Buyer's rights under a contract to get goods on payment of price is capable of being assigned. A 1954 Mad 87 (87).

(8) Benefits of a contract are assignable subject to a contrary intention which may be express or arising by necessary implication. A 1955 Cal 621 (622).

(9) Where in a contract of resale of land there is no contrary intention against the assignability of its benefits the mere absence of the phrase "heirs, assignees, administrators" is not sufficient to raise any such implication. The benefits of such contract are therefore assignable. A 1955 Cal 621 (622). (A 1918 Bom 158 and 35 Bom 258, **held no longer good law.**)

(10) In order that an assignee of seller, to a contract to sell goods, can sue for damages on breach of the contract by the buyer, the contract must have been contemplated by the parties as capable of being performed on both sides by their assigns or representatives. A 1947 Mad 258 (258).

(11) Specific performance regarding contract for purchase of immovable property can be claimed against legal representative. A 1929 Rang 274 (274) (DB).

(12) On death of banker liability of his sons to pay sums to customers is not changed. A 1940 Pat 129 (131) (DB).

(13) Under Section 40, except in very special circumstances, a person agreeing to purchase a property is not bound to purchase it himself and he may arrange for the purchase of the property by some other person as his nominee in the terms of the agreement entered into by him. A 1967 All 253 (257).

(14) Where the lessors were not parties to the agreement between the lessees and the State the lessors cannot be held liable for the business of the lessees. Hence decree against lessors for liability of lessees is liable to be quashed. Decision of the Patna High Court, **Reversed. A 1974 SC 1988 (1991).**

Section 41

(1) The section applies only where a contract has been in fact performed by some person other than the person bound thereby. A 1916 PC 68 (70) °° A 1942 Cal 87 (90) (DB).

(2) Part performance being not enough it should be performed in full. A 1966 Mys 84 (85).

(3) What is required by Section 41 is actual performance and not a substituted promise. According to the section, performance by a stranger, accepted by the promisee produces the result of discharging the promisor, although the latter has neither authorized nor ratified the act of the third party. A 1928 Mad 972 (974).

(4) Loss of goods insured — Insured accepting receipt of his total loss from insurer — Insured cannot enforce his claim for loss against those responsible for loss. A 1974 Cal 141 (144).

(5) Where in a suit on subsequent mortgage which was executed in lieu of prior mortgage, the subsequent mortgage is found invalid, the right of suit on the prior mortgage becomes revived and Section 41 has no application to the case since it applies only where a contract has been in fact performed by some person other than the person bound thereby. A 1916 PC 68 (70).

(6) A instituted suit against B and C. The plaint averred that the amount in suit was due to A by B and that C was liable for the reason that he had undertaken to make the payment. It was alleged that C had intimated this fact to A whereupon the debit and credit entries had been made in accounts but subsequently C informed in writing that inasmuch as B had failed to pay him he withdrew his undertaking to pay to A. Subsequently A withdrew his case against C and proceeded only against B. The lower appellate Court applied Section 41 and dismissed the suit. On appeal held that there was no novation within meaning of Section 62 and that Section 41 did not apply to the case. A 1933 Lah 335 (335, 336).

(7) Just like Section 63, Section 41 also enables a promisee not only to release a debt at the instance of a third party, but also to enable the promisor whose debt has been released at the instance of the third party to take advantage of that release. The intention is that release need not be made in favour of

42. Devolution of joint liabilities.— When two or more persons have made a joint promise, then, unless a contrary intention appears by the contract, all such persons, during their joint lives, and, after the death of any of them, his representative jointly with the survivor or survivors, and, after the death of the last survivor, the representatives of all jointly, must fulfil the promise.

[Malaysian Contract Act 1950, S. 43.]

43. Any one of joint promisors may be compelled to perform.— When two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any [a][one or more] of such joint promisors to perform the whole of the promise.

Section 41 (contd.)

the person liable. A 1931 Bom 123 (124) (DB).

(8) Where P, as adopted son of Q, renewed pronotes executed by Q, but his adoption was set aside, it was held that the creditor could fall back on the original notes as P could not be regarded as "third person" within Sec. 41. A 1928 Mad 972 (974).

(9) A was the cashier and accountant of a company and B was the auditor of the company. A misappropriated large sums of the company and executed a promissory note for Rs. 50,000 in favour of the company for the amount misappropriated by him. B was liable to the company for his negligence and paid Rs. 60,000 to the company in full discharge of that liability. It was contended that by reason of payment by B, A's liability under the pronote was discharged under Section 41 of the Contract Act. Held, that Section 41 had no application as A's liability was a contractual one while B's liability was one in tort. A 1945 Cal 218 (226) (DB).

(10) Where pre-emption decree proved abortive, after payment by pre-emptor of the unpaid purchase money to vendor, the vendor cannot enforce his lien for unpaid purchase money, against vendee, till he has reimbursed the pre-emptor, money paid by him. (1913) 16 Oudh Cas 1 (3, 4).

(11) Plaintiff having accepted payment from a third person in full satisfaction of his claim is not entitled to sue the defendant for the balance. A 1963 SC 250 (255).

(12) Consignee accepting performance of the promise to pay compensation from the insurer cannot enforce the same claim against the carrier. A 1964 Cal 362 (365).

[But see A 1966 Mad 381 (384) (DB).]

(13) Suit for damages against (1) Union of India, (2) Railway Administrations and (3) several insurance companies — Insurance companies settling suit claim by paying full amount on condition that plaintiff would prosecute suit against defendants 1 and 2 and pay to them whatever he would recover from defendants — Held, on reading clause in policy of Insurance, that settlement was conditional and Section 41 of Contract Act had no application. (1968) 2 Mys LJ 240 (242).

(14) Suit for damages for loss of goods against common carrier by insured — Insurer impleaded as co-plaintiff who paid total loss to insured — Decree passed only in favour of insurer valid because by reimbursing the loss the insurer became subrogated to the rights of the insured. A 1971 Cal 494 (503).

(15) Loss of goods in transit by Railway — Insurer compensating the loss — Owner of goods and the insurer suing the Railway for damages — Held on facts — The company, the owners had a contract with the carriers for transhipment of the consignment of the cotton. The contract which was the outcome of promise was for transhipment and the company did not expect performance thereof by the insurer. On the facts Section 41 was not attracted and insurer would not bring a suit against the Railway. A 1979 Orissa 165 (167) : 48 Cut LT 245 (DB).

Section 42

(1) Under Section 42, the obligation to perform the promise of the promisor devolves jointly on all his representatives and on the death of one of them, his heirs are not discharged but take their place with reference to the liability. 1896 Pun Re No. 53, page 148 (151) (DB).

(2) Under the English common law the rule of survivorship applies to the case of joint creditors as well as to the case of joint debtors, but under Section 42 and Section 45 of the Indian Contract Act the rule of survivorship is not recognised and the devolution of joint liabilities and rights is governed by the provisions of Sections 42 and 45 respectively. A 1948 Nag 279 (282) (DB).

(3) The rule of survivorship among joint tenants is modified by Sections 42 and 45, Contract Act which puts the representative of the deceased joint tenant in his place so long as there is such a representative. On failure of such a representative the rule of survivorship among joint tenants applies. A 1930 All 350 (352) (DB) •• A 1935 All 975 (976).

(4) It is clear from Sections 42, 43 and 44 of the Contract Act, that where there are joint promisors there is an implied contract amongst them, inter se, to contribute equally towards the performance of the joint promise. That implied contract of contribution is independent of the contract as between the joint promisors and the promisee. The promisee cannot in any way absolve a joint promisor from his liability to contribution so far as his other joint promisors are concerned who may have performed the promise. A 1949 Cal 242 (243).

SECTION 43 — SYNOPSIS

1. Scope.
2. Enforcement of joint contracts.
3. Contribution.
4. Join decree for costs — Contribution.
5. Co-heirs of a promisor.
6. Co-tenants.
7. Partners.
8. Joint tort-feasors.
9. Accord and satisfaction by one.

Each promisor may compel contribution.— Each of two or more joint promisors may compel every other joint promisor to contribute equally with himself to the performance of the promise, unless a contrary intention appears from the contract.

Sharing of loss by default in contribution.— If any one of two or more joint promisors makes default in such contribution, the remaining joint promisors must bear the loss arising from such default in equal shares.

Explanation.— Nothing in this section shall prevent a surety from recovering from his principal, payments made by the surety on behalf of the principal, or entitle the principal to recover anything from the surety on account of payments made by the principal.

Illustrations

(a) A, B and C jointly promise to pay D 3,000 rupees. D may compel either A or B or C to pay him 3,000 rupees.

Section 43 (contd.)

1. Scope.— (1) Sections 43, 69, 70 do no more than state in written form what was law before the Act. (1893) 9 Cal 395 (397) (DB).

(2) Where subsequent to the acceptance of a joint tender for the right to vend liquor the Government permitted one of the persons who made the tender to withdraw it was held that in view of the principle underlying Section 43 of the Contract Act there was nothing in law which prevented the Government from allowing the withdrawal and accepting performance from the other. 1958 Andh LT 696 (698).

2. Enforcement of joint contracts.— (1) Joint and several liability may arise from contract or for a tort but for such liability to come into existence there must be a joint contract or a tort committed jointly as the case may be. So far as the conditions of such liability are concerned they are identical against persons whose liability may be joint and several. ILR (1954) 6 Assam 53 (57).

(2) Whether a sale deed is joint transaction making all vendees jointly liable or is really several transaction making each vendee responsible for his own share only is a question of fact depending on the intention of the parties. A 1930 Lah 806 (807) (DB).

(3) Where the debts are jointly incurred the liability of each is for the whole amount. A 1928 Lah 962 (963) •• A 1933 Pat 24 (25) (DB) •• A 1957 Trav-Co 305 (307). (Mother executing mortgage in her own right and also on behalf of minor children as their guardian — Mother is liable for the entire whole debt and not only for that part which was binding on the minors — Hence decree should be passed against her for the full amount secured by mortgage.) •• A 1954 Ajmer 7 (2) (8). (Joint indemnity bond executed by two persons — Liability of each under the bond is joint and several — Hence decree on bond need not specify the liability of each.) •• (1965) 78 Mad LW 157.

[See also A 1969 SC 69 (72).]

(4) Under the provisions of Section 43 it is quite within the competency of the lender to sue all or any of the joint promisors as he may choose. A 1924 Pat 164 (165) (DB). (Nothing in Civil P. C. goes against adopting such a course.) •• A 1957 Raj 267 (273) •• A 1951 Mad 239 (240) (DB). (Fact that the person sued has as between the joint promisors undertaken liability only as a surety does not detract from the right of the creditor to recover from him the entire debt.) •• A 1950 Orissa 6 (9) (DB) •• A 1949 Pat 184 (190) (DB). (Caste organisation or sabha passing resolution — Defendants, members of the sabha compelling plaintiffs to deposit certain money pending arbitration proceedings in accordance with the resolution and also jointly promising to return the money after completion of the proceedings — Held Section 43, Contract Act applied to case and suit against them to recover the amount was maintainable.) •• A 1964 Cal 196 (206) (DB). (Vessel of plaintiff requisitioned by Government under Vessel of India Rules — Held, liability of Government for compensation for use of vessel was statutory and not contractual — Cause of action arose partly within Dominion of India and partly within Dominion of Pakistan — Liability was joint liability and could be enforced against any one of the Dominions.) •• (1977) 1 Andh WR 373 (DB) •• (1973) 1 Cut WR 509 (517). (Unregistered body through its office-bearers entering into contract of tenancy of building for school — Rent not paid — Landlord can compel in suit one or more of joint promisors to perform whole of the promise.)

[See also A 1948 Nag 44 (47). (Decree charging several properties — Charge holder can proceed to enforce the charge against any item just as he can against any person liable to him for a debt jointly with another.)]

(5) Unlike English law, the Indian law makes all joint liability, joint and several in the absence of any agreement to the contrary. It is therefore open to the promisee to sue any one or some of the joint promisors and it is no defence to such a suit that all the promisors must have been made parties. A 1949 FC 211 (218). (Suit for specific performance of part of contract, and willing to pay entire consideration — Suit maintainable.) •• A 1934 Pesh 94 (95) •• A 1956 Nag 111 (112) (DB). (Decree against joint promisors — Death of one joint promisor during pendency of appeal — Appeal abates only against him and can be continued against the rest — Decree in appeal can be executed against surviving promisor because his liability is joint and several.) •• A 1927 Pat 426 (427) (DB). (It is for the joint promisor who wants to resist the suit in which his co-sharer is not impleaded to show the existence of a definite contract that each promisor is not separately liable.) •• 1905 Pun Re No. 81 p. 254 (255) (DB).

(b) A, B and C jointly promise to pay D the sum of 3,000 rupees. C is compelled to pay the whole. A is insolvent, but his assets are sufficient to pay one-half of his debts. C is entitled to receive 500 rupees from A's estate and 1,250 rupees from B.

(c) A, B and C are under a joint promise to pay D 3,000 rupees. C is unable to pay anything, and A is compelled to pay the whole. A is entitled to receive 1,500 rupees from B.

(d) A, B and C are under a joint promise to pay D 3,000 rupees. A and B being only sureties for C. C fails to pay. A and B are compelled to pay the whole sum. They are entitled to recover it from C.

[See S. 145, infra : Malaysian Contract Act 1950, S. 44.]

[a] Substituted for "one" by the Amending Act, 1891 (12 of 1891).

Section 43 — Note 2 (contd.)

(6) A joint contract unenforceable against one on the ground of his not signing it can be enforced against the other signing and receiving consideration. A 1926 Nag 196 (196) ** (1962) 2 Andh LT 61. (Consideration paid to any of joint promisors is sufficient to support promise of all joint promisors.)

(7) Suit against Company illegally formed — Liability is joint and several — Suit can be maintained against some members. A 1930 Bom 5 (11) (DB).

[See however A 1961 Cal 393 (395). (Suit against unregistered society — Loan incurred by secretary on behalf of society — Suit by creditor to recover the money due on pronotes should be brought against all the members of the society.)]

(8) Where one of the directors of a company alone appointed the broker and entered into the contract it was held that he could be made liable on its basis and the fact that the other two co-directors had also been impleaded and the suit had been dismissed against them could not in any way affect the liability of the director who entered into contract. The fact that the earnest money was accepted by the other directors who passed a receipt for it, was immaterial, those directors being the joint promisors. A 1959 All 29 (31) (DB).

(9) Insolvency of one of the joint promisors does not bar a suit as against other joint promisors for recovery of a debt. A 1934 Pat 43 (43) ** A 1935 Mad 1055 (1055) ** A 1919 Cal 781 (782) (DB).

(10) Scope — Enforcement of joint contracts — Decree against some only of the joint promisors — Decree remaining unsatisfied — Second suit against other joint contractors not barred. A 1970 Mad 337 (341).

(11) One joint promisor cannot plead minority of the other as a bar to the promisee's claim against himself. A 1916 PC 2 (3) ** A 1934 Pat 663 (664) (DB) ** A 1924 Lah 146 (147) (DB) ** A 1963 Cal 325 (328) (DB).

(12) An agency created by a joint contract is joint and several according to Section 43, Contract Act and is not put to an end by the death of the joint agent. After his death the surviving agent would continue to be liable to account and can be sued. (1913) 17 Cal LJ 201 (204, 205) (DB). (Suit for accounts against the surviving agent is governed by Article 116, Limitation Act.)

(13) Where A who consigned coal to B under a contract arranged with the Railway administration that it should collect both the freight and the cess payable under the Coal Production Fund Ordinance, 39 of 1944 from B when the consignment is delivered to him it was held that both A and B were jointly and severally liable for the payment of the cess and hence the suit for the recovery of the cess was maintainable against A as well. A 1958 Madh Pra 425 (432) (DB).

(14) The creditor gets a right to proceed against any one of his joint debtors, and such right must be exercised before the creditor brings his suit. ('96) 1896 Pun Re No. 53, p. 148 (153) (DB) ** A 1961 Cal 393 (395).

[See however A 1921 Lah 357 (358) (DB). (Death of some defendants during pendency of suit — Suit could be proceeded with without bringing their legal representatives on record against the remaining defendants — Option under Section 43 can be exercised at any stage of the suit.)]

(15) Where a promisee chooses to proceed against one co-promisor, and obtains judgment he cannot proceed against the other co-promisors, or co-contractors. A 1936 Bom 344 (345) (DB). (Per Beaumont C. J., Rangnekar J., Dissenting.) ** (1935) 62 Cal 612 (616) (DB) ** A 1917 Bom 268 (273). (Agent and principal — Party dealing through the agent can sue both or either of them — Suit against only one pursued to judgment — Suit against other will not lie afterwards.) ** A 1917 Bom 262 (264) ** (1877-78) 3 Cal 353 (359, 360, 362) (DB) ** (1862) 5 Mad 37 (46) (DB).

[But see A 1934 Pat 52 (53) ** A 1933 Bom 407 (409) ** (1910) 33 Mad 317 (320) (DB) ** (1900) 22 All 307 (319) (DB).]

(16) When a suit against a number of joint promisors or joint contractors has been dismissed, the plaintiff cannot prosecute an appeal against only some of them renouncing his claim against the rest of their legal representatives. A 1961 Punj 555 (557) (DB).

(17) Sale of land by members of joint Hindu family — Shares of members determined — Contract not indivisible — Decree for specific performance of contract granted against the members to the extent of their share. (1966) 32 Cut LT 181 (183).

(18) Where the liability of defendants is joint and several a decree directing execution against one of the defendants in the first instance and to proceed against other defendant only afterwards for balance amount which remained unrealized, held bad — No equitable principle or statutory provision justified such decree — Decree in C. C. C. Appeals Nos. 63 and 66 of 1959, D/- 1-2-1963 (Andh Pra), Modified. A 1971 SC 449 (454).

Section 43 (contd.)

3. Contribution.— (1) The relief of contribution contemplated under Section 43 is distinct from the relief of reimbursement provided for by Section 69 of the Act. Contribution is between persons equally bound while reimbursement is between a person interested in payment and a person bound to pay. A 1950 Pat 212 (214) (DB) ** A 1957 Raj 267 (274). (Claim for "reimbursement" among joint promisors who are all equally bound to perform the promise cannot lie.) ** (1967) 2 Andh LT 283 ** A 1961 Pat 103 (104-105).

(2) "Contribution" signifies payment by each of the parties interested of his share in any common liability. Mutuality is the test of contribution. A 1934 Cal 626 (626) (DB) ** A 1915 Cal 278 (279) (DB).

(3) Persons who are liable under a joint decree are bound to contribute to the extent of their respective shares towards the discharge of the decree. A 1929 All 792 (793) (DB) ** A 1957 Raj 267 (273). (Persons jointly and severally liable under a decree are in the position of joint promisors.) ** A 1931 Pat 234 (235) (DB). (Co-debtor who is able to show that the person paying had joint money sufficient to discharge decree is not under any liability to contribute.) ** A 1922 Lah 148 (149).

(4) A person who pays in excess of his own share towards a joint liability must be considered in so far as the excess is concerned to have paid on behalf of his co-debtors. A 1954 Trav-Co 499 (503). (Suits for recovery of such excess from co-debtors is a suit for contribution.) ** 1946 Jaipur LR 375 (377).

(5) The right to contribution is an equitable right which can be availed of only by a co-promisor who has paid more than his share in satisfaction of the joint liability and not by co-promisor who has not paid anything in excess of his share. 1946 Jaipur LR 375 (377) ** (1873) 11 Beng LR 76 (81) (DB). (Payment by promisor would not by itself entitle him to claim contribution from his co-promisors unless the payment is in excess of his shares of the joint liability.)

(6) Principal and Surety — Where one of the joint promisors is only a guarantor or surety he is not liable to pay any contribution to the principal debtors themselves. A 1951 Mad 239 (241) (DB).

(7) A mere undertaking to pay the amount at some future date is not equivalent to payment. A 1925 Mad 261 (263) (DB).

[See also (1873) 11 Beng LR 76 (82) (DB). (Plaintiff and defendants co-principals each bound to pay his own share of debt — Plaintiff not even paying his own share of debt — His suit to ask for contribution from defendants is premature.)]

(8) Payment by one of the co-debtors which does not exonerate other co-debtors from liability does not give a right of contribution to the co-debtor making such payment. A 1924 Mad 279 (280) (DB).

(9) Partner of a firm — A co-promiser within Section 43 — Entitled to claim contribution from other partners in case he is required to pay the debt of the firm (Obiter). 1977 J & K LR 153 : A 1977 (NOC) 270 (DB).

(10) The fact that the promisor claiming contribution made the payment without consulting his co-promisor does not in any way affect his right to the contribution. A 1933 Mad 382 (383).

(11) In order to entitle a promisor paying a debt to claim contribution from his co-promisor it is sufficient if the debt was alive when he paid it. It is not necessary that the liability of the co-promisor was also alive then. A 1954 Trav-Co 499 (502). (Joint executants of hypothecation bond — Death of one during pendency of suit on bond — Abatement of suit as against him does not exonerate his heirs who have taken the benefit of his share of the property from their liability to contribute to decretal debt when recovered from the joint executant by execution.) ** A 1955 Cal 62 (63). (A and B jointly and severally liable for payment of putni rent — Suit for recovery of rent as against A only — Defaulting putni when brought to sale A paying off the decree — Fact that on the date of payment claim for rent was barred against B would not excuse him from payment of his share to A.) ** A 1929 Mad 309 (310) (DB). (Debt kept alive by acknowledgment — Amount recovered from joint promisor under decree — Other promisor is bound to pay his share.) ** A 1915 Mad 675 (677, 679) (DB). (Promissory note jointly executed by two — liability kept alive beyond three years against one only while it is barred by limitation against other — Former when compelled to pay under decree is entitled to contribution from latter although the decree exonerated him on the ground of limitation.) ** (1897-1901) Upp Bur Rul 331 (332). (One joint promisor compelled to pay debt — Liability of other promisors to contribute is not excused by the reason that as between them and the creditor the debt was barred by limitation.) ** A 1969 Cal 390 (393) ** A 1965 Andh Pra 98 (101) (DB). (Joint-debtor satisfying decree passed against him — Co-promisors are still liable to contribute and cannot escape liability though they are exonerated in prior proceedings.)

(12) The liability of the joint promisors to contribute equally to the performance of the promise is based on a presumed implied contract amongest them and that liability cannot be affected by any act of the promisee absolving one joint promisor of his liability to him for the debt. A 1949 Cal 242 (244) ** A 1957 Raj 267 (273). (One of judgment-debtors jointly and severally liable under decree released by decree-holder — Right of judgment-debtor paying off decree to contribution not affected.)

[See however A 1960 Mad 117 (119, 120) (DB).]

(13) Where a joint debtor sues for contribution against his co-debtor alleging that he has paid up a decree debt due by them jointly, it is open to him to enforce the defendant's liability on the strength of the original liability, even if the decree as such is found to be not binding on the defendant. A 1934 Mad 386 (387, 388) (DB) ** (1911) 38 Cal 1 (6, 7, 11, 12) ** A 1965 Andh Pra 98 (100, 101) (DB). (Right of judgment-debtor discharging entire joint decree — Payment of decretal amount is condition precedent to right to sue — Judg-

Section 43 — Note 3 (contd.)
ment-debtor fully satisfying decree — He can sue co-promisors for contribution.)

(14) Where a joint decree was scaled down under the C. P. and Berar Relief of Indebtedness Act, 14 of 1939, at the instance of two of the judgment-debtors and the third judgment-debtor was compelled to pay the full decretal debt it was held that he was entitled to recover from the other two their contribution towards the debt unaffected by the discharge in the relief Court before which he was no party. A 1948 Nag 292 (293).

(15) There is no provision in the Administration of Evacuee Property Act empowering Custodian to determine a claim made against an evacuee by a co-debtor who has paid off a joint decree and wants to compel the evacuee to contribute his share of the decretal amount — Jurisdiction of Civil Court to entertain such a claim is not barred. 1967 All LJ 799.

(16) Barring provisions to the contrary in the contract itself the right of a promisor who pays more than his share of a joint liability to compel contribution from his co-promisors is an absolute right and Courts have no option in the matter of giving effect to the right. A 1934 Pat 411 (413) (DB).

(17) In a suit for contribution all persons whose presence would be necessary to ascertain satisfactorily the liabilities of the parties must be impleaded. If any such necessary party is not so impleaded the suit would fail in limine. A 1940 Pat 119 (121) (DB).

(18) All partners must be joined in suit for contribution by one or more partners if partnership has come to an end and no adjustment has been made. A 1916 Lah 9 (9).

(19) For contribution, a prima facie case is made by the production of the judgment and the certificate of satisfaction. A 1934 Oudh 437 (439).

(20) Where on the facts set out by a plaintiff it is clear that he is entitled to contribution the method of computation is a matter of law and it is for the Judges to apply the law to the facts stated and give such relief as is appropriate to the case. A 1952 SC 47 (51).

(21) Where one of the joint promisors liable to contribute does not or cannot pay his proportion of debt his amount of debt has to be divided between other contributories only in the proportion of the benefits which each one of them has received at the time of the original contract and not in equal proportion. A 1951 Mad 239 (242) (DB).

(22) No doubt the question of contribution is dealt with both by Section 43 of the Contract Act and Section 82 of the Transfer of Property Act but when that question arises in connection with a mortgage it will be governed only by Section 82, T. P. Act. A 1952 SC 47 (50). (Section 43, Contract Act being only the general law will be excluded by Section 82, T. P. Act which is the special law dealing with the matter.)

(23) As to liability of co-sureties to contribute equally as between themselves, see S. 146.

4. Joint decree for costs — Contribution.— (1) Where a decree for costs does not indicate the proportions in which the costs are to be borne by the judgment-debtors, the rule is that such a decree imposes a joint and several liability on all the judgment-debtors. A 1933 Pat 24 (25) (DB).

(2) Prima facie a right of contribution exists between persons against whom a joint decree for costs has been passed, and it is for the defendant seeking to avoid the liability to show some equity which entitles him to exemption. A 1961 Pat 103 (106) ** A 1963 Pat 227 (228, 229).

(3) Section 43, Contract Act, does not generally apply to recovery of contribution in respect of costs imposed by a Court of law, on the principle that the liability arises out of a joint wrong. A 1950 Pat 212 (215) (DB).

(4) A co-defendant paying the full amount of costs cannot claim contribution unless some equity exists in his favour. In this respect a decree for costs stands on a different footing from a decree for payment of money arising out of a joint liability. A 1932 Mad 146 (147) ** A 1961 Pat 103 (105).

(5) On broad grounds of justice and equity there appears no reasons why a decree for costs should be excepted from the doctrine of contribution. The only ground on which such an exception could possibly be based would be the doctrine that no contribution lies between joint tort-feasors. A 1921 Oudh 128 (129) (DB) ** A 1950 Pat 212 (215) (DB). (Section 43 does not exclude contribution in the case of costs imposed by Courts on equitable grounds.)

(6) Where in a suit in which both the defendants were equally delinquent in taking up the defence and a decree for cost is passed against them and one of them pays the same, he is entitled to contribution from the other. A 1935 Mad 347 (349) ** A 1950 Pat 212 (215) (DB) ** A 1938 Lah 579 (580) ** A 1936 Mad 167 (168, 169) (DB).

(7) M borrowing sum on simple mortgage from N and S — Portion of amount paid by N and rest by S — Mortgage decree passed and property put to sale — Suit by R against N and S for declaration of title to half property — Decree with costs — Costs recovered only from S — Suit by S against N for contribution — S and N held liable for costs only in proportion to their interest in property affected by R's suit and not equally. A 1938 All 631 (632).

(8) Defendants neither taking interest nor defending suit are equitably entitled to exemption from contribution for costs in joint decree against them. A 1929 All 654 (655) ** A 1946 Cal 63 (65) ** A 1937 All 227 (228) ** A 1963 Pat 227 (228, 229).

(9) Mere execution of mortgage to satisfy the joint decree for costs does not entitle a defendant to claim contribution from other — Suit for contribution is premature until he redeems mortgage or mortgaged property is sold in satisfaction of mortgage. A 1936 Oudh 253 (255) (DB).

(10) If the decree awarding costs renders one of the defendants alone responsible for the payment of the costs awarded he cannot claim contribution from his co-defendants. If however the decree had made the costs the joint liability it would be otherwise. A 1955 Mad 721 (721).

5. Co-heirs of a promisor.— (1) Section 43 applies only where two or more persons have made a joint promise and not where two or more persons have become jointly interested by inheritance in a contract made by a single person. A 1929 Lah 783 (784) (DB) ** A 1957 Andh Pra 688 (690) ** A 1918 Cal 512 (514)

Section 43 — Note 5 (contd.)
(DB) ** A 1917 Cal 829 (829) (DB) ** A 1967 Orissa 158 (160) (DB). (A 1917 Cal 829 held no longer good law in view of A 1925 Cal 1056 (FB).) ** A 1973 Delhi 290 (292). (The reason is that the liability of heirs is joint and indivisible and not joint and several.)

[See however A 1957 Trav-Co 186 (189) (DB). (Devolution of mortgaged property on heirs of mortgagor — Mortgagee can enforce the mortgage against the entire property or against the share in the hands of one of the heirs.) ** A 1955 Raj 11 (14). (Principle of section may be applied even to co-heirs, at least those like the sons of a deceased Hindu father.)]

(2) Suit for rent is maintainable against some of the heirs or successors-in-interest of deceased tenant without bringing all on the record. **A 1925 Cal 1056 (1058) (FB).** (Ghosh and Mukherjee JJ. dissenting.)

(3) Heirs of joint tenants are not each of them liable for whole rent. (1910) 12 Cal LJ 642 (644).

6. Co-tenants.— (1) In view of Section 43, a landlord can sue some of his tenants for the whole rent of a holding. (1938) 17 Pat 662 (665) (DB) ** A 1935 Pat 146 (147) (DB) ** A 1927 Pat 426 (429) (DB) ** A 1927 Pat 2 (4) (DB) ** A 1914 Lah 500 (501) ** **A 1970 SC 716.**

(2) Where one of the two co-tenants dies, a suit by the landlord against all the heirs of the deceased tenant for the entire rent is maintainable without making the other tenant a party thereto. A 1923 Cal 615 (618) (DB) ** A 1924 Cal 165 (166) (DB).

(3) It is true that in the case of a joint contract the cause of action for a suit to enforce the promise is exhausted by a judgment obtained against one of the promisors only and hence no second suit against the co-promisor could be brought thereafter. But as arrears of rent when they fall due furnishes a separate cause of action in respect of each year the above rule would not affect the second suit of the landlord against certain co-tenants for the recovery of arrears of rent pertaining to subsequent years merely because in the previous suit against another co-tenant he had obtained a judgment for the arrears of a previous year. A 1947 Cal 11 (13, 14) (DB).

(4) Where the plaintiff and the defendant are in the position of joint tenants and are therefore joint promisors as regards the rent payable to the landlord, the plaintiff who has paid the entire rent is entitled under Section 43, Contract Act, to contribution from the defendant. A 1950 Pat 212 (214) (DB).

(5) A sharer in a patni lease discharging the decree for rent obtained against him by the landlord is under Section 43 entitled to recover by way of contribution from his co-sharer his share of the rent even though the claim of the landlord for rent against such co-sharer was barred by limitation. A 1955 Cal 62 (63).

(6) Joint lessee — Decree against for arrears of rent — Two groups having equal rights in the lease — One group making payments not exceeding their half share before Madras Act IV of 1938 came into force — Subsequent scaling down reducing the balance due — Contribution cannot be claimed from joint lessees for the amount paid before the Act came into force by the other lessees. A 1945 Mad 266 (266).

7. Partners.— (1) Section 43 applies as much to partners as to other co-contractors. A 1933 Bom 407 (409) ** A 1927 Lah 819 (821) (DB) ** (1898) 21 Mad 256 (257) (DB) ** A 1964 Tripura 13 (15) ** A 1969 J & K 96 (97, 98).

(2) Where in a suit against a partner of a firm and the firm was not made a party and an award was made against the partner on reference to the arbitration it was held that the award was not invalid on the ground that the firm was not made a party. Because the partners in the firm stand in the same position as co-promisors or co-contractors. 1977 J & K LR 91 : A 1977 (NOC) 269 (DB) ** 1974 WLN (UC) 1 (2) (Raj). (Liability of partner is joint and several.)

(3) Cause of action against firm is a joint cause of action against all partners and each partner is jointly and severally liable for the whole claim. A 1926 Sind 75 (76)

(4) Loan taken by firm — Pro-notes signed by principal partner — Principal partner can be made to pay. A 1924 Lah 148 (149) (DB).

(5) Civil P. C., O. 1, R. 6 — Partner of a registered firm entering into contract of tenancy — Suit for recovery of rent against him alone — Suit is maintainable — The failure to pay rent is an act of the firm and the landlord could elect to proceed against the contracting partner alone. A 1975 Cal 123 (127) ** ILR (1970) 2 All 299 (309).

(6) Suit instituted against partners in private capacity, if unsuccessful, cannot be continued against them as firm and Section 43 has no application to such a case. A 1915 Lah 167 (168) (DB).

(7) The remedy of a partner who has been compelled to pay the whole or more than his share of the partnership debt is to sue for account and his suit for contribution against his co-partners is not maintainable. A 1949 Mad 109 (2) (111, 112) (DB) ** **A 1954 Mad 1101 (1107) (FB).** (Subsisting partnership — Suit for contribution for payment of particular items in excess of their shares is not open to partners even though the payment had been made under decrees passed on those items of liability — A 1933 Mad 755. **Overruled:** A 1939 Mad 508. **Impliedly Overruled.**) ** A 1946 Oudh 118 (120).

[But see A 1942 Nag 72 (72, 73) ** A 1921 Nag 45 (46).]

(8) A claim for contribution against the co-partners based on the contract of partnership would be excluded by the general doctrine that as between partners there can be no claim for contribution. A 1939 Mad 508 (508) ** A 1946 Oudh 118 (120).

(9) Where a partner had to pay under a decree passed for a partnership debt after the dissolution of the firm but by then his right to claim general accounting had become barred it was held that his suit for contribution against the other partners was not maintainable. **A 1954 Mad 1101 (1110) (FB).** (**Held** Section 43, Contract Act conferred no right on him and the fact that the liability had become merged in a decree did not make any difference — A 1939 Mad 228. **Overruled:** 32 Mad 203, 34 Mad 112 and A 1914 Mad 295, **held impliedly Overruled** by A 1922 PC 115.)

(10) Where a partner who contested in his suit for dissolution the binding nature of a mortgage of the partnership assets agreed

44. Effect of release of one joint promisor.— Where two or more persons have made a joint promise, a release of one of such joint promisors by the promisee does not discharge the other joint promisor or joint promisors; neither does it free the joint promisors so released from responsibility to the other joint promisor or joint promisors.

[Malaysian Contract Act, 1950, S. 45.]

Section 43 — Note 7 (contd.)
under a compromise to recognize the validity of the mortgage and pay a certain amount to have his share of the assets released from the mortgage claim it was held that the other partner who had to pay off the entire mortgage was entitled to recover contribution up to the amount promised under the compromise even though subsequent to the compromise the mortgage had been declared by the Court to be not binding on the partner who disputed it. A 1914 PC 10 (11).

(11) A partner to whom a bill is endorsed by his firm is himself a co-promisor who could be compelled to contribute towards the discharge of the bill by the other partners and therefore his action against the firm on the bill will not be maintainable. A 1951 Cal 466 (468).

8. Joint tort-feasors.— (1) If an act is manifestly unlawful, or the doer of it knows it to be unlawful as constituting either civil wrong or a criminal offence, he cannot maintain an action for contribution or indemnity against the liability which results therefrom. An express promise of indemnity to him for the commission of such act is void. A 1932 Mad 1 (5) (FB) ** A 1936 Pat 49 (51) (DB) ** A 1961 Pat 103 (106) **. 1970 Ker LJ 737 (740)

[But see A 1953 Cal 513 (514) (DB). (Defence that plaintiff is a joint tort-feasor is no ground for refusing relief where facts brought before Court show defendant as more blameworthy out of the two.) ** A 1951 All 774 (790) (FB). (Contribution should be allowed where equitable considerations warrant — A 1932 All 334 (DB), Overruled.)]

(2) Person in wrongful possession cannot bring suit for contribution if payment was made in support of his own title. (1911) 13 Cal LJ 646 (647) (DB).

(3) Where joint debtors (who were joint tort-feasors in the suit) have under compromise in Court contracted to pay a sum to plaintiff and some of them pay the sum and sue the rest for contribution, their claim cannot be resisted on the ground that all of them were joint tort-feasors before the compromise. A 1916 All 160 (161) (DB) ** A 1963 Orissa 140 (142). (Joint tort-feasors may be sued for damages either jointly or severally.)

9. Accord and satisfaction by one.— (1) Under the English Law, accord and satisfaction made by one of several parties jointly liable or jointly and severally liable to the same creditor for the same debt, discharges the claim of the creditor against all. There is no reason why this principle would not apply to cases of joint and several liability under Section 43, Contract Act. A 1942 Cal 87 (91) (DB).

SECTION 44 — SYNOPSIS

1. Scope and applicability.
2. Co-mortgagors.
3. Co-heirs.
4. Co-judgment-debtors.
5. Decree against one co-promisor — Effect.
6. Contribution, right of.

1. Scope and applicability.— (1) English law doctrine that release of one of several joint debtors releases all from liability has no application to India. (1911) 14 Cal LJ 354 (357, 358) (DB).

(2) Section 44 applies as much to partial discharge as to complete discharge. (1942) 46 Cal WN 234 (237, 238) (DB) ** A 1948 Nag 279 (282) (DB).

(3) Section means generally, that release to one of several contractors does not discharge co-contractors, and applies as well to a discharge after breach as to a release before breach. (1879) 4 Cal 336 (338).

(4) The provisions of Section 44 are applicable to the coparceners of a joint Hindu family in spite of the dissolution of the joint family unless the creditor has agreed to the arrangement between the coparceners that one of them alone would pay the debt. 1949 Bur LR (SC) 46 (50).

2. Co-mortgagors.— (1) Release by the creditor of one of the mortgagors jointly and severally liable, has not the effect of releasing others. A 1917 Cal 502 (505) (DB).

(2) The qualified release of a part of the mortgage security in favour of some of several joint mortgagors, resulting from the mortgagee not seeking to enforce his right as against any surplus sale proceeds of such part when sold in satisfaction of a prior mortgage, ought not to affect the mortgagee's right. (1903) 30 Cal 953 (958) (DB).

(3) Where five brothers had made themselves jointly liable for a sum of money under a bond and mortgaged certain village as security for the debt and the mortgagee having subsequently taken a separate bond from each of the two brothers for one-fifth of the whole amount, sought to recover the remaining three-fifths of the said amount from remaining three brothers: Held that any one of the five might be sued for the whole amount and the promisee was entitled to recover the three-fifths from the remaining three brothers. (1876) 25 Suth WR 419 (419) (DB).

(4) Mortgage suit — Preliminary decree against joint owners — Plaintiffs applying for final decree — B, one of joint owners, applying to Debt Relief Court for determination of debt — Final decree proceedings stayed — Debt scaled down by such Court and B allowed to pay same in instalments — Plaintiffs applying for revival of final decree proceedings — Relief Court's order held did not release other defendants from liability. A 1947 Nag 61 (67) (FB).

3. Co-heirs.— (1) Claim for rent barred against some co-heirs — Remaining heirs not separately liable for entire rent. A 1919 Cal 861 (862) (DB).

45. Devolution of joint rights.— When a person has made a promise to two or more persons jointly, then, unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them during their joint lives, and, after the death of any of them, with the representatives of such deceased person jointly with the survivor or sur-

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Section 44 (contd.)

4. Co-judgment-debtors.— (1) The release of a joint judgment-debtor does not operate as a release of the others. A 1944 Cal 328 (330) (DB) ** A 1933 Lah 505 (507) ** A 1924 Cal 209 (211) (DB) ** A 1915 Mad 934 (936) (DB) ** (1880) 6 Cal LR 212 (214) ** 1965 Cur LJ 485 (Punj).

[See also A 1927 All 830 (831). (Joint decree against father and son — Father becoming insolvent and compounding with decree-holder — Son is liable only for such portion of decretal amount as had not already been realised by decree-holder in pursuance of the composition.)]

(2) Where some of the original defendants against whom joint decree for costs was passed died during the pendency of a Privy Council appeal and no substitution was made it was held that it did not amount to a release by the decree-holder of the interests of those judgment-debtors and the interests of all the other judgment-debtors were not also released from all liability under the decree. A 1933 Pat 24 (25) (DB) ** A 1973 Raj 39 (41).

(3) Release granted to one of several judgment-debtors without any intention to release others will discharge others only pro tanto and not in respect of the entire amount decreed. A 1918 Cal 51 (53) (DB).

5. Decree against one co-promisor — Effect.— (1) Where a promisee chooses to proceed against one co-promisor, and obtains a judgment, he has no right to proceed against the other co-contractors or co-promisors. A 1936 Bom 344 (345) (DB).

(2) Where in case of a joint promissory note one of the executants makes certain payment and the promisee agrees to discharge him from his liability, only reserving his right to sue the co-executant for the balance the co-executant is liable for the balance subject to his right to sue his other co-executant for contribution. A 1937 Rang 137 (137, 138).

(3) In absence of contract to the contrary, joint executants of pro-note, who have undertaken unconditionally to discharge obligations under pro-note, are jointly and severally liable to discharge liability under pro-note — Some of them cannot maintain the position that they are only sureties. A 1966 Ker 303 (304) (DB).

6. Contribution, right of.— (1) Where the promisee releases one or more of the joint promisors, the liability as between joint promisors to contribute equally does not end. (1941) 45 Cal WN 357 (361).

(2) A case may not be covered by Sec. 69 of the Contract Act, but that is not to say that the claim for contribution can be negatived on this score if it otherwise arises under Sections 43 and 44. A 1957 Raj 267 (274).

(3) Decree for arrears of putni rent against co-sharers — Execution of decree postponed against one co-sharer by reason of Section 10-C, Bengal Court of Wards Act — Such co-sharer is not absolved from liability to contribute to other co-sharer who pays entire amount. A 1949 Cal 242 (244).

(4) A case for contribution arising out of excess payment could and would come into existence only when such excess payment had been made and the limitation would begin to run from the date of such payment. A 1957 Raj 267 (275).

SECTION 45 — SYNOPSIS

1. Scope.
2. Discharge given by one joint promisee alone.
3. Suit by joint promisees.
4. Devolution of joint rights.
5. Partnership cases.

1. Scope.— (1) It is doubtful whether Section 45 applies to claim for possession of land. Where, however, suit is really for specific performance of contract, defendant may plead Section 45 as bar. 1912 Pun LR No. 49 p. 150 (158) (DB).

(2) The words "as between him and them" in Section 45 signify that as between the debtor and original body of creditors, the right to claim payment would rest with the body, but if by part payment the number of creditors is reduced, the right to claim payment will be a right arising as between the debtor and the remaining creditors. Where a partner of a dissolved firm collects his share of debts, impleading others, the other partners can sue for their share of debts. A 1919 Lah 14 (15).

(3) A promise can be made to two persons either jointly or severally but not both ways. A promise to two or more persons unless there is something to show that the intention of the parties was otherwise is only a joint promise made to them A 1954 Cal 303 (304).

2. Discharge given by one joint promisee alone.— (1) Payment to one of two joint promisees is not a discharge of the entire debt. A 1952 Mys 68 (69) ** ILR (1953) 3 Raj 318 (326) (DB) ** A 1917 Sind 71 (72) (DB) ** (1913) 17 Cal LJ 372 (375) (DB) ** A 1974 Bom 164 (168, 169).

[But see A 1957 Mad 191 (192). (Payment to one promisee so as to have the effect of discharging the debt as against all joint promisees must be an actual payment and not merely an undertaking to pay in future.) ** A 1917 Pat 82 (84) (DB) ** (1913) 36 Mad 544 (549, 552) (FB). (One of two or more payees of negotiable instrument can give valid discharge of entire debt without concurrence of other payees.)]

(2) A discharge given by one of the co-promisees is valid only to the extent of his own share in the debt. ILR (1951) 1 Raj 187 (189) ** A 1952 Mys 68 (69).

(3) In the absence of any evidence or circumstances which would justify a contrary inference it will be presumed notwithstanding the form of an obligation that a debt due to joint creditors is due to them in severality. A 1919 Cal 593 (596) ** A 1969 Raj 278 (280).

vivors, and, after the death of the last survivor, with the representatives of all jointly.

Illustration

A, in consideration of 5,000 rupees, lent to him by B and C, promises B and C jointly to repay them that sum with interest on a day specified. B dies. The right to claim performance rests with B's representative jointly with C during C's life, and after the death of C with the representatives of B and C jointly.

[Malaysian Contract Act, 1950, S. 46.]

Section 45 — Note 2 (contd.)

(4) The presumption in the absence of any proof as to the proportion in which the loan was advanced by the co-creditors is that the money was advanced by them in equal shares and on that presumption each of them is entitled to receive his share of the total advances and give a valid discharge qua his share. ILR (1953) 3 Raj 318 (327).

(5) One of the promisees jointly entitled with another to a debt cannot when sued upon by the debtor for the recovery of a debt which was due from him alone, set off the joint debt. A 1954 Cal 303 (305).

(6) A decree-holder holds such a legal character as to be able in law to give discharge on behalf of his co-decree-holders. A 1924 Cal 710 (713) (DB). (Where succession certificate is taken by all decree-holders, adult certificate holders are not competent to give a valid discharge without the concurrence of the minor decree-holders.)

(7) See also Section 38.

Mortgages.

(8) Mortgagees taking a joint security for the money advanced must, in the absence of anything shown to the contrary, be regarded as tenants-in-common having separate interest in the money advanced and not as joint tenants. A 1921 Pat 27 (28) (DB).

(9) Co-mortgagees being tenants-in-common their interests are severable or partible among themselves; so that one of them can sue on the mortgage provided those who are unwilling to be joined as plaintiffs are made defendants. Similarly, if some of the co-mortgagees are estopped from suing, Court can sever debt and give decree to others for their share. A 1918 Cal 411 (412) (DB).

(10) Where several mortgagees advance money on a joint security without specifying their respective shares the presumption is that they had contributed equally to the raising of the amount advanced. A 1918 Oudh 91 (92).

(11) Payment to one co-mortgagee without consent of others does not give discharge of debt due to others. A 1930 All 98 (98, 99) (DB) ** A 1928 Mad 933 (935) (DB) ** A 1927 Cal 425 (429) (DB) ** A 1922 Lah 64 (64) (DB) ** A 1921 Pat 27 (28) (DB) ** (1921) 3 Lah LJ 502 (504) ** A 1920 Pat 464 (468) (DB) ** A 1919 Cal 593 (596) (DB) ** A 1915 Cal 528 (528) (DB) ** (1911) 14 Oudh Cas 45 (47) ** (1910) 32 All 164 (167) (DB)

[But see A 1957 Mad 191 (192). (Arrangement with co-mortgagee that he must remain in possession and appropriate income towards mortgage-debt — Income so appropriated amounts to actual payment and discharges mortgage against all mortgagees though there is no payment of a lump sum.) ** A 1925 Mad 261 (263) (DB). (Payment made to one joint-mortgagee is valid discharge of mortgage liability. But a mere undertaking to pay the amount at some future date is not payment.) ** (1909) 1 Ind Cas 219 (219) (DB) (Mad). (A release of a mortgagor by one of several joint mortgagees, on payment to him of the mortgage-debt, discharges the mortgagor from all liability under the mortgage to the other mortgagees, inasmuch as the mortgagor had made a promise to two mortgagees jointly and the right to claim performance rested with both mortgagees jointly.)]

(12) The principle that payment to one of several joint creditors does not operate as a discharge of the debts in so far as the other creditors are concerned is not applicable to a case where the payment is to a joint mortgagee who was the manager and agent of the others. A 1928 Cal 125 (126) (DB) ** (1937) 169 Ind Cas 531 (531, 532) (Lah). (One co-heir cannot give valid discharge without consent of other — Payment to one is valid to the extent of his share; other's right to recover from the debtor is not affected.) ** A 1918 Mad 29 (29, 30) (DB) ** A 1916 Mad 1128 (1128) (DB).

(13) Where money was lent on joint account by two brothers who were appointed executers of the deceased testator by his will, the mortgagor in making repayment must see that he made the payment to and obtained a receipt from a person entitled to give him a discharge. A 1916 Cal 568 (568, 569) (DB).

(14) Payment to one of heirs of mortgagee does not bind the other heirs. A 1915 Oudh 29 (30) (DB).

Payment of rent to one of co-lessors.

(15) Payment by tenant of the rent to one of two co-lessors will not discharge him from liability to pay the share of the other co-lessor unless there is an agreement between the co-lessors that the rent received shall be held by them jointly or a mutual grant of authority between them to receive the rent. A 1952 Mys 68 (69).

(16) Where a tenant pays off the entire rent due from him to one of two co-sharers, he can escape liability to the other, if he shows that his payment to that co-sharer was one made bona fide. But if the payment by him was made to defeat the claims of the other co-sharer, the latter's right to recover his share of rent is not affected. A 1916 Mad 208 (208, 209) (DB).

(17) Where under a rent-deed its executant describing A as the owner of the

Section 45 — Note 2 (contd.)
property stipulated to pay the rent only to her he cannot elect to pay it to B whose name also has been included in the deed on the ground that she is an elderly member of the family. A 1952 Raj 115 (121, 122) (DB).

Debt due to Hindu joint family.

(18) In the case of a debt due to a joint family, the payment made to the manager of the family would discharge the debt so as to bind the junior members of the family as well. A 1952 Mys 68 (69). (Even a junior member can be treated as a manager for the purpose where it is clear that he had been so treated by the other members of the family and allowed to receive payments due to the family.)

(19) Transaction of mortgage really entered into by joint Hindu family but executed in favour of minor member. Tender of mortgage money to managing member of family is good and valid tender in law. A 1922 All 355 (356) (DB).

(20) Payment made to junior member of joint Hindu family during lifetime of its manager in whose favour the bond was executed does not discharge the promisor. A 1918 Mad 29 (29) (DB).

(21) The payment of a debt due to a joint Hindu family to a member other than the karta of the family will not bind the other members of the family and discharge the debt unless the member receiving the payment had authority to do so from the karta himself. A 1951 Ajmer 11 (11, 12) ** A 1933 Bom 245 (247) (DB).

(22) Where after mortgage to one member on behalf of family partition had taken place, payment to one of divided members is not valid discharge. (1910) 20 Mad LJ 709 (715) (DB).

(23) Order 36, Rule 6, Civil P. C. would certainly restrict the Hindu law powers of a father or manager of a joint Hindu family when he has been appointed as the next friend of the minor members to give a discharge but not when a different person is the next friend. (1949) 27 Mys LJ 74 (80, 82, 83) (DB).

(24) Though the right of a deceased person vests in his legal representatives in several shares, so far as the ancestor's debtor is concerned, they take as one unit and a suit to enforce the right must be instituted by all of them. The right can be exercised even by one also by producing in Court up to date of decree a succession certificate in his favour. 1964 Ker LJ 676.

(25) If a document is executed in favour of two persons who are members of the joint Hindu family, and concerns the business of that joint Hindu family, and one of them is the karta of the family, the karta alone can bring a suit, for he effectively represents the joint Hindu family. The other member of the family may be a proper party to the suit, but not a necessary party to the suit. The case is not at all covered by Section 45. 1960 Raj LW 129.

3. Suit by joint promisees.— (1) Under Section 45 of the Contract Act, it is not open to one of two or more joint promisees to sue alone either for performance of the promise in its entirely or to the extent of his share. **A 1957 Andh Pra 688 (690) (DB)** ** A 1927 Mad 84 (84, 85) ** **1889 Pun Re No. 156 p. 518 (540, 541) (FB)** ** (1886) 10 Bom 32 (34) (DB). (Defendant cannot be deprived of his right to insist on the other co-owners being joined on the record by reason of there being evidence to show that they approve of the suit being brought by the plaintiff alone.)

[See also (1911) 33 All 327 (331) (DB) (As one of several heirs of a deceased cannot sue for his share of debt due to deceased it is also not permissible to give him a succession certificate to enable him to collect a part of the debt due to the deceased.)]

(2) All the joint promisees are necessary parties to a suit to enforce a joint promise and the omission to implead any would render the suit liable to be dismissed. 1946 Jaipur LR 130 (131) ** A 1928 Sind 16 (16) (DB). (Two brokers employed in respect of single transaction — Suit by one for his own share of commission without impleading other brokers as co-plaintiff or defendant is liable to be dismissed.) ** A 1969 Raj 278 (280). (Debts of 56 creditors to same debtor — Specified separately in joint agreement relating to debts — Suit by one creditor — Some creditors not impleaded — Suit not maintainable.)

(3) If, when a co-promisee is impleaded as a co-plaintiff, by an amendment of the plaint, the enforcement of the claim by him is barred by limitation, the suit by the other co-promisees should also fail in view of Section 45 of the Contract Act. A 1957 Raj 298 (299).

(4) Joint promisees have joint right of suit and consequently of appeal which would vest on the death of any one of them in the surviving promisees and the legal representatives of the deceased. Therefore the whole appeal would abate when these representatives are not substituted in the place of the deceased. A 1957 Madh Pra 89 (90).

(5) One of several joint promisees may sue alone if other promisees refuse to join in action in which case they may be added as co-defendants and notice may be given to them. (1909) 9 Cal LJ 331 (334) (DB) ** A 1957 Andh Pra 688 (690) (DB) **** (1908) 35 Cal 331 (345) (PC) ** A 1977 SC 2439 (2444)** A 1980 Cal 258 (261) ** A 1979 Mad 130 (133) : (1979) 1 Mad LJ 71

(6) Where a hatchita was executed by a person in favour of himself and three others each having a definite share, it was held that a suit by two of the three promisees for their shares under the hatchita against the executant and the other promisee who refused to join with plaintiffs was maintainable. A 1941 Cal 595 (597 598) (DB).

(7) One co-promisee may sue on his own account. Section 45 does not prohibit this and one plaintiff must not be held to have lost his rights to enforce an obligation because others entitled to share in that right have lost their remedy only by the expiry of the period of limitation, and have been joined as defendants. **(1905) 1905 Pun Re No. 57, p. 192 (198) (FB).**

(8) Section 45 does not govern the case **of co-trustees and therefore, a surviving**

Section 45 — Note 3 (contd.)

co-trustee can file a suit for rent from tenants without impleading the legal representatives of the deceased co-trustee. A 1949 Mad 654 (655, 656).

(9) Where one of the two joint promisees sues to enforce the claim for debt making the co-promisee defendant, the claim cannot be split up in the absence of facts to show that the co-promisee has abandoned his claim. A 1959 Raj 254 (256).

(10) The general rule about the effect of death of a party to a contract on the survival of the rights under the contract to the legal representatives of the deceased party is that such rights ordinarily survive to the legal representatives unless the very nature of the contract shows that the rights themselves were personal to the party who died, and in the nature of things they could not be claimed by his legal representatives. ILR (1972) 1 Delhi 308 (309).

Co-promisees under promisory note.

(11) One of the co-promisees under a promissory note is not entitled to bring a suit without making the other promisee also a party to it under Section 45 of the Contract Act, claim right to claim performance of the promise rests with them jointly. A 1936 Pat 274 (275) : 37 Cri LJ 848.

(12) Although the plaintiff claims a money decree alleging himself to be the sole promisee the Court is justified in dismissing his suit on the ground of non-joinder of necessary parties where it finds that the debt in fact was not solely due to him but only jointly with two others who have not been impleaded. **1891 Pun Re No. 86, p. 422 (426, 427) (FB).**

Joint mortgagees.

(13) The rule that all the promisees should combine to enforce a promise which is jointly in their favour applies to mortgages also. Therefore, a suit by a co-mortgagee by himself, without impleading the other mortgagees either as plaintiffs or defendants for the whole or part of the mortgaged property should be dismissed as being not maintainable. **A 1950 All 598 (599, 603) (FB) ** A 1919 PC 24 (26) **** (1913) 20 Ind Cas 151 (151) (DB) (All). (Suit by one co-mortgagee for sale of entire property to recover his share of debt due.) ****** 1882 Pun Re No. 175, p. 519 (520) (DB) ****** A 1968 All 201 (202).

(14) Mortgage — Several mortgagees — Suit by one mortgagee to enforce part of security — All mortgagees made parties — Allegation that other mortgagees had received their share of mortgage money — Plaintiff undertaking to increase amount of claim and pay court-fee if other mortgagees' claim not satisfied — Suit as framed competent — Suit as framed cannot possibly be defeated when all the mortgagees are parties thereto and plaintiffs seek to recover whatever is due in the security. A 1914 Cal 788 (789) (DB).

(15) Partnership Act (1932). Ss. 69 (2), 4 — Firm — Suit on mortgage instituted in the name of firm — The fact that name of a person who has become partner of the firm subsequent to the execution of suit mortgage is not shown in Register of Firms as partner on the date of institution of the suit would not be a bar under Section 69 (2) of the Partnership Act (1932) for the maintainability of the suit. A 1972 Mys 209 (212).

Suits relating to sale.

(16) One only of the several persons in whose favour an agreement to sell a certain property has been made cannot sue to claim specific performance of the agreement. (1912) 11 Mad LT 192 (193) (DB).

(17) Once all the parties to the agreement are before the Court whether as plaintiff or defendants, there is nothing in Section 45 in the Indian Contract Act making a suit instituted by only some of the parties to the contract as not maintainable. (1972) 2 Mad LJ 401 (403).

(18) The defendants sold a certain village to the plaintiff and his brother, fixing the price on the basis of the net income which the defendants stated at the time of the contract to be a certain amount. The plaintiff later on discovered that the defendants had overstated the income and made certain other fraudulent representations, and sued for compensation for the fraud of the defendants at the time of the sale, alleging that on a partition entered into subsequent to the purchase between himself and his brother the village fell to his share. **Held**, that the suit was not one of pure tort, but was one for a wrong arising out of a contract, and that the suit was bad for non-joinder, it having been brought only by one of the joint promisees; **Held** also, that the fact that there was subsequent partition between the plaintiff and his brother did not confer on plaintiff the right to sue the defendants for compensation. A 1932 Mad 583 (584) (DB).

Joint leases.

(19) Joint lease entered by co-promisees — Some suing for possession — Others impleaded as defendants on their refusal to join — Suit held maintainable. 1912 Pun LR No. 49 p. 150 (158) (DB).

(20) A suit for ejectment can be brought against a tenant by sufferance by one co-sharer landlord alone. With regard to realisation of arrears of rent, however, all the co-owners must join as the property belongs to them jointly and the liability arises out of the contract of tenancy. A 1956 Madh B 35 (37). (Suit for ejectment and recovery of arrears of rent and mesne profits is not wholly a suit to enforce the contract of tenancy. It can be maintained by one of the co-owners as a suit for possession against a trespasser.)

[See however (1964) All LJ 465 (DB). (When a lease is granted jointly by two persons, one of them cannot bring a suit for ejectment and arrears of rent, as he cannot terminate the tenancy and the rent is also payable jointly.)]

(21) In the case of a joint lease, one of the co-lessors cannot maintain a separate suit against the lessee for his share of rent but where the lessee collusively and not bona fide pays the rent to one of the co-lessors, the payment operates as a discharge of that co-lessor's share only and the other co-lessor can maintain a suit for

Section 45 — Note 3 (contd.)

his share of rent without making the other co-lessor, who has received the money, party to it. A 1945 All 311 (315, 316) (DB).

(22) In the absence of proof of agreement between two co-lessors that the rent paid should be held by them jointly or of a mutual grant of authority between them to receive the rent the tenant by payment of rent to one of the co-lessors was not discharged from his liability to pay rent to the other and consequently the other was entitled to one half of the rent from lessee. A 1972 Orissa 269 (270, 271). **(A 1957 Madh Pra 5, Not followed.)**

(23) Suit for ejectment and recovery of rent by a co-mortgagee-lessor alone, instituted after the death of the other co-mortgagee-lessor, would not be maintainable without impleading the representatives of the deceased co-mortgagee-lessor. **A 1973 Raj 63 (67, 68).**

(24) A suit for enhancement of rent under the Bengal Tenancy Act, 8 of 1885, being an action in which all the landlords are required to act together by the Statute itself the rule which permits one of the landlords to bring a suit by himself provided he makes the other joint landlords parties-defendant to the suit will not apply to such suits. **(1911) 38 Cal 270 (277) (PC).**

Suits by Joint Families.

(25) Joint cause of action by members of an undivided Hindu family against defendant — Suit in name of only one member not maintainable. (1895) 18 Mad 33 (35, 36) (DB) **** A 1971 Andh Pra 363 (376) (FB)** ** A 1970 Bom 251 (262).

(26) Where the right of a person to recover certain debt has devolved upon his sons jointly and the sons constitute a joint Hindu family, they can file only one suit against their debtors for the recovery of the whole amount. Some of them cannot split up the claim and institute a suit for a part thereof on their own behalf on the ground that others did not join with them as co-plaintiffs. In such a case, it would be incumbent upon those instituting suit to claim the whole amount on behalf of themselves and their brothers on payment of the full court-fees and to make their brothers who refused to join as co-defendants. A 1939 Sind 173 (176) (DB).

(27) Plaintiff alone suing defendant for joint debt due to him and three brothers in a joint Hindu family — Defendant can insist on all the contractors being made co-plaintiffs when there is a joint cause of action notwithstanding an expression of willingness by the other members of the family that the plaintiff should sue alone. (1883) 7 Bom 217 (219) (DB).

(28) Members of joint Hindu family firm having a joint cause of action against defendant — Defendant has a right to ask to join all members in suit for enforcement of claim, though plaintiff may afterwards adjust sums recovered with his co-contractors. (1881) 6 Cal 815 (826) (DB).

(29) Suit for recovery of debt, secured or unsecured due to Hindu Joint family — Some members refusing to join as plaintiffs can be made defendants. (1912) 9 All LJ 410 (417) (DB).

(30) Manager of joint Hindu family can enforce contract made with family — Junior members not necessary parties. **(1911) 33 All 272 (277, 278) (PC).**

4. Devolution of joint rights.— (1) The rule of survivorship which according to the English common law applies in the case of devolution of joint rights has no place in India inasmuch as Section 45 has not recognised the rule. A 1948 Nag 279 (282) (DB).

(2) Where the agreement between the parties does not specify any shares and it is impossible to say in what shares the consideration was to be paid by or the land to be divided between the parties, the right to enforce the contract, on the death of one of the parties, vests in his legal representative along with others and not in others alone. A 1935 Lah 478 (479) (DB).

(3) Where one of several joint tenants is liable for the whole rent, on the death of one such joint tenants leaving a number of heirs, the liability is joint and not several because the bundle of rights and liabilities which was in one such joint tenant is, by operation of law transferred to number of coparceners who constitute in law one heir. A 1924 Cal 165 (166, 167) (DB). ** A 1960 Cal 187 (189). (On the death of original promisee, single individual, his heirs do not become themselves several joint promisees.)

(4) Where a person solely entitled to a certain amount in deposit with a party wrote to that party asking him to convert the account into a joint account in the name of himself and his wife payable to either or survivor and upon which both of them could operate and that letter was not signed by the wife as well it was held that the wife who was merely a volunteer did not thereby become a joint creditor of that person and it cannot confer any right on the wife towards that amount. A 1957 Cal 585 (589).

(5) Mortgage in favour of B and D — Suit by B alone — D dying during course of suit — B accquiring D's rights of recovering debts — Non-joinder of D held immaterial — B, although he had no right to sue on the dav when he instituted the suit, had acquired the full and exclusive right when D died. A 1939 Nag 242 (244) (DB)

(6) Appeal by all plaintiffs in suit by several co-sharers — Common cause — One appellant dying during pendency of appeal — No legal representative brought on record — Court can pass any decree as the case required even though no legal representative is brought on record — Sec. 45 Contract Act, does not apply. A 1941 Oudh 155 (158).

(7) Part-assignment of debt is valid in law, and action can be maintained thereon by the transferee provided he makes both the transferor and other assignees that may be concerned parties to the suit. A 1941 Lah 337 (340) (DB)

(8) In a case of a joint debt, an assign-ment by one of the joint creditors does not

Time and place of performance

46. Time for performance of promise, where no application is to be made and no time is specified.— Where, by the contract, a promisor is to perform his promise without application by the promisee and no time for performance is specified, the engagement must be performed within a reasonable time.

Explanation.— The question "what is a reasonable time" is, in each particular case, a question of fact.

[Malaysian Contract Act 1950, S. 47.]

Section 45 — Note 4 (contd.)

enable the assignee to enforce the payment of the whole debt A 1937 Cal 532 (533).

5. **Partnership cases.**— (1) Section 45 of the Act has no application to debts due to trading partnership. Although the right of the deceased partner devolves on his executors, the remedy survives to his co-partners, who alone must enforce the remedy by action. A 1923 Lah 197 (200) (DB) ** A 1929 Rang 306 (307) ** (1894) 17 Mad 108 (117) (DB).

[**But see** A 1974 Bom 52 (55) ** (1897) 21 Bom 412 (421, 422) (Representative of deceased partner alone may sue for recovery of debt to the firm even where the business of the firm is continued by the surviving partner.)]

(2) Right of suit on death of partner — See Order 30, Rule 4, Civil P. C.

(3) The representatives of a deceased partner are not necessary parties to a suit for the recovery of a debt which accrued due to the partnership in the lifetime of the deceased partner. (1893) 17 Bom 6 (14) (DB) ** (1913) 17 Cal LJ 648 (651) ** A 1961 Madh Pra 314 (315).

(4) Although one partner alone cannot sue for partnership debt, yet he can use name of firm and of co-partners so as to be able to sue, and unwilling partner can only claim indemnity for costs. A 1917 Pat 246 (246) (DB).

(5) If surviving partners refuse to sue for recovery of debts due to firm the remedy of the legal representative of deceased partner lies in suit against others for winding up, for accounts and for appointment of receiver. A 1914 Low Bur 58 (61) (DB).

(6) Where a partner of a dissolved firm collects his share of debts, impleading others, the other partners can sue for their share of debts. A 1919 Lah 14 (15).

(7) Where firm is dissolved, suit by one partner for individual share of a debt, owing to the firm, is not maintainable even if other partners are made co-defendants. A 1924 Nag 196 (197).

(8) Payment to one of two partners constituting firm operates as discharge. A 1920 Lah 53 (54).

(9) Section 45 has not been modified by the Civil Procedure Code, save as appears in Order 30, which is confined to cases where suits are brought not by individuals but in the name of firms. A 1927 Lah 115 (117) (DB).

(10) Rule 4, Order 30, Civil P. C. is enacted to set at rest doubt in connection with Section 45, Contract Act, regarding suit by or against firms. A 1927 Bom 581 (591) (DB).

(11) It is true that Order 30, Civil P. C. constitutes an exception to Section 45, Contract Act, but to press that provision into service the plaint must disclose that the suit or application has been brought by the firm and the partners signing the same have done so only as partners. A 1958 Punj 260 (262, 263) (DB) ** A 1969 Guj 178 (191) (DB).

(12) The suit on behalf of the firm can be filed equally by all the partners who are co-promisees and all of whom are under Section 45 of Indian Contract Act joined together in enforcing a promise against a third party promisor. A 1969 Guj 178 (185). (**Reversed** on facts in A 1976 SC 1703).

(13) If all the partners are dead the right of the partners devolve on the legal representatives of all the partners who would become joint promisees and a suit only by some of the joint promisees cannot proceed. 1974 Rajdhani LR 286 (290).

(14) Where a property belongs to a firm and is purchased by the funds of the firm a partner cannot file a suit in his own name on the basis of power of attorney executed in his favour by defendant partners against other partners for rendition of accounts because a partner in his individual capacity cannot assert a right to claim performance of contract by invoking Section 45 of the Contract Act. A 1979 Delhi 160 (164).

Section 46

(1) When no time is fixed for completion of sale, it must be implied that it is to be completed in a reasonable time. **A 1930 PC 165 (169) ** A 1951 Orissa 291 (294) (DB) ** A 1972 SC 1826 (1833).**

(2) The normal or usual time is alone the relevant criterion or test to be taken into consideration for finding out the prima facie reasonable time which would be taken in transit of goods for raising the necessary statutory presumption under Sec. 76 of the Railways Act (IX of 1890). (1978) 19 Guj LR 34 (47, 48) (DB).

[A 1967 Guj 130 **held no longer good law in view of** the Amendment of the Railways Act in 1961.)]

(3) Where an agreement to convey land provides that the vendee would be bound to reconvey the land to the vendor it must be taken that the parties contemplated the performance of contract within reasonable time as implied by law and the agreement cannot be challenged on the ground of vagueness. A 1951 Mad 767 (768).

(4) The law engrafts on the contract a condition that reasonable time. in the absence of any specific time provided in the contract, will be of the essence of the contract and if the contract is not performed within that reasonable time by any of the

Section 46 (contd.)

parties, that party will be deemed to be guilty of breach of duty or breach of contract. A 1958 Punj 111 (115) (DB).

(5) Even if time be not of the essence of the contract, under Sec 46, it has to be performed within reasonable time. So if there is unnecessary delay on the part of the plaintiff it would be open to the other party to put an end to the contract by giving a notice before its termination. A 1950 Nag 238 (240) (DB).

(6) The question as to what is a reasonable time is a question of fact. ('11) 22 Mad LJ 207 (211) (DB) ** 1967 All LJ 323 ** A 1979 Cal 246 (248) (DB) ** A 1967 Guj 130 (137). **(Held no longer good law in view of amendment of Railways Act in 1961).**

(7) C. I F. Contract — In absence of any stipulation as to time for payment, payment must be made when bill of lading and other shipping documents are presented to buyer. A 1942 Mad 139 (141) (DB).

(8) In a contract of purchase of shares, reasonable period for its completion held would be two months. **A 1950 PC 90 (96).**

(9) B agreeing with A to pay certain debts owing by A — Three years from date of contract held was reasonable time for performance. (1912) 22 Mad LJ 207 (211) (DB).

(10) Contract for sale of goods — Goods to be delivered in instalments — Dates of delivery of instalments not fixed — Instalments must be deemed to be rateably distributed over period appointed for delivery of whole quantity of goods. **A 1917 Cal 721 (727) (FB)**

(11) Person borrowing ornaments for use in ceremony — It is unreasonable for him to detain them after completion of ceremony and demand by their owner. A 1930 Oudh 395 (396, 397) (DB).

(12) Subsequent mortgagee to redeem prior mortgages — Time not fixed for such redemption — Puisne mortgagee must redeem within reasonable time, i. e., by the first date when redemption is obtainable. A 1918 Oudh 331 (332) ** A 1925 Oudh 132 (134) ** (1900) 23 Mad 441 (443, 444) (DB).

(13) Mining leases not containing time for payment of royalty — Royalty must be paid within reasonable time of coal being raised and three months held reasonable. A 1940 Pat 609 (609, 610) (DB).

(14) Where no time for performance of contract is specified and the contract is not performed by a party within reasonable time, the other party is not bound to give a prior notice to perform the contract within a specified time before treating the contract as revoked or rescinded. A 1962 Pat 155 (157) (DB).

(15) There is no difference in law between a contract where the time is fixed by the act of the parties and a contract where no time is fixed and by implication of the law the contract is to be performed within a reasonable time. A 1962 Pat 155 (158) (DB).

(16) It is true that the Court always leans in favour of upholding a commercial contract and if necessary fills in the gap by supplying a term which the parties have in view but have not expressly provided for in their agreement be it oral or written. But this power of the court does not extend in making a new Contract for them and the Court cannot exclude an express term for giving business efficacy to their bargain by invoking Sec. 46 of the Contract Act and thereby holding that they have impliedly agreed to perform their obligations within a reasonable time which they have intended. ILR (1976) 1 Cal 228 (234).

(17) Time will be of the essence of the contract if it is so provided in the contract or if one of the parties after unreasonable delay on the part of the other party gives a reasonable notice to the other party making time as of the essence of the contract. If none of the two has happened, reasonable time will be deemed to be the time which will be of the essence of the contract. If the contract is not performed within that reasonable time by any of the parties that party will be deemed to be guilty of breach of duty or breach of contract. A 1958 Punj 111 (115) (DB).

(18) Ordinarily, in the absence of an agreement to the contrary, time is not of the essence of a contract for sale of immovable property and there is nothing wrong if the plaintiff exercises his right to claim specific performance within the period of limitation prescribed by the law. A 1965 Raj 115 (118).

(19) Where a written contract for supply of large quantity of milk to certain field service depot did not fix any time for the supply and the fixation of time was left to the officer operating the contract, it has to be implied that the parties intended that the time fixed would be reasonable. 1965 Pun LR (Sup) 56 (DB).

(20) Where a stipulation in a sale deed in respect of certain property in the Punjab provided that balance of consideration would be paid "as soon as possible but when vendee would be in position to make payment" its import was that the balance would be payable within reasonable time. A 1964 Punj 123 (126) (DB).

(21) Agreement for purchase of plot of land after completion of roads — Conveyance to be taken within one month of such completion — Subsequent requisition of land rendering such activity unlawful — No time fixed for development of land — Section 46 held to have been excluded in these circumstances. **A 1965 SC 1523 (1526).**

(22) Where a contract for supply of goods provided by an express term that the delivery had to be completed within ten days or earlier i. e., before 10th May 1964 and the buyer extended the time and accepted delivery upto November, 1964, it cannot be held, even applying the doctrine of reasonable time, that the extensions of time should go on indefinitely and that the buyer could not terminate the contract after a certain extension. A 1970 Cal 321 (323, 324).

(Malayan Case)

(23) Damages recoverable for breach of Contract for delay in the completion of an ordinary dwelling house required for personal occupation include the reasonable cost of living accommodation or living elsewhere if such expenses were in fact incurred In the present case, the respondent

47. Time and place for performance of promise, where time is specified and no application to be made.— When promise is to be performed on a certain day, and the promisor has undertaken to perform it without application by the promisee, the promisor may perform it at any time during the usual hours of business on such day and at the place at which the promise ought to be performed.

Illustration

A promises to deliver goods at B's warehouse on the first January. On that day A brings the goods to B's ware house, but after the usual hour for closing it, and they are not received. A has not performed his promise.

[Malaysian Contract Act, 1950, S. 48.]

48. Application for performance on certain day to be at proper time and place.— When a promise is to be performed on a certain day, and the promisor has not undertaken to perform it without application by the promisee, it is the duty of the promisee to apply for performance at a proper place and within the usual hours of business.

Explanation.— The question "what is a proper time and place" is, in each particular case, a question of fact.

[Malaysian Contract Act 1950, S. 49.]

49. Place for performance of promise, where no application to be made and no place fixed for performance.— When a promise is to be performed

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Section 46 (contd.)

gave evidence for her living accommodation and the learned Judge was convinced that she was paying $ 100 per month as rent. it was right in awarding damages of $ 100 per month for the relevant period. **(1976) 2 Malayan LJ 14 (16) (FC).** (Bee chuan hubber Fy — V — Loo Sam Moi).

Section 47

(1) Section 47 applies only when a certain day is fixed for performance. **(1907) 9** Bom LR 903 (909).

(2) Under a contract governed by the rules of the Bombay Cotton Trade Association the vendor is bound to tender a delivery order backed by the goods before 1 p. m. of due date Where the vendor has not tendered the goods before the specified time, he fails under Section 47, Contract Act, to perform his part of the contract. A 1916 Bom 268 (272).

(3) Acceptance by mortgagor of part of mortgage money after agreed period does not amount to new contract but is mere acquiescence in late payment. A 1924 Pat 825 (829) (DB).

(4) Electric supply company — Discount to be allowed for prompt payment — Consumer receiving bill after expiry of date fixed for payment with discount is not entitled to fresh bill fixing fresh date for payment. A 1934 Lah 292 (292, 293).

(5) The instalment due in 1947 was payable on the 1st May, 1947. **Held,** that the remittance of the money order from a different place on 1-5-1947 could not be said to be payment to the creditor on or before the 1st May, 1947. It was not suggested that the remittance reached the creditor on the same day. So the creditor was not bound to accept the remittance towards the instalment due on the 1st May, 1947. A 1954 Nag 270 (271) (DB).

Section 48

(1) Sections 48 and 49 clearly indicate that the mode of performance of a contract is a question of fact in a particular case. A 1944 Nag 330 (332).

(2) No doubt a limited company entitled to receive money is not on the same footing as an ordinary individual who may at any moment change his residence and there may be a good reason to infer that money due to a company is to be paid by a debtor in another country at the office of the company. A 1944 Nag 330 (332).

(3) The plaintiff took a licence from the defendant to take wood from the defendant's forest and deposited a certain amount as security in the treasury maintained by the defendant. The deposit was to be refunded on the expiry of the term of the licence. A 1944 Nag 330 (332).

(4) Contract for sale of goods by sample and within specified time — Goods delivered not according to sample nor within specified time or within reasonable time — **Held,** there was breach of contract on vendor's part, and he was therefore not entitled to damages from purchaser, and the purchaser was entitled to refund of earnest money. (1965) 31 Cut 477.

SECTION 49 — SYNOPSIS

1. Rule that debtor must seek creditor.
2. Place of performance.
3. Place of repayment of deposit.
4. Place of payment of rent.
5. Place of payment in case of contract of agency.
6. Place of delivery of goods.
7. Promissory note payable on demand.

1. Rule that debtor must seek creditor.— (1) It is a common law rule that where no place of payment is specified, either expressly or by implication, the debtor must

without application by the promisee, and no place is fixed for the performance of it, it is the duty of the promisor to apply to the promisee to appoint a reasonable place for the performance of the promise, and to perform it at such place.

Illustration

A undertakes to deliver a thousand maunds of jute to B on a fixed day. A must apply to B to appoint a reasonable place for the purpose of receiving it, and must deliver it to him at such place.

[Malaysian Contract Act 1950, S. 50.]

Section 49 — Note 1 (contd.)

seek out his creditor. (1905) 7 Bom LR 993 (994) (DB) ** A 1955 Cal 413 (414) ** A 1950 Madh B 72 (75) (DB) ** **A 1960 Mad 64 (69): 1960 Cri LJ 242 (FB).** ** ILR (1969) 1 Cal 210.

(2) The common law rule is a reasonable rule and is in conformity with justice and equity as it recognises the obligation of the debtor to pay his debt by going to his creditor and imposes this obligation only when there is no express contract to the contrary. A 1956 Bom 111 (112) (DB) ** A 1968 Guj 276 (279) ** A 1966 Cal 259 (264) ** A 1965 Andh Pra 231 (234) ** A 1964 Cal 418 (421) (DB) ** A 1961 Raj 93 (97). (If it is not possible to establish such agreement, the court can apply the rule. If, however, on a consideration of the various circumstances, it is not possible to arrive at a finding as to an express or implied agreement, other factors cannot be considered along with the rule for determining place of performance.)

(3) In applying the general rule regard must be had to the proper place at the time when the money is payable. A 1955 Cal 413 (415).

(4) By British law the duty of a debtor to find and pay his creditor is only imposed upon him when the creditor is within the realm. **A 1925 PC 290 (292)** ** 1953 BLJR 626 (627).

(5) Section 49 does not preclude the application of the rule of English Common Law that the debtor must seek out his creditor and pay his debt where the creditor happens to reside, unless there is an arrangement to the contrary and does not get rid of the inference which should justly be drawn from the terms of the contract itself or from the necessities of the case. A 1941 Mad 695 (696) (DB) ** A 1956 Bom 111 (111) (DB) ** A 1936 Cal 97 (99) ** A 1936 Rang 251 (252) ** A 1915 Nag 65 (67) ** ILR (1960) 10 Raj 43 [**But see** A 1961 Raj 93 (97). (A 1936 Cal 97 and A 1950 Bom 111, **Dissented from.**)]

(6) There has been a pronounced disinclination on the part of the Indian Courts to apply to this country unreservedly the English Common Law that a debtor should find and pay his creditor and that generally speaking that place of payment has to be determined, independently of any such general maxim, with reference to the terms of the contract, the circumstances attending on it, the necessities of the case and having regard also to the statutory provision contained in the Code of Civil Procedure and in Section 49 of the Contract Act. A 1957 Mad 201 (205, 206) ** A 1946 Mad 300 (304).

(7) The rule of debtor seeking the creditor is not applicable in India for the purpose of determining the local jurisdiction of the Courts. A 1951 Punj 33 (42) (DB) ** ILR (1961) 2 Ker 664 (DB).

(8) Assuming that in regard to the recovery of the amount of deposit or advance upon breach of contract the principle of law is that unless the right is excluded by the terms of the contract money paid for consideration which fails becomes money received by one party to the use of the other party and is recoverable as a debt, the rule that the debtor must find his creditor would apply only if the suit is confined to a return of the advance and nothing more and then the forum would be the place where the plaintiff resides. A 1957 Mad 201 (206).

(9) Where the plaintiff is suing on the basis of a contract and the breach thereof, the question of jurisdiction has to be decided on the determination of the question of the breach of contract and not on the relationship of debtor and creditor and hence the Common Law rule that debtor must find the creditor does not apply. A 1957 Mad 201 (206).

(10) In the case of a wife claiming maintenance from her husband and claiming return of ornaments against her father-in-law : **Held**, that neither the husband nor the father-in-law were debtors and the English rule had no application to the case. Even if they were debtors, the common law rule did not apply inasmuch as in the case of husband, his liability, if any, did not arise out of contract. It arose, if at all, because he maltreated his wife to such a degree that she could not live with him any longer and in the case of the father-in-law, it was reasonable to infer that the parties contemplated repayment and delivery of the cash and articles at the family house or at the place where the wife was residing with her husband. A 1941 Mad 695 (696) (DB).

(11) Neither Section 49 nor the English rule of debtor seeking creditor applies when the obligation to be discharged is not the obligation to fulfil a promise express or implied but is different as for example, liability arising out of breach of contract or out of tort or agency. A 1960 Ker 188 (190).

(12) Debtor to seek creditor — Rule not applicable to Bank account. (1970) 74 Cal WN 150.

Section 49 — Note 1 (contd.)

(13) Where money is deposited in Indian currency with a money lender, who is a permanent resident of India, it is implicit that the money lender agrees to repay the money back in India and in Indian currency. The investment of the amount by him in a foreign firm will not give him right to claim to be a banker and hence he cannot claim that the depositor must claim the money in the country where it is invested. A 1972 Mad 238 (240).

2. Place of performance.— (1) The Contract Act makes no provision for place of performance when no time or place is fixed and where there is no provision to perform without application. (1907) 9 Bom LR 903 (910).

(2) The creditor's place of residence at the time when contract was made will often be deemed, by fair implication of fact, the place of performance contracted for. A 1959 All 612 (613) ** **A 1960 Punj 450 (453, 455) (FB).**

(3) It is only where the contract does not stipulate the place of performance, that Section 49 will come into play. A 1957 Mad 201 (204) ** A 1959 All 612 (614) ** 1978 Ker LT 906 (913) (DB).

(4) The rule as to the place of performance, whether it be payment or any other mode of performance, is to be determined by Section 49. **A 1927 PC 156 (158)** ** (1905) 7 Bom LR 993 (994) (DB).

(5) Strictly, Section 49 only comes into operation when there is an application by the promisor to the promisee. Where it is not suggested that the promisor made any application to the promisee for the performance of the contract Section 49 would have no application. A 1956 Bom 111 (111) (DB).

(6) The promise to pay the creditor implies that the debtor will find the creditor to pay him and will pay where the creditor is; under Section 49. Contract Act, it is reasonable to suppose that if the debtor applies for a place to be appointed the creditor will appoint the place where he himself resides, at any rate, he has the power so to appoint. A 1935 Bom 283 (284).

(7) The duty having been cast on the promisor by Section 49, to apply to the promisee to appoint a place for the performance of his obligation he cannot improve his position by neglecting to perform that duty. A 1946 Mad 300 (301) ** A 1935 Bom 283 (284).

(8) Where place of performance is not mentioned in the contract, a Court is not precluded from finding out implied intention of the parties in regard to the place of performance. (1941) 22 Pat LT 282 (283) ** A 1961 Pat 198 (199) (DB).

(9) Though the common law rule that a debtor must seek his creditor may not as a rule of law be applicable to India, yet it can be considered as a factor for determining the intention of parties as to place of payment. A 1971 All 326 (327).

(10) Contract silent as to place of payment of liability — Payment should be made where creditor is — Intention of parties to the contract must be seen **A 1927 PC 156 (158)** ** A 1956 Orissa 147 (151) (DB) ** A 1946 Mad 300 (301, 304) ** A 1933 Sind 62 (64) (DB) ** A 1930 Nag 207 (208) ** (1906) 30 Bom 167 (171).

(11) Section 49 clearly indicates that the mode of performance of contract is a question of fact in a particular case. When the manner and the place of repayment of money are not the subject of express contract it is the duty of the Court to gather what by necessary implication, having regard to the nature of the contract and the circumstances in which it was entered into, the parties must have meant. A 1944 Nag 330 (332) ** A 1964 Cal 418 (421) ** A 1961 Pat 198 (199) (DB).

(12) Where an employer has a number of employees, who are paid regularly on the first or any other fixed date their monthly emoluments at the employer's office, there is an implied contract that the place of payment is the employer's office and to such a stituation, the Common Law rule that the debtor must seek the Creditor has no application. 1972 MPLJ 1053 (1060).

(13) If from the circumstances in which the contract in question was entered into it is reasonable to infer that the intention of the parties was that performance was to be in a certain place, that inference should be drawn whether the rule of the English Common Law which requires the debtor to seek the creditor applies or not to India. A 1938 Mad 977 (978, 979).

(14) Where A, a trader at Karachi had business with B in India who contracted to pay A at Karachi and on partition A came to India as displaced person and settled at place X, B was not bound to seek his creditor A at place X. A 1960 Raj 243 (244).

(15) The rule that a debtor must seek his creditor does not entitle the creditor in the absence of contract to the contrary to claim payment beyond the jurisdiction of the country, where the contract was made. The contract was made in Pakistan (the date of the contract being after the partition of India), and the creditor was not entitled on shifting to India to say that the payment should be made at his new place of residence. A 1959 All 612 (613, 614).

(16) Neither Section 49 nor the English rule of debtor seeking creditor applies where the obligation to be discharged is not the obligation to fufil a promise express or implied but is different as for example, liability arising out of breach of contract or out of tort or agency. A 1960 Ker 188 (190).

3. Place of repayment of deposit.— (1) The general rule that debtor must seek the creditor which may be applicable to the case of private money lender and a borrower, has no application to the case of a fixed depositor in a Bank which is a limited company. A 1944 Nag 330 (331).

(2) In the absence of any specific contract to that effect, it cannot be said that a fixed deposit with a bank is repayable at any place where the depositor resides. The plaintiff depositor must prove that the money was repayable at the place where he resides. A 1940 All 243 (244).

(3) When there is no indication in the contract or otherwise of the intention of the parties where, on breach of the agreement, the deposit has to be returned, it is the duty of the defendant to return the de-

Section 49 — Note 3 (contd.)
posit to the plaintiff at the plaintiff's residence. ILR (1957) Ker 932 (939) ** ILR (1960) 10 Raj 187. ** 1971 Ker LR 567.

(4) Government not refunding security deposit — Security money became debt due from Government — Rule that debtor must seek creditor applicable. A 1966 All 159 (160).

(5) Bilticut transaction between defendant and plaintiff — Suit for recovery of amount deposited with seller as advance for transactions which did not materialise — Deposit is in nature of debt — Defendant bound to pay to plaintiff at latter's place. A 1962 Raj 122 (126).

4. Place of payment of rent.— (1) Where a lease is silent as to the place where the rent is to be paid, the question as to where it is payable is to be decided with reference to Section 49. A 1938 Mad 977 (978).

(2) Where the contract of lease does not fix a place for the payment of rent and the lessee does not apply to the lessor to fix a place for payment, under Section 49 of the Contract Act, the duty of the lessee is to pay the rent where the lessor is. This duty is not dependent on a demand being made by the lessor. A 1955 Nag 202 (203) ** A 1933 All 147 (148).

(3) The principle of law that a debtor has to find his creditor and discharge his debt to him if the contract does not provide for the place of payment is applicable in case of a tenant who has covenanted to pay rent to his landlord and the covenant does not provide for the place of payment. A 1953 Bom 280 (281) (DB).

5. Place of payment in case of contract of agency.— (1) In cases where the relationship is one of agency, the place of payment has to be determined independently of the general rule of English common law with reference to the terms of the contract, the circumstances attending on it and the necessities of the case. A 1946 Mad 300 (304) ** A 1960 Ker 188 (190).

(2) In the absence of specific terms in a contract the general law that the debtor must find the creditor, will apply in deciding the place where the profits and losses were to be paid in a contract of agency. A 1952 Raj 81 (83) (DB).

(3) Where certain persons staying at R enter into a contract of agency with a person staying at M, undertaking to sell his goods on commission at R, there is an implied obligation on them, arising from the necessities of the case, that they should pay their principal at his place of residence M. AIR 1936 Rang 251 (233).

(4) In the case of Pakki Adat agency primarily the place of payment is the place where the constituent resides but where the constituent has chosen to give directions to the effect that the payment should be made at any other place, it should be so done — Per Chandavarkar J. (1909) 33 Bom 364 (368) (DB).

(5) A firm A carried on the business of commission agents both at Indore and Jodhpur. B from Jodhpur entered into contracts for purchase and sale of bullion through the firm at Indore. These transactions proved unprofitable to B and the amount of loss was paid to third parties at Indore by A on behalf of B. B paid part of the dues to A and for the balance he was sued at Jodhpur. It was held that it was the statutory right which flowed from the contract of agency that A was seeking to enforce against B and the suit had been brought in the Jodhpur Court as the defendant resided within the jurisdiction and the fact that in case of Pakki Adat the place of payment was normally where the constituent resides was immaterial **A 1954 SC 500 (502).**

(6) Insurance company at Lahore appointing certain person working at Meerut as its chief agent for Rajputana and Bundelkhand area — Appointment made at Lahore and all payments to be made at Lahore — Appointment subsequently cancelled — Suit by agent at Ajmer for damages for cancellation of the appointment — Subsequent suit by the company at Lahore for recovery of certain amount due by agent: **Held,** that the cause of action arose at Lahore and that Section 49 was not applicable to the case. A 1940 Lah 85 (86, 87).

(7) If by an agreement, express or implied, by the creditor, the debtor is authorised to pay the debt by a cheque and to send the cheque to the creditor by post the post office is the agent of the creditor to receive the cheque and the creditor receives the payment as soon as the cheque is posted to him. **A 1966 SC 1466 (1469).**

(8) Where money was deposited by the plaintiff resident of Sibi in Pakistan, with the defendant at Meerut, who was a commission agent to be utilised by the latter at Meerut for purchasing Jaggery, there was an implied agreement for repayment at Meerut and not at Sibi and hence the rule that 'debtor must find creditor' did not apply. A 1961 Raj 93 (98).

(9) Bank at Madras transferring customer's amount, upon customer's instructions standing in his name at Bank's Head Office at London, to Karachi Branch — Bank's Agency comes to an end as soon as amount is transferred — It is not under obligation to repatriate the amount from Karachi to Madras. A 1965 Mad 266 (274).

6. Place of delivery of goods.— (1) Section 49 applies to promises for payment of money as well as to promises for delivery of goods. A 1933 All 147 (148) ** **A 1927 PC 156 (158)**

(2) Section 49 is only a general provision and in the case of a contract for sale of goods is modified by Section 93 of the Contract Act. (1911) 10 Ind Cas 18 (19) (Oudh)

(3) Where a contract provided for delivery of the goods 'at any place in Bengal" and the place of delivery was to be mentioned thereafter and accordingly the buyer specified the place of delivery in a letter sent to the seller it was held that the contract resembled what was contemplated in Sec. 49. **(1897) 24 Cal 8 (17) (PC).**

(4) Even in a case where goods are sent by V. P. P. the contract is intended to be performed at the place where the goods are to be received and the Court at that place has jurisdiction to try the suit arising out of the contract. A 1934 Mad 581 (582).

50. Performance in manner or at time prescribed or sanctioned by promisee.— The performance of any promise may be made in any manner, or at any time which the promisee prescribes or sanctions.

Illustrations

(a) B owes A 2,000 rupees A desires B to pay the amount to A's account with C a banker. B who also banks with C, orders the amount to be transferred from his account to A's credit, and this is done by C. Afterwards, and before A knows of the transfer, C fails. There has been a good payment by B.

(b) A and B are mutually indebted. A and B settle an account by setting off one item against another, and B pays A the balance found to be due from him upon such settlement. This amounts to a payment by A and B, respectively, of the sums which they owed to each other.

Section 49 — Note 6 (contd.)

(5) When a seller takes goods to the buyer without any order from him and negotiates and effects a sale it must be taken, in the absence of anything to the contrary, that from the very nature of and circumstances of the transaction, the intention of the parties was that payment should be made at the buyer's place. A 1960 Ker 188 (190).

(6) In case of Bilticut transactions delivery of the railway receipt to the buyer after endorsing it in his favour is necessary to give him title to the goods. The place where it is to be delivered is the place where the performance of the contract is to be completed and the place of payment of money is the place where the buyer resides. The Court of that place has therefore, jurisdiction to try a suit arising out of such a contract. A 1962 Raj 122 (125).

7. Promissory note payable on demand.— (1) Section 49 deals with a contract between a promisor and a promisee and has no application to matters governed by the law merchant, which is contained for the most part, in the Negotiable Instruments Act. A 1942 Bom 251 (255) (DB) ** **A 1954 Madh B 184 (188, 189) (FB)** ** (1963) 4 Guj LR 305. (Sections 49 and 50 apply to a document which is not negotiable instrument but amounts to a promise to pay the stated amount together with interest.) ** A 1961 Cal 321 (328) (DB). (A 1940 Cal 443, **Dissented from.**)

(2) Section 49 has no application where money payable under a promissory note is payable on demand. (1908) 31 Mad 223 (228) (DB) ** A 1942 Bom 251 (254, 255, 256) (DB) ** A 1940 Cal 443 (445).

[**See also** (1912) 16 Cal LJ 279 (281) (DB). (Section 49 of the Contract Act does not apply, where the money is payable on demand and not "without application by the promisee.")]

(3) In India the common law rule that a debtor should seek his creditor is not applicable in the case of promissory notes and particularly in promissory note payable on demand. A 1951 Punj 33 (37) (DB) ** A 1957 Madh B 90 (92) (DB) ** **A 1954 Madh B 184 (189) (FB)** ** A 1942 Bom 251 (255) (DB).

[But see A 1940 Cal 443 (445).]

Section 50

(1) The method of payment in discharge of a contract includes also mere transfer of figures in accounts. A 1925 Sind 144 (146) ** A 1966 SC 170 (174).

(2) Where a subscriber of a chit fund conducted by a company deposits money towards the future instalments he has to make in a bank as directed by the rules of the company, the performance of the promise by him is good. And if the bank goes into liquidation, the promisee company has to take the risk. A 1942 Mad 337 (338).

(3) Where the defendant, not entitled to have delivery of goods until he had paid for them, procured the delivery from an unauthorised agent of the plaintiff, and paid money to the agent who embezzled the amount so paid to him: **Held,** that the plaintiff could sue defendant for recovery of the price of goods sold to him. (1874) 12 Beng LR 360 (365) (DB).

(4) When a person agrees with his partner, who is also his creditor for Rs. 600 by setting aside 6 as. of his share of partnership profits towards its liquidation, it was held that the creditor could not recover the debt in any other way than that stipulated for in the contract. (1912) 16 Cal WN 636 (638) (DB).

(5) If the promise prescribes or sanctions any manner of performance, performance in that manner discharges the obligation of the promisor. A 1947 Mad 122 (123) ** A 1963 Pat 216. (Plaintiff asking defendant to sell plaintiff's rice and send sale proceeds to him — Reasonable to infer implied request to send money by post.)

(6) Where from the previous conduct of the parties, it is evident that sending premium by money order was one of the approved or sanctioned methods of payment the obligation of the party who is to make the payment shall be deemed to have been discharged if the money order was sent on or before the relevant date. A 1952 Trav-Co 181 (181) (DB).

(7) By posting a cheque in pursuance of the request of the creditor the debtor performs his obligation in the manner prescribed and sanctioned by the creditor and thereby discharges the contract by such performance. A 1954 SC 429 (436).

[See also A 1956 Orissa 147 (151) (DB). (No specific or implied request to send cheques by post — Decision in A 1954 SC 429 does not apply.)]

(8) There is nothing in Section 20, Limitation Act to suggest that payment in kind should be in pursuance of a previous agreement. (1955) 8 Sau LR 150 (153).

(9) The Post Office Act of 1898 did not enlarge the right of the sender to reclaim the

(c) A owes B 2,000 rupees. B accepts some of A's goods in reduction of the debt. The delivery of goods operates as a part payment.

(d) A desires B, who owes him Rs. 100, to send him a note for Rs. 100 by post. The debt is discharged as soon as B puts into the post a letter containing the note duly addressed to A.

[Malaysian Contract Act 1950, S. 51.]

Performance of reciprocal promises

51. Promisor not bound to perform, unless reciprocal promisee ready and willing to perform.— When a contract consists of reciprocal promises to be

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Section 50 (contd.)

postal article to such an extent as to nullify Illustration (d) to Section 50, Contract Act or otherwise to affect the well-known general principle that a contractual obligation is discharged by the performance of the engagement or promise in the manner prescribed or sanctioned by the promisee. A 1954 SC 429 (436).

(10) Where money is due to a person from another, then the liability to pay that money can be discharged only by repaying it in cash unless the parties expressly agree to some other mode of discharging that liability. If there is an agreement that the liability has to be discharged not by paying cash but by a bank draft this agreement has to be pleaded and proved. In the absence of this. it must be taken that the liability has to be discharged by payment of cash. A 1959 Bom 267 (268) °° A 1957 All 293 (293).

(11) The illustration attached to S. 50 clearly indicates that the direction by the drawer of the cheque to the bank to put the amount in the credit of the payee amounts to payment by the drawer to the payee. If the payee deposits the cheques in his current account, it is as good as a payment of cash to the bank unless the drawer had no funds in the bank to meet the amount of the cheque. A 1960 Assam 191 (202) (DB).

(12) If the payee presents the cheque beyond reasonable time, the liability of the drawer stands discharged. A 1960 Assam 191 (203) (DB) °° A 1965 SC 1679 (1681, 1682). (Creditor accepting cheque from debtor — Sending it for collection and accepting draft in lieu of cash payment — Creditor holding draft for unreasonable time — Draft drawer bank closing business — Debtor, held stood discharged. A 1957 Assam 133, Reversed.)

(13) Subscriber to Railway Provident Fund electing to be governed by Provident Fund Sterling Accounts Rules — Subscriber requesting payment in sterling and by Bank draft in a bank in England — Railway Administration drawing cheques in favour of Reserve Bank of India with instructions to convert it into sterling and then to transmit amount to subscribers bankers in England — Obligation of railway administration could not be said to have been discharged till directions of subscriber regarding transmission of fund were complied so long as money remained under control of Railway Administration. A 1969 SC 762 (764).

(14) In view of Sections 49 and 50, it is open to the promisee to appoint any place he likes for performance of promise (1963) 4 Guj LR 305.

(15) Mode of performance agreed to cannot be changed or substituted. A 1966 Madh Pra 145 (149) (DB).

(16) Promise has to be performed at place and in manner agreed upon — Common law rule that debtor must seek creditor does not apply. A 1971 SC 206 : 1971 Cri LJ 262.

(17) Time for the performance of the contract, not fixed — Contract has to be performed within reasonable time — What is reasonable time is always a question of fact. A 1966 Madh Pra 145 (149) (DB).

(18) Contract to be completed within 10 months of commencement — Date of commencement to be when order to commence was given — Promisor enquiring about date — Date communicated was the date wherefrom 10 months had already expired at the time of communicating — Promisor held, had not failed to perform promise at the time prescribed. A 1963 Punj 538 (543) (DB).

(19) If in the normal course of events parties have come to view an offer of payment by demand draft as a valid form of offer. it cannot be held that unless there is an offer of cash, there is no offer of payment ILR (1971) 1 Ker 494 (507, 508).

SECTION 51 — SYNOPSIS

1. Scope.
2. Simultaneous performance.
3. Readiness and willingness.
4. Burden of proof.
5. Pleadings.

1. Scope.— (1) Where promises are reciprocal each party has always the option to perform his part of the contract but one party cannot insist on the other performing his promise without himself performing what he has agreed to do. A 1925 Mad 1029 (1030) °° 1967 Raj LW 498. (Contract on behalf of minor for purchase of immovable property.)

(2) Where the plaintiff asserts that he has paid Rs. 1500 to the defendant and is willing to pay the balance of Rs. 272/- to him but it is found that he had not paid the sum of Rs. 1500//- to the defendant, the plaintiff is disentitled to the discretionary relief of specific performance not only on the ground that he has set up a false plea but also that he was not ready and willing to perform his part of the contract. A 1971 Andh Pra 279 (281).

(2) Where the agreements between the parties are reciprocal one of them cannot be enforced if the other is void and unenforceable.

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simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise.

Illustrations

(a) A and B contract that A shall deliver goods to B to be paid for by B on delivery.

A need not deliver the goods, unless B is ready and willing to pay for the goods on delivery.

B need not pay for the goods, unless A is ready and willing to deliver them on payment.

(b) A and B contract that A shall deliver goods to B at a price to be paid by instalments, the first instalment to be paid on delivery.

A need not deliver, unless B is ready and willing to pay the first instalment on delivery.

B need not pay the first instalment, unless A is ready and willing to deliver the goods on payment of the first instalment.

[Malaysian Contract Act 1950, S. 52.]

Section 51 — Note 1 (contd.)
(1928) 106 Ind Cas 823 (823) (Lah) ** A 1962 Assam 41 (46) (DB).

2. Simultaneous performance.— (1) Unless otherwise agreed delivery of goods and payment of price are concurrent conditions in a contract for sale of goods. A 1925 Mad 971 (971) (DB) ** (1870) 2 NWPH CR 60 (61) ** A 1962 Cal 103 (108) (DB).

(2) In a c. i. f. contract payment of price for the goods has to be made simultaneously with the delivery of documents. Promise by the buyer to pay on or before the arrival of the steamer cannot be construed as a stipulation to pay even before the tender of documents. A 1958 Mad 43 (51) (DB).

(3) Where a decree for maintenance provided inter alia, that from out of the amount of past maintenance to be paid by the defendant, the plaintiff should get a reconveyance in her favour in respect of the property she had sold, it was held that the obligations of the plaintiff and the defendants were concurrent obligations. (1974) 2 Mad LJ 361 (363).

(4) Where a consent decree in substance provided that on the defendant paying a certain sum of money the plaintiff company should transfer some shares to the defendant, it was held that the promises were not reciprocal promises to be performed simultaneously. A 1950 FC 8 (10, 11) ** A 1963 Cal 583 (585) (DB).

(5) Where on payment by RD the costs of receiver and on his writing certain letters to receiver F was to pay £5000 to RD it was held that the reciprocal promises were incapable of simultaneous performance within S. 51. A 1933 PC 233 (236).

(6) The obligation of a vendee retaining part of consideration to pay off previous mortgage and the undertaking by the vendor to compensate vendee for the defect of title in the property, being wholly independent promises, will not come under Section 51, Contract Act. Therefore, if the vendee does not pay off the mortgage and is subsequently dispossessed of a portion of the property, he cannot, in a suit for damages brought by the vendor, take advantage of the indemnity clause on the ground that the vendor had failed to give him title with respect to that portion of property. A 1946 Pat 263 (266) (DB).

(7) Apart from any special contract it is not the law that the consideration money must be tendered as a condition precedent by the party aspiring for specific performance of a contract of reconveyance. A 1962 Cal 103 (108) (DB).

3. Readiness and willingness.— (1) Where consideration for contract consists of promise, the party bound to do act promised, fully performs his part of contract if he is ready to do the act when required. A 1914 Cal 166 (166) (DB).

(2) The question whether a party to the contract was ready and willing to perform his obligation is one of fact. A 1950 PC 90 (96) ** A 1970 SC 546 (547).

(3) Actual tender of the purchase money or of goods sold is not necessary. Capacity to tender these is sufficient. ILR (1955) 1 Cal 63 (71) ** A 1928 Lah 834 (836) (DB) ** A 1927 Lah 176 (177) (DB) ** A 1926 Lah 318 (319) (DB) ** A 1923 Sind 50 (52) (DB) ** 1970 Raj LW 148.

(4) Contract for sale of Government Securities — Seller in a position to transfer securities by due date and informing purchaser of this by going to his place of business — In absence of evidence to the contrary, this constitutes readiness and willingness. (1883) 9 Cal 791 (797) (DB).

(5) Contract to sell shares — Ability of vendor to constitute vendee the legal owner of shares amounts to "readiness and willingness" on his part. (1864-66) 2 Bom HCR 246 (249).

(6) Tender presupposes a person to whom one can tender. If the buyer closes his usual place of business and absconds, it is clear that he is not ready and willing to perform his part. Tender will be dispensed with in such case. A 1932 Sind 9 (14).

(7) Where, before the date fixed for the delivery of goods, the buyer filed an application for insolvency and the interim receiver also did not act within a reasonable time, it was held that from the conduct of the buyer and the interim receiver it could be taken that the contract was abandoned by the buyer, absolving the seller performing his part. A 1953 Nag 345 (349, 350) (DB).

(8) Where the buyer is in acute financial embarrassment on the date of the delivery of

52. Order of performance of reciprocal promises.— Where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order; and where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires.

Illustrations

(a) A and B contract that A shall build a house for B at a fixed price. A's promise to build the house must be performed before B's promise to pay for it.

Section 51 — Note 3 (contd.)

goods, there cannot be any readiness on his part to pay the price and the seller is absolved from the performance of his part. A 1940 Rang 284 (285) (DB).

(9) The readiness and willingness has to be proved continuous from the date of the contract to the time of the hearing and it must be to perform the contract as it really was and not in the way the plaintiff thought. A 1932 Lah 265 (267) (DB).

(10) In a contract of sale where the term as to payment was cash on delivery, the seller made some of the deliveries and the buyer paid certain amount on the account leaving a large balance due to the seller. The seller refused to deliver the remainder of goods as the balance was not paid and the buyer set up some cross-claims to be adjusted. It was held that the neglect to pay was after delivery, when reciprocity of obligation had ceased. It was no reason for refusing to make all further deliveries. (1879) 4 Cal 252 (257) (DB).

(11) Where the promisee had agreed to reduce the rate of interest provided that the promisors pay it regularly and pay the principal within certain time but later on the promisee persistently refused to be bound by the agreement and thus prevented the promisors from performing their part of agreement within time, it was held that the promisors were entitled to reasonable time to perform their part after the promisee has performed his part of the agreement. A 1939 Rang 84 (86) (DB).

(12) Illustration (a) is the ordinary case of buying and selling goods when neither the buyer need pay the price nor the seller deliver the goods unless the other party is ready and willing to perform his part. A 1930 Mad 364 (371) (DB).

(13) Contract for sale of immovable property — Time not essence of contract — Failure to find money or prove possession of money before time for performance arrives cannot be taken as breach entitling vendor to resile from the contract — Vendor is bound to give reasonable notice requiring performance within definite time. A 1967 Mad 220 (223).

(14) Simultaneous performance — Readiness and willingness on the part of plaintiff established — Decree for specific performance granted. A 1976 SC 2325 ** 1970 Pat LJR 218.

(15) The reciprocity when applied to a contract for supply of goods within a fixed time cannot mean that while the buyer was willing to accept delivery even for sometime beyond the agreed or specified time, he should be obliged to do so indefinitely and that the seller need not perform his part of any reciprocal promise or his obligation. A 1970 Cal 321 (325).

(16) Section is applicable to the chitty contract contained in Clause 9 of the Kurivariola which insists for the payment of prize amount on the subscriber furnishing security for the future subscriptions due from him. ILR (1977) 2 Ker 67 (72).

4. **Burden of proof.**— (1) In a suit for damages for a breach of one of two concurrent obligations the onus of proving readiness and willingness to carry out his obligation is on the plaintiff. A 1934 PC 91 (92) ** A 1936 PC 236 (238) ** A 1958 Punj 289 (294) ** A 1928 Lah 20 (26) (DB) ** A 1925 Mad 971 (971) (DB) ** A 1923 All 220 (224) (DB) ** A 1958 Punj 289 (294) (DB).

(2) Ordinarily it must be presumed that the goods are to be paid for at delivery. The onus will be on plaintiff who pleads a special contract contrary to this usual practice and very strong and cogent evidence would be required from him. A 1923 Lah 363 (365) (DB).

(3) Where the defendant did not repudiate the contract but contended that if the plaintiff had offered money the defendant could have secured the goods from the open market, it was held that it was for the plaintiff to allege and establish that he was in possession of the entire money payable under the contract. A 1958 Andh Pra 427 (435).

(4) Suit for specific performance of agreement — Abandonment of contract by plaintiff alleged by defendant — Burden of proving abandonment is on defendant. A 1966 Mys 154 (157) (DB).

(5) Suit for specific performance of agreement of sale — Plaintiff to prove his readiness and willingness to perform his part — Wrongful repudiation of contract by defendant — Plaintiff not absolved from performing conditions precedent. A 1976 Andh Pra 243 (248) (DB).

(6) Compromise decree for specific performance of contract — Execution — Party seeking to execute must fulfil his obligations. 1970 Pat LJR 218.

5. **Pleadings.**— (1) Averments as to the readiness and willingness at all material times must be made in the plaint. ILR (1955) 1 Cal 63 (68).

[See however (1895) 19 Bom 546 (550) (DB).]

Section 52

(1) When a person's right to claim money that was promised to him is dependant upon his performing a particular act, he cannot bring in an action unless he performs his part. A 1933 PC 233 (236).

(2) When payment of purchase-money is delayed due to the vendor's delay in showing good title, vendor has no right to claim interest on purchase money. A 1918 Mad 716 (717) (DB).

(b) A and B contract that A shall make over his stock-in-trade to B at a fixed price, and B promises to give security for the payment of the money. A's promise need not be performed until the security is given, for the nature of the transaction requires that A should have security before he delivers up his stock.

[Malaysian Contract Act 1950, S. 53.]

53. Liability of party preventing event on which the contract is to take effect.— When a contract contains reciprocal promises, and one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented; and he is entitled to com-

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Section 52 (contd.)

(3) Where the lessee has not performed his part of the contract he cannot say that the lessor committed a breach. A 1928 All 360 (362) (DB).

(4) Work is not usually paid for in advance unless there is an express agreement to the contrary by the person for whom it is done. A 1927 Oudh 616 (617).

(5) The party desiring to submit a dispute to arbitration ought to specify the nature of the dispute and nominate his own arbitrator first, as performance of his own part of the contract. A 1929 Sind 58 (60). (A 1921 Mad 58, Disting.)

(6) When a person is to perform an act on condition that another person fulfils a certain promise, he is not bound to perform the act in case the latter breaks his promise. **1898 Pun Re No. 17, p. 39 (43) (FB).**

(7) Section 52 lays down the order in which parties have to perform reciprocal promises and does not in any way affect the application of the principle in suits for specific performance of contracts for sale which enables the buyer to obtain relief, provided he could satisfactorily explain the delay in performing his part of the promise and where time is not the essence of the contract. A 1950 Cal 526 (528).

(8) In the case of cross contracts for purchase and re-purchase of goods, entailing delivery of exactly similar quantities of cotton bales on either side there is no necessity for either party to either tender the goods or tender the price. The person who has to get the difference can, without going through the farce of tender, claim the difference which is really in his favour. A 1945 Mad 59 (60).

(9) Apart from any special contract it is not the law that the consideration money must be tendered as a condition precedent by the party aspiring for specific performance of a contract of reconveyance. A 1962 Cal 103 (108) (DB).

(10) Agreement to reconvey property by vendee on return of consideration amount within stipulated time — Contract is one of reciprocal promises and is governed by Section 51 — Suit for specific performance by vendor — By tendering the amount within time, vendor-plaintiff discharges his obligation and is entitled to a decree for specific performance. A 1973 Gauhati 66 (71, 72).

(11) Award providing that B 'do pay' a certain sum to D and D 'to deliver' certain number of shares — In default of payment within fortnight B liable to pay interest — Payment of B held not dependent upon tender of shares by D. A 1963 Cal 583 (585) (DB).

(12) A to reconstruct house by stipulated date and B to pay yearly rent to A in advance — B paying part of rent on execution of contract — Failure of A to reconstruct by stipulated date — B can recover rent paid in advance. 1965 All LJ 1039.

(13) Suit for specific performance of agreement of sale — Plaintiff to prove his readiness and willingness to perform his part — Wrongful repudiation of contract by defendant — Plaintiff not absolved from performing conditions precedent. A 1976 Andh Pra 243 (248) (DB).

(14) Where according to the terms of the contract to lease out immovable property it is proved that the parties have agreed to accept compensation in money in case of breach, the contract cannot be specifically enforced. (1979) 48 Cut LT 33 (36) (DB).

(15) Reciprocal promises to be performed in fixed order — Plaintiff in suit for damages for breach of contract need not prove readiness to perform his part of contract. (1969) 71 Bom LR 769.

(16) Section is applicable to the chitty contract contained in Clause 9 of the Kurivariola which insists for the payment of prize amount on the subscriber furnishing security for the future subscription due from him. So it goes without saying that a prize subscriber cannot compel a foreman to deposit the prize amount in fixed deposit in a bank and treat the same as security for payment of future subscriptions. ILR (1977) 2 Ker 67 (72).

Section 53

(1) Wrongful repudiation by one party does not end the obligation unless other party elects to treat it so — Such repudiation by itself does not absolve the other party suing on the contract from proving his performance of a condition precedent. A 1933 PC 233 (236).

(2) A sued the obligees to enforce a bond hypothecating immovable property, the discharge of which he had agreed by the sale of the property. The vendors were willing and ready to give possession of the property, but he failed to pay the stipulated price. **Held** that A was not at liberty to enforce the bond. (1875) 7 NWPHCR 152 (154).

(3) When one of the parties to a decree setting forth two reciprocal promises, expressed willingness to fulfil the obligation resting on her, and the other party prevented such performance through evasion, the former does not lose the primary rights under the contract, and would be deemed to have fulfilled her promise. A 1958 Andh Pra 504 (507).

(4) In a contract with Government, the contractor was not to be supplied with machinery

pensation from the other party for any loss which he may sustain in consequence of the non-performance of the contract.

Illustration

A and B contract that B shall execute certain work for A for a thousand rupees. B is ready and willing to execute the work accordingly, but A prevents him from doing so. The contract is voidable at the option of B; and, if he elects to rescind it, he is entitled to recover from A compensation for any loss which he has incurred by its non-performance.

[Malaysian Contract Act 1950, S. 54.]

54. Effect of default as to that promise which should be first performed, in contract consisting of reciprocal promises.— When a contract consists of reciprocal promises, such that one of them cannot be performed or that its

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Section 53 (contd.)
but was to get assistance in procuring controlled articles. His demand for a crane and iron materials free of cost was refused. **Held**, the Government by such refusal did not make the performance of the contract impossible. A 1958 Andh Pra 533 (539).

(5) In a contract to provide employment for a definite period, the employer wanted to terminate the employment before the period was over. The other party was ever willing to perform his part of the contract. **Held** that the employer should pay damages equivalent to the salary for the remaining period. A 1957 Madh Pra 144 (145).

(6) Part of promise not performed by plaintiff — Defendant however not prevented thereby from carrying out the contract and contract not repudiated by defendant — No loss hence occasioned to him — Sections 53 or 55 therefore cannot apply. ILR (1969) 2 All 421.

SECTION 54 — SYNOPSIS

1. "When a contract consists of reciprocal promises".
2. "Such that .... been performed".
3. "Fails to perform it".
4. "Such promisor cannot claim performance of the reciprocal promise".
5. "Must make compensation to the other party".

1. "When a contract consists of reciprocal promises".— (1) Section 54 relates to a contract consisting of reciprocal promises such that one cannot be performed or its performance cannot be claimed till the other has been performed. In a contract for sale where the passing of title is completely independent of the payment in full of the consideration money, the seller cannot invoke the aid of Section 54 and contend that the purchaser having failed to perform his part cannot claim title to the property under contract. A 1949 Orissa 14 (17).

[But see (1973) 2 Cut WR 1759. (Consideration of contract intended to be basis for passing of title — In absence of proof as to payment of consideration title could not be said to pass to the buyer.)]

(2) Property mortgaged — Part of property along with other property subsequently sold — Part of consideration left with vendee to pay off mortgage — Vendee not paying off mortgage — Vendee dispossessed of portion of property by third person later on — Mortgagee obtaining decree for sale — Mortgaged property sold and purchased by mortgagee — Suit by vendor for damages, and compensation for breach of contract by vendee — Section 54, Contract Act, held, did not apply, as there was no promise, by vendors, on which payment of mortgage money depended — Section 73, held, applied and plaintiff was entitled to compensation. A 1946 Pat 263 (266, 267) (DB).

(3) Where the agreement has been embodied in a compromise decree the judgment-debtor cannot say that, because the decree-holder committed the default first, he was entitled to avoid his own obligations under the terms of the decree; especially, when those terms were independent of each other. A 1929 Nag 164 (168).

(4) Where by a deed of compromise the parties relinquished a claim in respect of some property in dispute and recognised the right of the other to a portion of it on the assumption that they had in antecedent title and the agreement acknowledged and defined what that title was. **Held**, that the deed was a family arrangement and Section 54 was not applicable. A 1949 Oudh 1 (5, 6) (DB).

2. "Such that .... been performed."— (1) Where the letter of acceptance stated that the acceptance of the proposal for an insurance was conditional upon the continued good health of the applicant and laid upon him the same obligation as at the time of the proposal to inform the Insurance Company of any adverse circumstances connected with his general health which might occur till the date of the issue of acceptance and the applicant failed to inform the company of his illness which occurred just before and after the date of acceptance: **Held**, that there was a warranty of continued good health up to the date of the issue of acceptance and as the applicant committed a breach thereof by his failure to disclose the Company was absolved from all liability under the policy; the circumstance that the failure to disclose was after the letter of acceptance was sent made no difference at all. A 1948 Mad 182 (183, 184).

(2) When a shipowner has contracted to give a certain notice to a charterer or to do any other act, with a view to inform the charterer when the ship will be ready, the charterer is

performance cannot be claimed till the other has been performed, and the promisor of the promise last mentioned fails to perform it, such promisor cannot claim the performance of the reciprocal promise, and must make compensation to the other party to the contract for any loss which such other party may sustain by the non-performance of the contract.[a]

Illustrations

(a) A hires B's ship to take in and convey, from Calcutta to the Mauritius, a cargo to be provided by A, B receiving a certain freight for its conveyance. A does not provide any cargo for the ship. A cannot claim the performance of B's promise, and must make compensation to B for the loss which B sustains by the non-performance of the contract.

(b) A contracts with B to execute certain builder's work for a fixed price, B supplying the scaffolding and timber necessary for the work. B refuses to fur-

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Section 54 — Note 2 (contd.)
not bound to ship his goods until the ship owner has given him that notice or has done that act. (1879) 4 Cal 237 (248, 251).

(3) Vendor, desiring to enforce contract for sale, with condition that title adduced should be approved by purchaser's solicitor, must prove that solicitor did approve of title or that such title was tendered, as made it reasonable to approve it. (1911) 35 Bom 110 (120).

3. "Fails to perform it".— (1) When promisor fails to perform his part of the contract, promisee can rescind the whole contract; but, if the promisee treats it as a subsisting contract, he must do his part fully to entitle him to insist on the promisor's carrying out the contract. A 1925 PC 188 (189, 193) ** A 1930 Lah 979 (982) (DB).

(2) Where contract consisted of twelve parts, non-performance of one does not necessarily indicate an intention to put an end to contract. A 1914 Bom 312 (315) (DB).

(3) Sale of property — Part of consideration left with vendee to pay off mortgage by vendor — At time of sale vendor failing to put vendee in possession of very small portion of property — Still vendee cannot refuse to redeem mortgage. (Obiter.) A 1946 Pat 263 (267) (DB).

(4) Breach of essential term of contract alone, entitles the other party to repudiate contract — Breach of non-essential term entitles the other party to damages only. A 1924 Sind 105 (105) (DB).

(5) Seller agreeing to send "delivery telegram" but failing to do so — Buyer is entitled to rescind contract as being broken and to sue seller in damages; for a covenant as to delivery is as much an essential part of a contract for sale as a covenant for payment of price. A 1923 Mad 103 (107) (DB).

(6) Shipowner contracting with charterer to give notice of arrival of ship "after completion of two counter-voyages for London" — Notice given after vessel had completed one voyage only — Charterer refusing to ship goods — Clause "after completion of two counter voyages" held was essential part of contract and charterer was justified in refusing to perform his promise. (1879) 4 Cal 237 (247, 248) (DB).

(7) The plaintiff who had taken a contract from the P. W. D. for clearing the forest produce entered into an agreement with the defendants for sale of the felled timber. Some disputes having arisen regarding payment, the forest authorities attached the timber. Eventually the parties settled their disputes and entered into an agreement with regard to the payment of money. The plaintiff was held responsible to get the attachment of timber vacated within a week but in spite of his best efforts he could not do so. Held that the condition in relation to raising of the attachment could not be deemed to be essential to the main purpose of the contract the breach of which might give rise to a right to treat the contract as repudiated. A 1957 Andh Pra 784 (794) (DB).

(8) In a contract with Government for supply of bhusa to its several military farms, the Government agreed to arrange for railway wagons but did not guarantee the supply. Non-supply of wagons was not to be the ground for non-performance of the contract. At the same time there was an oral agreement that Government would supply wagons. R contractor was ready and willing to supply goods and was left under the impression that the wagons would soon be made available and acted under the belief. But wagons were not made available. Held that it could not be said that contractor had failed to perform his part of the contract and therefore his security was not liable to forfeiture. A 1957 Punj 141 (144) (DB).

(9) The plaintiff contracted with the defendant company to ship cargo in their ship at C. The ship arrived at M enroute for C. The defendant repeatedly asked the plaintiff to advise them if he was ready to make the shipment. The plaintiff intimated to them that owing to war conditions and other causes he was not ready and the ship proceeded to another destination. It was held that the plaintiff having dispensed with the ship's coming from M to C and the defendants having performed their part of the contract the defendants were not liable in damages to plaintiff. A 1917 Mad 294 (296) (DB).

(10) Defendants at Mirzapur to despatch goods to plaintiffs at Madras, F. O. R. Mirzapur at earliest booking day, railway receipt to be negotiated through Bharat Bank Ltd. — Defendants not sending goods in spite of fact that booking could be had — Plaintiffs held justified in repudiating contract and defendant was liable in damages. A 1949 Mad 858 (859).

4. "Such promisor cannot claim performance of the reciprocal promise."— (1) A, the lessee of a Government forest transferred his lease rights to B. Under the terms of the agreement

nish any scaffolding or timber, and the work cannot be executed. A need not execute the work, and B is bound to make compensation to A for any loss caused to him by the non-performance of the contract.

(c) A contracts with B to deliver to him, at a specified price, certain merchandise on board a ship which cannot arrive for a month, and B engages to pay for the merchandise within a week from the date of the contract. B does not pay within the week. A's promise to deliver need not be performed, and B must make compensation.

(d) A promises B to sell him one hundred bales of merchandise, to be delivered next day, and B promises A to pay for them within a month. A does not deliver according to his promise. B's promise to pay need not be performed, and A must make compensation.

[Malaysian Contract Act 1950, S. 55.]

[a] See Ss. 2 (j), 53 and 56.

Section 54 — Note 4 (contd.)

it was obligatory on the part of B to pay the second instalment of the lease premium to the Government. Without this payment the agreement with the Government could not be signed by A. B incurred expenses to cut down the forest but in the meanwhile the Government cancelled the lease, because no second instalment was paid and refused to issue export permit. B instituted a suit against A for recovery of the money spent: Held, that it was B who failed to perform his part of the contract by not paying the 2nd instalment without the payment of which A could not sign the agreement which led to the cancellation of the lease. Consequently, it was not open to him to turn round and accuse A of breach of contract. The provisions of Section 54 were attracted. A 1957 Him Pra 70 (72).

(2) Where contract loan is for consolidated sum of money to be paid from time to time, and lender refuses to lend small portion remaining due to borrower, lender by his conduct, put an end to contract and cannot claim interest at contract rates. A 1914 Mad 210 (215).

(3) A and B were both chelas of C, the late mohunt of a muth. According to custom and practice of the muth, there was one mohunt only and two chelas could not become mohunts at the same time. Both the chelas had become mohunts with the result that dispute had arisen between them. They therefore executed an ekrarnama. They agreed that A should be declared to be the mohunt and B adhikari of the said muth to the end of their lives and that in the event of difference between the parties A would give to B Rs. 40 a year for maintenance. Notwithstanding this agreement B brought a suit against A claiming the mohuntship — Held, that B, by his action, in bringing a suit for mohuntship, broke his promise and defeated the whole intention of the agreement, and that he could no longer hold A to his part of the contract to pay B the maintenance. A 1925 Pat 496 (497) (DB).

(4) Hundi given on consideration of execution by A to B of a mortgage for money due on accounts — Mortgage not executed — B suing on hundi — Suit must be dismissed under Section 54, Contract Act — No decree can be passed on consideration other than shown in hundi. (1908) 3 Mad LT 405 (405).

(5) Agreement to sell house for consideration to be paid — Consideration converted into cash debt, evidenced by three bonds — Contract of sale not carried through — Suit for money on bonds — Held, that bonds were without consideration as the contract of sale was not carried through and that the remedy of vendor was to sue for specific performance of contract or for damages for breach. (1936) 19 Nag LJ 232 (236).

(6) A party, cancelling a contract without any justification, is precluded from making any defence, which would have been open to him in an action for damages by the other party. A 1920 Bom 181 (182).

(7) M conveyed certain property to S. It was agreed that an account would be made of arrears of rent due from raiyats to M and on such account being made S would have a deed of assignment executed by M in respect of the arrears. The accounts were not made and S did not get the deed of assignment. M filed a suit against S for an amount on the footing of what would be payable by S if the deed of assignment had been executed by M. It was held that M not having performed his part of the contract he was not entitled to maintain the suit. A 1929 Pat 395 (397).

(8) Mortgagor mortgaged his property for 15 years and the condition was that mortgagee should pay decree-holder of the mortgagor regularly by instalments. Mortgagee failed to pay after some instalments and it was held that mortgagor was entitled to redeem his property before the expiry of the period of 15 years. A 1927 Oudh 12 (13, 14) (DB).

(9) Where vendee could not complete sale due to the vendor's defective title and the broker was helping the vendor, it was held that the broker had in effect committed breach of Contract and was not entitled to any brokerage. A 1925 Sind 220 (221) (DB).

(10) Where defendants agreed to charter a ship, of which the tonnage was guaranteed by the plaintiff, and the ship actually was found to weigh more, it was held, that the defendants were justified in repudiating the contract and thus refusing to charter that ship. (1891) 15 Bom 389 (396, 399) (DB).

5. "Must make compensation to the other party".— (1) Where parties to a contract consisting of reciprocal promises failed to perform their respective promises, one wilfully and, the other, because he was not bound to perform his part until the other had fulfilled his, the contract is broken by act of both parties and a suit for specific performance will not lie, though the latter is entitled to compensation

55. Effect of failure to perform at fixed time, in contract in which time is essential.— When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

Effect of such failure when time is not essential.

If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

Section 54 — Note 5 (contd.)

for breach of contract. A 1915 Mad 210 (216) (DB).

(2) Where the plaintiff agreed to sell "entire stock of coal or 7 to 8 hundred tons of coal" the words were not only words of estimation but descriptive of the stock; and, therefore, the plaintiff was liable to pay damages to the defendant when the entire stock sold was only 469 tons. (1910) 37 Cal 334 (337, 338) (DB).

(3) Where in a mortgage, the mortgagee does not pay prior mortgagee as per agreement, the mortgagor is entitled, in a separate suit, to claim damages from the mortgagee resulting from non-performance of the contract by him. (1907) 10 Oudh Cas 69 (75).

(4) A contracting to supply B bricks upon B's supplying coal for purposes of manufacturing bricks — Kutcha bricks prepared by A — Failure of B to supply coal in time for baking — Kutcha bricks destroyed by monsoons — B held liable in damages for loss suffered by A on account of breach of contract by B. 1964 All LJ 1092.

SECTION 55 — SYNOPSIS

1. Scope and applicability.
2. Time whether of essence of contract.
3. Time when of essence of contract.
4. Mercantile contracts.
5. Agreement to lease.
6. "Becomes void, at the option of the promisee".
7. Extension of time.
8. Time when not of essence of contract.
9. Sale of land.
10. Performance within reasonable time — Delay.
11. Acceptance of performance after time fixed — Paragraph 3.
12. Effect of non-performance.

1. Scope and applicability.— (1) Section 55 provides for a special rule in regard to the performance of a promise to do a certain thing at or before a specified time namely that (unlike terms of contracts generally) the Court is not to enforce such a promise in accordance with its term but is to enforce it subject to the provisions of Section 55. A 1937 Bom 417 (421) (DB).

(2) Section 55 does not enable a promisee to keep alive a broken contract in the hope of being able to recover heavier damages for its breach. A 1914 Mad 573 (574, 576) (DB) °° A 1977 Mad 109 (115) (DB).

(3) Section 55 applies to cases where property in the goods passed by the contract, as much as to contracts where the property did not pass. (1881) 6 Cal 64 (69) (DB).

(4) Suit for specific performance of contract — Plaintiff must plead and prove willingness to perform his part of contract. ILR (1975) Cut 993 (DB).

(5) Normally in an agreement to sell immovable property time may not be the essence of the contract unless it is seen to be so not merely from the fact that a period has been stipulated in the agreement for the performance but from other circumstances also. It must appear that the parties intended that contract should be unenforceable against a party thereto if the other party defaults to perform its obligations within the time specified. Section 55 embodies this rule. Though this is the rule in regard to contracts for sale of immovable property, contracts for reconveyance stand in a different position. Such contracts operate as options to repurchase property and they form an exception to the rule of time being not the essence. In the case of a contract for reconveyance the party who seeks to enforce the contract must exercise it within the time prescribed. ILR (1971) 1 Ker 494 (500, 501).

2. Time whether of essence of contract.— (1) The general rule is that contracts for the performance of which no definite time is specified must be carried out within a reasonable time, and contracts for the performance of which a definite time has been fixed must be completed within the time limited. A 1947 Lah 352 (354) °° A 1962 J & K 10 (11) (DB).

(2) It is the duty of the Court, while construing a contract, to look to the pith and substance of the agreement and decide whether time was or was not of the essence of the contract. A 1947 Lah 352 (354).

(3) The question whether the time mentioned in the contract is of essence or not depends upon facts and circumstances of each case. A 1945 All 70 (74, 75) (DB).

(4) Contract between State Government and Contractor for construction of an aqueduct within 12 months — Executive Engineer empowered to grant extension of time — Provision made for levy of penalty at specified rates for unfinished work after expiry of fixed date — Excludes inference that time was intended to be of the essence of the contract. A 1979 SC 720 (726). (F. A. Nos. 488 of 1961 and 245 of 1962, D/- 10-9-1968 (Bom), Reversed.)

(5) Under both the Contract Act and Sale of Goods Act there is no presumption that time

Effect of acceptance of performance at time other than that agreed upon.

If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless at the time of such acceptance he gives notice to the promisor of his intention to do so.

[Malaysian Contract Act 1950, S. 56.]

STATE AMENDMENT

Uttar Pradesh

In its application to the State of Uttar Pradesh, in the third paragraph, for the words "unless at the time of such acceptance he gives notice to the promisor of his intention to do so", the words "where at the time of such acceptance he has waived his right to do so" be substituted.— U. P. Act 57 of 1976, S. 26 (1-1-1977).

Section 55 — Note 2 (contd.)

is of the essence of the contract. A 1957 Pat 586 (591) (DB).

(6) Time essence of contract to sell goods — Failure to deliver goods by seller in time — Repudiation by buyer — Claim for damages by seller — Not maintainable. A 1971 Cal 393 (397) (DB).

(7) The rule is that except in commercial contracts, the ordinary presumption is that time is not of the essence of the contract. This presumption can, however, be rebutted by showing the intention of the parties to the contract. A 1947 Nag 193 (199) (DB) ** A 1957 Pat 586 (590) (DB) ** A 1954 Ajmer 75 (76) ** A 1940 Oudh 443 (444) ** A 1932 Cal 493 (494) (DB).

(8) The question whether the stipulation as to time is of the essence of the contract or not depends on the terms of the contract and the intention of the parties. A 1954 Madh B 23 (26) ** A 1957 Pat 586 (591) (DB) ** A 1949 Cal 661 (662) ** 1967 Raj LW 498 ** A 1964 Punj 375 (380) ** A 1963 Pat 254 (259) (DB) ** A 1960 Mad 203 (205) (DB).

(9) The intention of the parties is a question of fact. A 1949 Cal 661 (662) ** A 1957 Pat 586 (591) (DB).

(10) Intention to make time essence of contract must be expressed in unmistakable language. A 1915 PC 83 (84) : 43 Ind App 26 ** A 1955 Pat 201 (205) (DB) ** A 1952 Sau 88 (89) ** A 1950 Cal 582 (584) ** A 1949 Cal 510 (511) ** A 1967 SC 868 (871) ** A 1964 Orissa 269 (272) ** A 1963 Pat 254 (259) (DB) ** A 1974 Raj 112 (114).

(11) Intention to make time essence of contract may be inferred from what passed between parties before but not after contract is made. A 1915 PC 83 (85) ** A 1966 Mad 46 (48) (DB).

(12) The intention of the parties must appear from the contract as it was entered into and the subsequent conduct of the parties is not relevant. A 1950 East Punj 278 (280) (DB) ** A 1957 Pat 586 (594) (DB) ** A 1963 Pat 254 (259) (DB).

(13) Real intention of parties to agreement has to be deduced from all surrounding circumstances. A 1945 All 70 (74, 75) (DB) ** A 1923 Bom 441 (444) ** A 1919 Sind 68 (69) ** (1903-1904) 2 Low Bur Rul 99 (100) (DB) ** A 1959 Madh Pra 42 (42) ** A 1977 SC 1005 (1011). (Circumstances should be sufficiently strong to displace normal presumption that in a contract of sale of land stipulation as to time is not the essence of the contract — (F. A. No. 15 of 1966, D/- 20-4-1970 (All), Reversed on facts.) ** A 1977 Andh Pra 172 ** A 1974 Cal 261 (263, 264).

(14) The intention of the parties that time should be of the essence of the contract should be ascertained not only from the written words of the contract but also from the nature of the property which is the subject-matter of the contract, the nature of the contract itself and also from the surrounding circumstances. A 1955 Cal 298 (300) (DB) ** A 1957 Pat 586 (591) (DB) ** A 1952 Nag 220 (234) (DB) ** A 1950 Cal 582 (584) ** A 1947 Nag 193 (199) (DB) ** A 1964 Orissa 269 (272).

(15) The mere insertion of a term in a contract that a certain act shall be done within a particular period will not necessarily indicate that time is of the essence of the contract. A 1950 Cal 582 (584) ** A 1956 Trav-Co 93 (94) (DB) ** A 1954 Madh B 134 (135) ** ILR (1952) 2 Raj 1 (3) ** A 1949 Cal 510 (511) ** A 1947 Lah 352 (354) ** A 1931 Lah 205 (206) (DB) ** A 1967 SC 868 (871) ** 1969 All LJ 279 (284) ** 1967 Raj LW 498 ** A 1964 Orissa 269 (272) ** A 1960 Mad 203 (205) (DB) ** A 1972 Assam and Nagaland 8 (10).

(16) The intention as to time being of the essence of the contract may either be express or implied. A 1956 Trav-Co 93 (94) (DB) ** A 1967 SC 868 (871) ** A 1964 Punj 375 (380) (DB) ** A 1960 Mad 203 (205) (DB).

(17) The question of time being the essence of the contract would only arise in the performance after a concluded contract comes into existence. ILR (1954) Mys 118 (120).

(18) Time will be of the essence of the contract if it is so provided in the contract or if one of the parties after unreasonable delay on the part of the other party gives a reasonable notice to the other party making time as of the essence of the contract. If none of the two has happened reasonable, time will be deemed to be the time which will be of the essence of

Section 55 — Note 2 (contd.)
the contract. A 1958 Punj 111 (115) (DB) •• A 1968 Andh Pra 190 (192).

(19) The onus is on the plaintiff to plead and prove that time was of the essence of the contract. A 1964 Orissa 269 (279).

(20) Where in a suit for refund of earnest money the defence was of non-performance of terms of agreement by the plaintiff but the defendant failed to prove any stipulation by way of penalty and his plea that the time was of essence of contract was also not proved and further there was no proof of any loss or damage incurred by the defendant, Section 74 would not apply and the defendant could not claim any compensation or any forfeiture of earnest money. A 1975 Gauhati 58 (60).

3. **Time when essence of contract.**— (1) Where in execution of a money decree, the decree-holder agrees to accept less amount in full satisfaction if paid within two months but on failure the decree-holder is to proceed with the execution, time is of the essence of the contract, and the Court will not relieve against the forfeiture. A 1937 Pat 542 (544, 546) (DB).

(2) Time is always considered of the essence of the contract in following cases :—

(1) Where the parties have expressly agreed to treat it as of the essence of contract.

(2) Where delay operates as an injury, and

(3) Where the nature and necessity of the contract require it to be so construed. A 1961 Pat 107 (109).

(3) Where the words of a contract are that in case the judgment-debtor fails to pay up the decretal amount within the time specified, the sale would stand confirmed and no order is necessary, the wording shows that the parties meant that the benefit which was to accrue to the judgment-debtor would be lost to him if the payment was not made within the specified time : or in other words, that time was of the essence of the contract. A 1937 Pat 113 (116) (FB) •• A 1925 Pat 691 (692) (DB).

(4) In Kuri transactions, time being of the very essence of the contract, the bidder loses his right to the amount payable to him, unless the security is furnished within the period prescribed. A 1920 Mad 822 (823).

(5) Compromise decree — Payment by instalments over a long period — It cannot be laid down as a matter of law that time is not the essence of the contract in such a case. A 1931 Lah 696 (702) (DB).

(6) Where by a consent decree, the decree-holder has agreed to accept by way of certain instalments a lesser amount than actually due and there is a default clause in the decree, time will ordinarily be deemed to be the essence of the contract, and in case of default of any of the instalments the decree-holder would be entitled to claim the whole amount. A 1940 Lah 46 (46, 47).

(7) Sale by public auction at the instance of equitable mortgagee — Stipulation as to payment by higest bidder of initial deposit and balance of purchase money within certain time — No agreement to extend time — Default in payment by auction-purchaser — Right of mortgagee to resale property — Auction purchaser's suit for specific performance — Time held was essence of contract. A 1963 Mad 468 (470) (DB).

(8) Where a creditor agrees to accept part of debt, in full satisfaction, only if it is paid within certain time, time is essence of such agreement. 1935 Mad WN 1032 (1032) (DB) •• A 1937 Mad 284 (285) •• A 1926 All 278 (280, 281).

(9) Contract for supply and purchase of molasses — Quantity to be supplied in twelve monthly instalments, each instalment to be delivered within specified period — Held, on the facts of the case that the time was of essence of the contract and that the vendor was, therefore, entitled to put an end to the contract on breach of stipulation to take delivery of one instalment. A 1943 All 370 (377, 378) (DB).

(10) Where the railway administration entered into contracts with the plaintiff for supply of foodgrains to the railway needed for the consumption of railway staff, during war period when the foodgrains were becoming scarce and prices were rising abnormally, and it appeared that the parties intended that not only the entire quantity should be delivered within the stipulated period but also the supply should commence immediately — Held, that time was of the essence of the contracts. A 1957 Pat 586 (594) (DB).

(11) Where the defendants employed the plaintiffs as their agents to raise a loan within one month to clear their debts and it appeared that at that time the creditors of the defendants were insisting upon payment, it was held that the time was intended to be of the essence of the contract. (1912) 15 Cal LJ 40 (47) (DB).

(12) Contract of sale of immovable property — Specific performance of — Payment within stipulated time essence of contract — Non-payment by vendee entitles vendor to treat as a breach committed by vendee — Decree for specific performance cannot be granted. A 1980 Delhi 188 : ILR (1979) 2 Delhi 539.

(13) Where under a contract to bail out water from the fields if the work was completed after the fixed date the cultivator could keep the field fallow and claim damages but if he cultivated the fields he would have to pay full charges for bailing out, time is the essence of the contract but if in spite of contractor's delay the cultivator cultivates the fields he waives his rights and is bound to pay full charges. 1971 Ker LT 220.

(14) Time would be essence of a contract agreeing to reconvey within a definite term. A 1973 All 16 (18, 19).

(15) Contract to supply sal wood sleepers — Time essence of contract — Breach of contract — Cancellation of contract — Buyer entitled to recover as damages whatever costs have been incurred by him in procuring same or similar goods. ILR (1971) 2 Cal 493 (518) (DB).

(16) Agreement for sale between plaintiff and the State Government and its officials — Breach of contract — Time essence of contract — Termination of agreement by Government — Claim in the nature of remote damages — Held that plaintiff was not entitled to get relief of remote damages as he himself was the guilty party and had committed breach of the

Section 55 — Note 3 (contd.)
agreement by not making the payment. A 1978 (NOC) 208 (Cal).

(17) Unlike a contract of sale of movable property a contract of re-sale or re-conveyance of immovable property is in the nature of a concession given to the original vendor. The conditions of re-sale must be construed strictly against the original vendor and if he fails to comply with the stipulation as to time, which is of the essence of the contract in such a case, his right to repurchase will be lost. A 1974 Bom 136 (138 to 140) •• (1979) 1 Andh Pra LJ 463.

4. Mercantile contracts.— (1) In cases of mercantile contracts stipulations as to time are prima facie to be regarded as of the essence of such contracts. A 1940 Oudh 443 (445) •• A 1957 Pat 586 (590) (DB) •• A 1953 Mys 66 (67) (DB) •• A 1935 Nag 111 (112) •• A 1916 Cal 901 (901) •• A 1916 Sind 4 (6) •• (1909) 5 Mad L Tim 247 (248) (DB) •• A 1961 SC 1295 (1296) •• A 1961 SC 990 (992) •• 1967 All LJ 323 •• A 1964 Orissa 269 (272) •• A 1962 J & K 10 (11) (DB).

(2) Stipulations regarding time for delivery of the goods are deemed to be of the essence of the contract in mercantile transactions, though not necessarily stipulations regarding payment. A 1961 Pat 107 (109).

(3) A transaction under which a subscriber to a chitty makes his bid at an auction is on a par with a commercial contract in which time is prima facie the essence of the transaction. ILR (1951) Trav-Co 685 (689) (DB).

(4) Where goods are sold on condition that they would be taken delivery of, on payment within certain time failing which seller being at liberty to re-sell same to another, time is of the essence of the contract. 1913 Punj LR No. 144, p. 493 (496) (DB).

(5) Contract for purchase of 6 cases of printed cloth to be shipped in Nov.-Dec., 1907 — Subsequent alteration in contract, no fresh stipulation made as to time of delivery — Held, in mercantile contracts the stipulations as to time are of the essence of contract and in absence of fresh stipulation the previous stipulation was to hold good. (1910) 8 Ind Cas 945 (947) (Low Bur).

(6) Contract for purchase of bales of yarn — Condition that vendee should take delivery within certain period on payment — Failure to take delivery entitling vendor to sell goods and recover damages from vendee — Held, time was of the essence of contract in such sales and therefore Section 55, Clause (2) was not applicable. 1913 Punj LR No. 144, p. 493 (496) (DB).

(7) In the case of Hazarmal contracts, as distinguished from forward delivery contracts, no date for delivery is fixed, but the expectations of the purchaser and the vendors are that delivery could be demanded and given as soon as possible if the goods are ready or after they become ready. A 1926 Nag 410 (412).

(8) Contract for sale, time being of the essence — Custom alleged to exist that the purchaser could take delivery after some days of the fixed date — Definite custom must be proved by the purchaser. A 1925 Mad 1232 (1233).

(9) A contract of carriage by rail is a case of contract which does not expressly or by necessary implication fix any time for the performance of the contractual obligation. That being so, the law implies that it shall be performed within a reasonable time. A 1959 Madh Pra 276 (279) (DB).

(10) Where the railway administration entered into contracts with the plaintiff for the supply of food grains needed for consumption of the railway staff, it was held that the contracts were not mercantile contracts and accordingly there was no presumption that the stipulations as to time were of the essence of the contracts. A 1957 Pat 586 (590) (DB).

(11) In the case of perishable goods like oranges, the term of contract that the goods are to be carried by a special type of train which is faster than the ordinary goods train, is clearly of the essence of the contract. A 1957 All 193 (195) (DB).

(12) Notices for the purpose of making time the essence of a contract are not expressly mentioned in Section 55 but are no doubt available in relation to mercantile contracts. A 1924 Cal 427 (434) (DB).

(13) Where time is not of the essence of the contract, one party cannot subsequently by unilateral action make time the essence of the contract. A 1960 Mad 452 (454) (DB).

(14) Where the performance of a contract falls due on a holiday, seller is bound to establish that he was entitled to perform the contract on the day following the holiday, by reason of the existence of a valid usage which is deemed to have been incorporated in the contract between the parties. He must not only prove existence of trade usage, but also establish that usage when read into written contract does not make it insensible or inconsistent. A 1921 Cal 809 (812) (DB).

(15) Even if time is the essence of a contract, where the vendor has not perfected his title to the goods by the date when the contract has to be completed, there is no breach of the contract on the part of the vendee, if he failed to pay the consideration on that date and complete the contract. A 1958 Punj 289 (293) (DB).

(16) Where a mercantile contract does not specify any date for supply of goods, the goods are to be supplied within reasonable time and the time is the essence of the contract. (1971) 2 Cut WR 86.

5. Agreement to lease.— (1) Where time is distinctly of the essence of contract, it is within the power of the lessee to rescind it when the lessor has broken the contract by not putting the lessee in possession on the date agreed upon — The Transfer of Property Act and the Contract Act have to be read together, and under Part 1, Section 55, Contract Act the lessee can rescind the contract. A 1928 Nag 328 (328).

(2) Renewal of a lease is a privilege and if the tenant wishes to claim the privilege he must do so strictly within the time limited for the purpose. Delay in exercising option of renewal can be condoned only when delay is due to any unavoidable accident, excusable ignorance, fraud or surprise. Delay arising from mere neglect is not sufficient. A 1969 SC 405 (407).

(3) Where no time for renewal of lease is fixed, application for renewal of lease may be made within reasonable time before expiry of the term. A 1969 SC 405 (407).

Section 55 — Note 5 (contd.)

(4) Agreement to lease fixing 4 months for giving formal patta — Time not of essence — Lessee in possession paying rent to lessor — Purchaser of leasehold property with knowledge of agreement to lease suing lessee for ejectment — Lessee's right to claim specific performance of contract, held, not barred by efflux of time. A 1934 Cal 235 (237, 238) (DB).

(5) Where the parties agree that a contract of lease for twenty years should commence on a certain date, to ask for a lease of twenty years from a subsequent date is to substitute a different lease for the original one which the Court have no power to do. The doctrine that equity does not ordinarily regard time as essence of contract does not apply to such a case. A 1952 Pat 393 (400) (DB).

6. "Becomes void, at the option of the promisee".— (1) Under Section 55, the right of the promisee to avoid the contract after breach is not circumscribed by any chronological limitations. A 1946 Bom 429 (435) (DB).

(2) Section 55 read with S. 2 (i) of the Act means that on the promisor's failure to perform within the contract time the promisee loses the power to enforce the contract. It is true the promisee has the option of enforcing the contract or not as may suit him. He may drop it altogether, but if he chooses to enforce it, he can only claim damages as provided for in S. 73 of the Act. ILR (1949) 2 Cal 530 (535).

(3) Under Section 55 where in a contract time is the essence of it and a party who is bound to perform his promise within the time fixed fails to do so the contract becomes voidable at the option of the other party. A 1959 Madh Pra 30 (33) (DB).

(4) The mere mentioning of the fact that time should be deemed to be of the essence of the contract does not make it voidable at the instance of one of the contracting parties. Under S. 55 the contract becomes voidable after the lapse of the specific time if the intention of the parties was that time should be of the essence of the contract. A 1955 Cal 298 (300) (DB) ** (1969) 1 Andh WR 344 (DB).

(5) Time is essence of contract — Exercise of option after expiry of period not permissible. (1954) Madh BLJ HCR 1610 (1625).

(6) Where time is of the essence of the contract and the contract is not performed within stipulated time, it does not get automatically determined. A 1968 Andh Pra 190 (192).

(7) The expression "voidable at the option of the promisee" occurring in S. 55 does not confer upon the promisee, although the promisor may have broken the contract by nonfulfilment thereof within the specified time, the discretionary right of tacitly treating the contract as subsisting for as long as he, the promisee, likes until it suits him to formally rescind it. ILR (1949) 2 Cal 530 (534, 535).

(8) It is open to the promisee not to exercise the option or to exercise the option given to him under Section 55 at any time. But the promisee cannot by the mere fact of not exercising the option change or alter the date of performance fixed under the contract itself. A 1946 Bom 1 (4, 5) (DB).

(9) Where the primary obligation under a contract is secured by a secondary covenant to pay a penalty or liquidated damages the obligor obtains no option of breaking his primary obligation. A 1957 Cal 217 (219).

(10) Sale of house site by municipality — Stipulation that construction of house should be completed within three years and that, in default, title of vendee would cease and vendee will be entitled only to 90 per cent of the purchase money — Default by vendee — Contract, held, did not become void on happening of contingency but was only voidable at the option of Municipality and vendee was not entitled to claim refund. A 1934 Mad 135 (136).

7. Extension of time.— (1) Under Section 55 the right of the promisee to avoid the contract after breach is not circumscribed by any chronological limitations. A 1946 Bom 429 (432) (DB).

(2) If the time is originally of the essence of the contract, it does not cease to be of the essence of the contract because a party agrees to grant a short extension. A 1940 Oudh 443 (445) ** A 1964 Punj 375 (380) (DB) ** A 1961 Pat 107 (109).

[But see A 1943 Bom 229 (235).]

(3) When the purchaser seeks to have damages for breach of contract, assented to at a later date than that fixed by the contract for delivery, the effect of Section 55 is to put an end to the agreement, come to, after the original date of performance of a contract has expired, on the same footing as the original agreement. Mere forbearance from suing or giving a formal notice of rescission does not amount to extension of time for the performance of contract so as to alter the relevant date on which damages are to be assessed. A 1946 Bom 429 (431) (DB) ** A 1946 Bom 1 (5) (DB) ** ILR (1960) Mys 1079 (DB).

(4) Compromise between parties that amount due under mortgage-decree should be paid by instalments and that the mortgagor should furnish additional security within specified time — Time essence of contract — Failure of mortgagor to furnish security within time — Court, held, could not enlarge time. A 1940 Rang 62 (64) (DB).

(5) Parties by consent fixing date for payment of decretal amount — Sale to be cancelled on payment — Time being of the essence of the contract could not be extended by Court. A 1925 Pat 691 (692).

(6) Contract for delivery of goods within specified time — Failure to perform — Several agreements extending time for performance — There need not be continuous and unbroken chain of extension — Final agreement of extension is necessary. A 1946 Bom 429 (432, 435) (DB).

(7) Though time is of the essence of the contract, a default by payee such as renders proper tender by the purchaser by due date impracticable would be interpreted as extending time when purchaser was prepared with ready and willing tender. A 1924 Rang 57 (60).

(8) Where the compromise decree itself has provided for an automatic dismissal of the suit if the conditions mentioned therein regarding the filing of the draft sale deed within 15 days are not performed, the terms as to the filing of the draft sale deed was an essential term of compromise and the Court cannot extend the time for the filing of the draft sale deed. A 1962 Mad 489 (490).

(9) Where a party to a contract commits defaults in performance of its part of the con-

Section 55 — Note 7 (contd.)
tract and gives extension after extension to the contractor to complete the contract, time cannot be considered to be of essence of the contract. A 1971 J & K 130 (135).

(10) Failure to deliver goods on certain date specified in the contract with the Government — Conditions of contract itself providing for extension of time — Time not of essence of contract — Government can ask for compensation in terms of the conditions of contract without annulling the contract. A 1973 Cal 550 (555).

8. Time when not of essence of contract.— (1) Where the defendant avails of the benefits of the contract even if there was default on the part of the plaintiff, it cannot be said that time was of the essence of the contract. A 1957 Andh Pra 784 (794) (DB).

(2) Where the goods were to be delivered 'as soon as possible' time in the sense of a deadline was not of the essence of the contract. A 1960 Mad 452 (454) (DB).

(3) Where time is not of the essence of the contract, one party cannot subsequently by unilateral action make time the essence of the contract. A 1960 Mad 452 (454) (DB) •• A 1978 Cal 559.

(4) Stipulation either to transfer certain bonds and decrees in two months or to pay the amounts due under them, does not of itself show that time is of essence of contract. (1909) 5 Mad LT 247 (248) (DB).

(5) Where there is an express provision that time is of the essence of the contract and at the same time the contract provides for extension of time in certain contingencies, and provides for the payment of a fine or penalty for every day or week the work undertaken under the contract remains unfinished on the expiry of the time provided in the contract, such provision is inconsistent with time being of the essence of a contract, and would be calculated to render ineffective an express provision in a contract to that effect. It cannot be said in such a case, that it was intended that time should be of the essence of the contract. The principle applies equally to P. W. D. contracts. A 1940 Sind 1 (7) (DB) •• A 1923 Nag 140 (140).

(6) Where an agreement to cut timber stipulated for payments in instalments and against any area being cut until the corresponding portion of the consideration money had been paid, held the clause about payment of the instalments every quarter did not show that time was of the essence of contract. A 1922 Oudh 259 (262) (DB).

(7) Contract of sale and act of transfer embodied in same deed — Clause as to cancellation on failure to satisfy the dues of certain creditors by a certain date — Finding that appellants were not responsible for failure of the respondents to pay the whole dues by the fixed date; Held, that the time was not of the essence of the contract. A 1936 PC 24 (25, 26).

(8) Agreement granting remission of part of debt if debtor paid the rest of the debt in two instalments on specified dates — In case of default in payment of instalment on date fixed the remitted amount was to become due and was to be recoverable from the properties given as security for the debt or personally from the debtor — Time fixed for payment of instalments, held, was not essence of contract. (1861) 8 Moo Ind App 239 (257) (PC).

(9) Contract to deliver linseed in two instalments at specified periods — Terms as to payment were cast on delivery — Part delivery made by defendant — Claim by plaintiff for excess refraction — Defendant refusing to deliver remainder of linseed unless plaintiff paid in full for the portion already delivered, Held, time was not of essence of contract so as to entitle defendant to cancel the contract. (1879) 4 Cal 252 (257) (DB).

(10) A consent decree or order is only the order of the Court carrying out the agreement between the parties and consequently no greater sanctity can be placed upon a consent decree than upon the agreement itself and if such an order names a specific time by which a particular term embodied in order has to be performed unless the language shows unmistakably that it was the intention of the parties to make the right of the parties depend on the observance of the time limit prescribed, the stipulation as to time is tantamount to this, that the term shall be carried into effect within a reasonable time. A 1930 Pat 234 (235).

(11) Consent decree providing for exchange of houses of plaintiff and defendant, after plaintiff had constructed well in his house — Exchange to be effected by a certain date — Plaintiff failing to construct well but applying for execution of decree — Defendant contending that time being of essence of decree it was voidable — Time, held, was not of essence as conduct of defendant in not protesting against the delay showed that he did not regard time as of vital importance. A 1916 Bom 282 (283).

(12) Where time fixed for the performance of the contract was extended twice and the object of the purchaser was also not a commercial undertaking time is not of the essence of the contract. A 1971 Mys 217 (220, 221).

(13) In all the agreements to convey immovable property, usually time is not the essence of the contract; specific performance of such a contract could be granted although there has been a failure by vendor to pay the amount of consideration before the date stipulated in the agreement. (1974) 2 Mad LJ 62.

(14) Where the agreement of sale of certain premises did not state in express terms that time was of the essence of contract nor were there other circumstances indicating that it was intended that time should be of the essence of the contract the finding of the trial court that time was not of essence of contract has to be upheld. A 1976 Andh Pra 243 (247) (DB).

(15) Agreement for reconveyance of land on payment of sale price within 5 years from the date of agreement executed on 1-6-60 — Suit for specific performance filed on 29-5-65 but full Court fee on plaint paid on 15-7-65 and tender for sale price to be deposited in Court made on same date — Held ordinarily time is not of the essence of contract of sale of immovable property — Plaintiff acted with all possible speed in bringing the suit — Suit to be decreed. 1979 All LJ 967 (971).

(16) Condition of agreement — Mortgage deed to be cleared and paid by vendors before execution of sale deed — Another condition

Section 55 — Note 8 (contd.)
requiring vendors to execute sale deed within 6 weeks from date of agreement — Stipulations show that time could not be essence of contract. A 1978 All 446 (449).

(17) Time not essence of contract for sale of immoveable property — Mere delay in paying the consideration money does not disentitle the plaintiff to relief of specific performance. A 1971 Andh Pra 293 (294, 295).

(18) In a contract of sale of immovable property, ordinarily time is not of the essence of contract. Besides, even if time is of the essence of the contract, there is no breach of contract by the purchaser if the seller has not perfected his title to the goods by the date the contract is to be completed. ILR (1974) Bom 1207.

(19) Contract of sale with condition of reconveyance — Stipulation that if amount was not paid by fixed date vendor would be debarred from enforcing condition of reconveyance does not make time essence of contract. A 1980 Cal 5.

(20) Works contract — Time mentioned as of essence of contract — But contract enforceable till completion of work or its abandonment — Recission of contract and consequent forfeiture of security deposit held proper and within terms of contract. A 1979 SC 1339 (1341). (Appeal No. 534 of 1960, D/- 11-7-68 (Bom), Reversed.)

(21) Agreement for supplying electrical equipment including four chandeliers — Date of delivery of chandeliers was one month from date of agreement — Intimation that there would be delay in supplying chandeliers — Cancellation of contract — Held that time was not the essence of contract. (1978) 1 Malayan LJ 162 (164).

9. Sale of land.— (1) Time is not ordinarily of the essence of a contract of sale unless the parties can make it so by express agreement in the contract itself or it can be inferred if the nature of the property intended to be sold requires it. A 1950 Trav-Co 61 (64) (FB) ** A 1958 Madh Pra 295 (297) (DB) ** A 1957 Andh Pra 307 (328) ** A 1955 Punj 189 (190) (DB) ** ILR (1955) Nag 236 (247) (DB) ** A 1953 All 529 (529) (DB) ** A 1953 Orissa 105 (107) (DB) ** A 1952 Sau 88 (89) ** ILR (1952) 2 Raj 1 (3) ** A 1949 Lah 72 (74) (DB).

(2) In the case of a contract for sale of immovable property there is no presumption that time was of the essence of the contract. A 1950 Nag 78 (80).

(3) In the case of contracts for sale of immovable property, the presumption is that time is not of the essence of the contract. A 1950 East Punj 278 (280) (DB) ** A 1953 Trav-Co 161 (165) (DB) ** A 1953 Trav-Co 90 (94) (DB) ** A 1967 SC 868 (871) ** A 1967 Mad 220 (222) ** 1967 Raj LW 498 ** A 1966 Mad 46 (48) (DB) ** ILR (1966) 2 Mad 117 (DB) ** A 1964 Orissa 269 (272). (The rule is, however, subject to some well recognised exceptions : (i) when one party is guilty of undue delay in performing his part of the contract and the other party has given reasonable notice that the contract is to be completed within reasonable time; (ii) when the character of the property is such that the Court would not exercise jurisdiction in allowing specific performance; (iii) when from other circumstances it would appear to the Court that decreeing specific performance is likely to result in injustice.) ** A 1964 Punj 375 (380) (DB). (Presumption is rebuttable.) ** A 1963 Madh Pra 31 (32) (DB) ** A 1961 Mad 289 (290).

(4) Agreement to sell leasehold property — Vendee given possession on payment of money — Pucca documents to be executed and registered within six months after obtaining the consent of the lessor — Time, held, was not essence of contract. A 1933 Bom 71 (73) (DB).

(5) Where A contracted to purchase a plot of land from a company, but when A by letters enquired as to when he might expect to be called upon to complete the conveyance, the Company did not reply to the letters: Held, that the omission of the company to answer the letters would not constitute a waiver on its part, but it was a significant piece of conduct which would tend to show that the company had never intended that the contract would automatically come to an end if it was not performed within the time specified. A 1955 Cal 298 (301) (DB) ** A 1963 Madh Pra 31 (32) (DB).

(6) Defendant agreeing to sell property to plaintiff — Plaintiff to pay consideration within three years with interest — Plaintiff in possession executing rent note in favour of defendant on same day — Held, defendant's amount was carrying interest in form of rent — Hence, time not of essence of contract. A 1949 Bom 193 (196) (DB).

(7) Contract for sale of land — Circumstance that price of land is rising is no ground for holding that time was essence of contract. A 1955 Punj 189 (190) (DB).

(8) In the case of a contract for the sale of a house, the circumstances that the house was required for the personal residence of the purchaser and he wanted vacant possession, that a period was specified within which vacant possession was to be given, that the purchaser had given on previous occasion one extension and that liquidated damages had been settled upon in case of default are not sufficient to make time as the essence of the contract. A 1950 East Punj 278 (280) (DB).

(9) The presumption that, time is not the essence of a contract to sell land is rebuttable, when sale is arranged to meet expenses of a marraige taking place on a certain date. A 1915 Mad 546 (547).

(10) There were penal clauses binding on both parties. If the purchaser failed to complete the purchase before the 10th Jan., 1942 the vendor was to forfeit the deposit of Rupees 5,000 in his hand. On the other hand, if it was the vendor who had been delaying the completion of the transaction he had entered into he would be liable not only to refund the deposit of Rs. 5,000 but also to pay a compensation of another sum of Rs. 5,000. Held that the very fact that there were reciprocal agreements to compensate each other would make it clear, within the ambit of Section 55 of the Contract Act, that the intention of the parties was that time should be the essence of the contract. 1950 Bur LR (SC) 98 (104).

(11) Agreement to sell property — Purchaser to pay part of purchase-money on or before 20-10-1117 — Balance to be paid within certain time — Purchaser further agreeing that in

Section 55 — Note 9 (contd.)
case he was ready with money on or before 20-10-1117 to take sale-deed seller would get compensation of certain amount — Compensation to be charged on purchaser's property — Time held was essence of contract and that sale-deed was to be executed on or before 20-10-1117. A 1953 Trav-Co 377 (379) (FB).

(12) Contract of sale of real property expressly stating that seller would be entitled to dispose of property on expiry of period fixed for effecting conveyance and buyer would have no right left — Time held essence of contract. 1954 All WR (HC) 446 (447).

(13) The doctrine that time was not of the essence of the contract is not applicable to contracts for resale, within a time limit, of the property conveyed. The reason is that in the case of an option of repurchase there is no mutuality; the purchaser cannot compel the repayment of the consideration money and the power of purchase is only a privilege. Madh BLJ (1954) HCR 1610 (1625) (DB) °° A 1958 Madh Pra 295 (297) (DB) °° A 1954 Assam 54 (55) (DB) °° A 1954 Mad 799 (801) (DB) °° A 1952 Cal 32 (33) °° A 1947 Nag 208 (209) °° A 1927 All 321 (324) °° A 1919 Mad 544 (544) °° A 1960 Mad 203 (205) (DB).

(14) Agreement for purchase of land — Deposit paid — Agreement to make final payment on fixed date — Failure to make payment — Breach of contract — Forfeiture of deposit — Valid. (1974) 1 Malayan LJ 114 (118) °° (1979) 2 Malayan LJ 212.

(15) Contract of reconveyance — Payment of considerations to be simultaneous with execution of deed in absence of special contract — Time essence of contract — Delay in performance largely due to defendant's attitude — Plaintiff held not disentitled to relief of specific performance. A 1962 Cal 103 (110) (DB).

(16) Where time is not of the essence of the contract of resale, reconveyance should be within reasonable time. A 1964 Mad 304 (305).

(17) Contract — Agreement for purchase of semi-detached bungalow — Option money paid — Agreement to signing of formal agreement of sale failing which owners empowered to resell to another person — No agreement signed — Owners cancelling sale — No legally binding contract created. (1973) 1 Malayan LJ 191 (192).

10. Performance within reasonable time — Delay.— (1) Section 55 of Contract Act does not lay down any principle which differs from law of England as to contracts for sale of land. In such cases, equity looks at substance and not at letter of agreement in order to ascertain whether parties notwithstanding that they named specific time within which sale was to be completed really and in substance intended more than that it should take place within reasonable time. Prima facie equity treats importance of such time limits as being subordinate to main purpose of parties. A 1915 PC 83 (84, 85). (A 1914 Bom 233, Reversed.) °° A 1952 Sau 88 (89) °° ILR (1952) 2 Raj 1 (3) °° A 1934 Pat 518 (519, 520) (DB) °° A 1933 Bom 71 (76) (DB) °° A 1927 Sind 49 (50) °° (1926) 98 Ind Cas 890 (891) (DB) (Lah) °° A 1924 Lah 151 (153, 154) : 4 Lah 327.

(2) In the case of contracts for the sale of land, the presumption is that the parties intended that performance should take place within a reasonable time even though the time was mentioned. ILR (1955) Nag 236 (247) (DB) °° A 1953 All 529 (529) (DB) °° A 1960 Mad 203 (205) (DB).

(3) The maxim on which the rule of equity is based that time shall not be of the essence of the contract, can have no application where the agreement contains a plainly expressed stipulation that time shall be of the essence of the contract or the Court can hold that the implied intention of the parties was that time should be of the essence of the contract. In such a case and also in cases where, having regard to the general circumstances of the case, the Court cannot disregard the stipulation as to time, the special jurisdiction that can be exercised by the application of the rule of equity stands excluded. ILR (1960) Mys 96 (DB).

(4) In the case of contracts to sell immovable property, specific performance can be compelled if a tender is made within a reasonable time. A 1958 Madh Pra 295 (297) (DB).

(5) Even where time is not essence of contract, purchaser must show his readiness and willingness to perform his part of contract within reasonable time. A 1917 Mad 8 (9) °° (1969) 1 Andh WR 344 (DB).

(6) In the absence of express stipulation on other circumstances, the date fixed in the contract to sell land is not of the essence of contract, but it can be made so by serving notice by either party to complete within reasonable time. A 1926 Cal 339 (342, 343) (DB) °° A 1957 Andh Pra 307 (328) °° A 1957 Pat 586 (596) (DB) °° 1955 Andh WR 609 (610) °° A 1952 Nag 220 (234) (DB) °° A 1951 Mys 59 (62) (DB) °° A 1924 Bom 473 (474) °° A 1924 Bom 357 (358) °° A 1920 Cal 651 (654) (DB).

(7) Where the nature of the property intended to be sold requires that time should be of the essence as for instance, if the contract is for sale of a life interest or a mining lease given for a fixed period, the parties can make it so by express agreement in the contract itself or subsequently giving reasonable notice to complete on a certain day. A 1936 Cal 51 (52, 53).

(8) The time specified by notice demanding performance must be reasonable in the sense that enough time should be given to the other party for the doing of the things required in a proper manner. If the period fixed is not reasonable, the notice will be inoperative. 1955 Andh WR 609 (611).

(9) The Court can enforce contract beyond time fixed, if notice is unreasonably short. A 1922 Bom 14 (16, 17).

(10) Even if time was not of the essence originally, a much shorter time for performance would be considered reasonable when a demand for performance within a fixed space of time is made in a case where a commercial element is involved. A 1952 Nag 220 (234) (DB).

(11) The reasonableness of time is determined by the Court with reference not merely to what remains to be done at the date of the notice, but all circumstances of the case, including the previous delay of the party in default and attitude of the other side in relation to it. A 1920 Cal 651 (654) (DB) °° A 1957 Pat 586 (596) (DB) °° 1955 Andh WR 609 (611).

(12) A party who is ready and willing to perform the contract can alone complain of the

Section 55 — Note 10 (contd.)
unreasonableness of the time engrafted into the contract by the subsequent notice. If he refuses to receive notice and to take advantage of the opportunity given by the party not in default he cannot subsequently complain that the time was unreasonable and therefore, the notice should be treated as inoperative. 1955 Andh WR 609 (611).

(13) The presumption that contracts of sale in respect of real property are intended to be carried within a reasonable time may be displaced by the clear language of the agreement of sale itself. 1954 All WR (HC) 446 (447).

(14) Where the contract has to be completed within a fixed period and, therefore, time is of the essence of the contract, to require of the vendor that he should allow reasonable time beyond the fixed period to enable the purchaser to do what he was required to do by the terms of the contract, would amount to making a new contract for the parties. **A 1948 PC 192 (194).**

(15) Although in a contract for sale of land, time may not be of the essence of the contract, yet unreasonable delay by the vendee will entitle the vendor to terminate the contract. A 1921 Mad 141 (142).

(16) Equity will not come to rescue where there has been undue delay in performance by a party. A 1953 Orissa 105 (107) (DB) ** A 1947 Nag 193 (199) (DB).

(17) It is not every delay which will give the other side a right to rescind, and each case must be decided on its own facts. A 1952 Nag 220 (235) (DB).

(18) In certain circumstances the Court of Equity will condone the delay and enforce the contract. The Court has no power, however, to make a new contract between the parties. A 1952 Pat 393 (400) (DB).

(19) Where there has been inordinate delay on both sides, it may be inferred that the contract has been abandoned although no notice fixing a reasonable time has been given. A 1950 Nag 238 (240) (DB).

(20) Time made essence of contract — Substantial compliance of contract within stipulated time by plaintiff — **Held** did not entitle him to any relief. A 1977 Cal 52 (54, 55).

(21) Agreement to reconvey property by vendee on return of consideration amount within stipulated time — Contract is one of reciprocal promises and is governed by Section 51 — Suit for specific performance by vendor — By tendering the amount within times, vendor-plaintiff discharges his obligation and is entitled to a decree for specific performance. A 1973 Gauhati 66.

11. Acceptance of performance after time fixed — Paragraph 3.— (1) Acceptance of payment after the expiry of the time fixed operates as a waiver of limitation as to time in the contract. A 1917 Pat 82 (83).

(2) Acceptance of performance of contract in which time is of essence after expiry of time without notice to claim compensation forfeits rights to such compensation. (1910) 8 Mad LT 40 (46) ** A 1930 Oudh 417 (420) (DB).

(3) Time made expressly of the essence — Equity Court will not decree specific performance unless parties have waived the provision as to essence. **A 1915 PC 94 (95).**

(4) Purchaser may by his conduct waive although time is made the essence of the contract and where the time is once allowed to pass and, parties continue to negotiate for completing the purchase then time no longer remains the essence of the contract. But simple extension of time without anything more amounts only to a waiver to the extent of substituting such extended time for the original time and does not destroy the essential character of the time. A 1925 Cal 324 (326) (DB) ** A 1964 Bom 76 (81) (DB).

(5) Mere delay on the part of a party to the contract should not be taken to amount to waiver or abandonment by him, unless the parties have expressly or impliedly by their conduct made time the essence of the contract delay is no valid plea in a suit on contract. Undue delay on the part of one party to a contract coupled with reasonable notice given to him by the other party will disentitle the party delaying from claiming any relief in equity. A 1925 Nag 58 (58) ** A 1929 Nag 164 (168).

(6) Sale — Time as essence of contract — Earnest money paid and balance to be paid within thirty days — Balance paid by instalments extending beyond such period and accepted by vendor — Right to recover entire money within thirty days is waived — He cannot contend that time was essence of the contract. A 1938 Rang 367 (367) (DB)

(7) Time fixed for delivery but no delivery called for — Subsequently plaintiffs manufacturing goods and defendants taking delivery in small quantities for long time — Plaintiffs giving notice to defendants to take delivery of remaining goods and on defendant's default selling by auction and claiming difference — Written contract had come to an end and there being no second contract plaintiffs were not entitled to relief. (1922) 24 Bom LR 142 (147, 148).

(8) Contract to deliver goods within a specified time — Time essence of contract — Breach of contract — Promisee not avoiding contract but extending time — Failure to deliver within extended time — **Held** there was breach of contract at the extended dates, and plaintiff was entitled to damages — Section 55 (3) means that the promisee cannot claim damages for non-performance at originally agreed time, not that he cannot claim damages for non-performance at the extended time. **A 1922 PC 178 (180) ** A 1959 Cal 472 (474) (DB).**

12. Effect of non-performance.— (1) Specific performance of contract to sell land will be granted although there has been failure to keep dates assigned to it, if justice can be done between parties and if nothing in express stipulations of parties, nature of property or surrounding circumstances make it inequitable to grant relief. **A 1915 PC 83 (84, 85) ** A 1955 Pat 201 (205, 206) (DB) ** A 1953 Orissa 105 (107) (DB) ** A 1952 Sau 88 (89) ** A 1949 Cal 510 (511) ** A 1967 SC 868 (871) ** ILR (1966) 2 Mad 117 (DB) ** (1964) 68 Cal WN 611.**

(2) Where time is not of the essence of the contract, the expiry of the time limit given in the agreement does not make the agreement impossible of performance — The agreement can still be specifically enforced. **A 1949 Cal 510 (511).**

Section 55 — Note 12 (contd.)

(3) Where time is not the essence of the contract for the purchase of immovable property, the failure to pay a portion of the purchase money within the stipulated period will not ipso facto, disentitle him to get a decree for specific performance. A 1950 Cal 526 (527).

(4) Where the purchaser does not complete the contract within time which is of the essence of the contract, the remedy is to claim specific performance. ILR (1949) 2 Cal 530 (534).

(5) Where in a contract for the sale of land time is expressly made of the essence of the contract in all respects, specific performance cannot be decreed in favour of the party in default and the default, though trivial, will entitle the other party to stand on the letter of the agreement — Time being of the essence of the contract, the vendor is entitled to rescind it on the expiry of the prescribed period. A 1916 PC 152 (157).

[See also A 1963 Mad 468 (471) (DB). (Sale by public auction at the instance of equitable mortgagee — Stipulation as to payment by highest bidder of initial deposit and balance within certain time — Default in payment by action purchaser — He is not entitled to decree either for specific performance or for damages.)]

(6) Where an express stipulation as to payment of entire consideration before execution and registration exists between the purchaser and the seller and the latter by his conduct in accepting a part of the consideration when the sale deed could not be registered clearly indicates that the stipulation was not of the essence of the contract, the purchaser is entitled to specific performance of the contract when the seller sells the property to a third party. A 1955 Pat 201 (206) (DB).

(7) Where the vendors were guilty of unreasonable delay on their part in the matter of obtaining the sanction of the High Court which was a condition requisite for the sale to be effected and there was notice from the vendee asking them to complete the sale, it was held that the vendee was entitled to get back his earnest money. A 1958 Punj 111 (115) (DB).

[See also A 1958 Madh Pra 239 (241) (DB). (Agreement for sale of land — Obtaining sanction of revenue authority necessary — Vendors not taking diligent steps to obtain — Breach of obligation — Vendors are bound to return earnest money.)]

(8) Where there is neither any evidence to show that in absence of sanction from Government to transfer the land, the transfer would be rendered void nor such sanction was contemplated under the terms of contract for sale, the purchaser cannot insist to complete contract only on the vendor's obtaining such sanction. 1965 Pun LR (Supp) 251 (DB).

(9) Where the vendor agrees to sell land after obtaining requisite sanction from Government, but later on abstains from taking such permission, and time is not of the essence of contract, he can be compelled by Court to apply for permission and specific performance enforced if permission is obtained. A 1964 SC 978 (979, 980).

(10) The defendants contracted to sell their property to the plaintiff by an agreement dated 10-1-49. It was stipulated that the conveyance of the property would be executed within 60 days and in case the defendants failed to do so, they would be liable to pay Rs. 3,000 as damages. The plaintiff paid Rs. 1,500 as earnest money at the time of the contract. The last day of the expiry of 60 days fell on 11-3-1949. On 10-3-1949 the plaintiff sent a telegraphic notice alleging breach of contract and claiming return of the earnest money and Rs. 3,000 as damages. It was held that the time was not of the essence of contract and the breach of the contract was on the part of the plaintiff. The plaintiff having wrongfully repudiated the contract on 10-3-1949 he was not entitled to the return of the earnest money. A 1952 Sau 88 (90) •• (1950) 3 Sau LR 252 (254) (DB).

(11) Where time is not of essence of contract failure to comply by specified time entitles promisee to damages only. A 1916 Sind 71 (72) •• A 1924 Bom 282 (286, 287).

(12) As soon as contract for sale of goods within a specified date is broken obligation of purchaser to take delivery vanishes; he is not bound to take the goods when delivered later. A 1915 Cal 194 (197) (DB).

(13) Contract for sale of immovable property to be performed within a certain time — Time not essence of contract — Vendee performing his part but not vendor — Vendor disentitled to claim specific performance — Vendee entitled to avoid the contract and claim return of purchase money. A 1933 Bom 71 (76) (DB).

(14) In a contract purchaser agreed to purchase some land and paid advance, the agreement was that the balance would be paid within a fixed time. In part performance of the contract, some land was transferred to the nominee of the purchaser and the vendor served a notice on the vendee for completion of sale by a fixed date; otherwise sale would be avoided. The purchaser failed: **Held**, the purchaser was not entitled to return of the deposit as the contract was avoided on failure of the purchaser to perform his part at a fixed time when time was of the essence of contract. (1910) 33 Mad 375 (382) (DB).

(15) Where the plaintiff claims remuneration on the basis of the contract in which time was of essence and that contract which was foundation of the claim, fails completely the plaintiff is not entitled to remuneration on the basis of quantum meruit of his services. (1912) 15 Cal LJ 40 (49) (DB) •• (1913) 19 Ind Cas 48 (50) (Low Bur).

(16) Agreement for sale of immovable property — Property capable of identification by description — Agreement giving full description and not including any term for demarcation before execution of sale deed — Purchaser demanding demarcation before executing deed — **Held**, that there was breach on part of purchaser and vendors were not liable for any damages. A 1968 Goa 98 (100).

(17) Part of promise not performed by plaintiff — Defendant however not prevented thereby from carrying out the contract and contract

56. Argeement to do impossible act.— An agreement to do an act impossible in itself is void.

Contract to do act afterwards becoming impossible or unlawful.

A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

Compensation for loss through non-performance of act known to be impossible or unlawful.

Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know to be impossible or unlawful, such promisor must make compensation

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Section 55 — Note 12 (contd.)
not repudiated by defendant — No loss hence occasioned to him — Section 53 or 55 therefore cannot apply. ILR (1969) 2 All 421.

(18) After the contract becomes voidable, if the promisee continues to accept the performance of the contract by the promisor, and does not treat the contract void, the promisee cannot claim compensation for any loss occasioned to him by the non-performance of the promises at the time agreed, unless, at the time of such acceptance, the promisee gives notice to the promisor of his intention to do so. Thus in absence of notice by one party to another while accepting performance of the contract by the latter beyond the stipulated time no claim for damages can be maintained. ILR (1972) Cut 1111.

(19) Suit by A against B for specific performance of contract — Property agreed to be sold only for a sum of Rs. 17,000/- — B from time to time paying Rs. 12,000/- — B also in possession of property — A calling upon B to pay full amount — Failure of B to do so — A competent to maintain suit for possession and in the alternative for the balance of the amount and interest thereon. **A 1977 SC 1517 (1520).**

SECTION 56 — SYNOPSIS

1. Scope.
2. Becomes impossible.
3. Becomes unlawful.
4. Contract containing arbitration clause.
5. Decree for specific performance.
6. Refund and compensation.

1. Scope.— (1) Section 56, Contract Act, clearly does not apply to a case, in which, although consideration of contract is lost, performance of promise on other side is still possible. (1880) 2 Mad 187 (190).

(2) Section 56, contemplates that a contract may be void under its provisions and yet compensation may be payable by the person, who is unable to perform it, whether the impediment is impossibility or unlawfulness, and whether, the impediment existed at the time of the contract or supervened. The real question that must be considered, when it has to be determined whether Section 56 is applicable or not in any suit, except where the contract is sought to be specifically enforced, is not whether the contract was or become void, but whether the promisor has to make compensation for non-performance. The substance of Section 56 (viz., the payment of compensation being excused can only apply when there is no contract to the contrary. A 1928 Sind 21 (24).

(3) Part of compromise decree, directing payment direct out of Court, to minor's next friend can be ignored on analogy of Section 56 as unlawful. A 1939 Mad 814 (816) (DB).

(4) Section 56 held not applicable to compromise decree — Decree could not be held to have been frustrated owing to non-receipt of any income or profit in respect of schedule property which had vested in the then State of Pakistan. A 1978 Cal 147.

(5) Maintenance given under compromise in settlement of disputed claim to taluqdari — Profits of taluqdari dwindling — **Held**, that the maintenance rate can be reduced on principles of justice, equity and good conscience, rules of which can be applied, if they are not in conflict with the provisions of Contract Act. A 1937 Oudh 82 (84, 86) (DB).

(6) Co-sharer zamindar contracting to sell 800 acres of his undivided share to P — Land specified adjoining to P's — Sale-deed written crudely — Two postscripts — Co-sharer promising in sale deed to get land measured out and handed over to P — **Held**, that postscript could not be cut off from agreement and that P could not give general character instead of specific to his claim — Contract was contingent and Section 32 applied — Section 56 did not apply. A 1936 Sind 26 (28) (DB).

(7) Contract impossible of fulfilment owing to supervening condition can be relied on in defence. A 1926 Sind 27 (30) •• A 1918 Cal 830 (834) (DB).

(8) It is not accurate to say that impossibility excuses breach, without further qualification. It would be more correct to say that precisely opposite is the rule. (Obiter.) **A 1919 PC 85 (90).**

(9) The concept of frustration of the agreement which is consensual as envisaged under the Contract Act, cannot have ipso facto application to the situation arising under the specific statute like Abkari Act. The Governmental contract as envisaged under the Abkari Act is to be construed in the context of the provisions contained therein and the Rules made thereunder. It is more or less unilateral in character in the sense that the lessee or licencee undertook to abide by the terms and conditions contained in the lease or the licence prepared by the Government. A 1980 Andh Pra 18 (24).

(10) Agreement for sale of agricultural land — Permission refused by Prant Officer to sell since certificate under Rule 36 was not obtained by purchaser — Collector subsequently granting certificate and permission — Contract not rendered impossible of performance by former order of Prant Officer. **A 1977 SC 1019 (1025).** (Decision in App. No. 472 of 1960, D/- 29-1-1968 (Bom), **Reversed.**)

to such promisee for any loss which such promisee sustains through the non-performance of the promise.

Illustrations

(a) A agrees with B to discover treasure by magic. The agreement is void.

(b) A and B contract to marry each other. Before the time fixed for the marriage, A goes mad. The contract becomes void.

(c) A contracts to marry B, being already married to C, and being forbidden by the law to which he is subject to practise polygamy. A must make compensation to B for the loss caused to her by the non-performance of his promise.

(d) A contracts to take in cargo for B at a foreign port. A's Government afterwards declares war against the country in which the port is situated. The contract becomes void when war is declared.

(e) A contracts to act at a theatre for six months in consideration of a sum, paid in advance by B. On several occasions A is too ill to act. The contract to act on those occasions becomes void.

[Malaysian Contract Act 1950, S. 57.]

Section 56 (contd.)

2. Becomes impossible.— (1) In English law, a contract to do act which becomes impossible in law after contract is made, becomes void when act becomes impossible, but contract to do act which becomes impossible in fact does not become void, unless according to true intention of parties, agreement was conditional on its performance being or continuing possible in fact. Indian Contract Act makes no distinction of this kind. In second paragraph of Section 56, so far as contract to do act which becomes impossible in fact are concerned, it lays down as general rule what was English law only in certain exceptional cases. 1910 Upp Bur Rul 2nd Qr 22 (24 and 25).

(2) Performance of a contract may become impossible because of the destruction of the subject-matter or of anything essential to the performance of the contract or in case of contracts of service by death or illness of the party concerned. A contract may become impossible by change in law which has the effect of rendering a contract unlawful which was lawful at the time it was made. A contract may also become impossible of performance because a state of things which was the basis of the contract had ceased to exist and finally a contract may become impossible of performance in the sense that circumstances have intervened which render the performance within the time, in the way contemplated, impossible. A 1954 Tripura 17 (20).

(3) Test of impossibility is whether it was practically impossible for party to perform the contract within specified time. A 1917 Mad 509 (510).

(4) 'Impossible' includes what has become impracticable but it does not include what has become more onerous and burdensome. 1910 Mad WN 686 (687).

(5) A security bond is in essence a contract for the due performance of a certain thing, and a party is entitled to have that contract enforced by the Courts, unless it cannot be enforced due to some reason, viz., if the latter falls ill. A 1928 Lah 61 (62).

(6) What is reasonable time for performance of contract is to be decided by circumstances of particular case. A 1919 Mad 287 (291, 292).

(7) In commercial contracts, where the contract becomes impossible of performance by reason of a state of war or by an act of the executive Government, or the contract which would otherwise be expected to be ordinarily performed, is delayed by reason of certain regulations imposed by the Government making the performance of such contract dependant upon the grant of licence or permit, the parties need not wait for an indefinite period in the hope of the relaxing of the control orders or the granting of licence and permit. A 1954 Mad 119 (123) (DB).

(8) Section 13 of the Specific Relief Act, 1877, provides that notwithstanding anything contained in Section 56 of the Contract Act, a contract is not wholly impossible of performance because a portion of its subject-matter, existing at its date, has ceased to exist at the time of the performance.

Frustration.

(9) Section 56 does not cover every case of frustration. It applies only to cases of physical impossibility. A subsequent unforeseen event or contingency, for which neither of parties is responsible and for which they have not provided, may sometimes operate to avoid the contract. Regard must be had to the nature and circumstances of the transaction and the implied terms. But no Court has power of absolution and special care must be taken to avoid making a new contract for parties. A 1921 Cal 509 (513, 514) •• A 1960 SC 588 (594) •• A 1960 J & K 91 (94) •• A 1959 Cal 576 (580) : 63 Cal WN 549 (DB).

(10) In a suit on the basis of a contract it is open to the defendant to admit the contract and the contractual liability and to avoid the effect of that admission on the pleas of frustration or of performance. A 1969 All 571 (581) (DB).

(11) The doctrine entrenched in Section 56 can come into operation only when the performance of a contract becomes impossible or unlawful by an event that intervened subsequently. A 1957 Andh Pra 71 (72).

Section 56 — Note 2 (contd.)

(12) If the performance of a contract becomes impracticable or useless having regard to the object and purpose the parties had in view then it must be held that the performance of the contract has become impossible. But the supervening events should take away the basis of the contract and it should be of such a character that it strikes at the root of the contract. A 1971 SC 1756 (1759).

(13) In order that the doctrine of frustration as embodied in Section 56, Contract Act, may apply the following three conditions must be satisfied, viz. —

(a) a valid and subsisting contract between the parties,

(b) there must be some part of the contract yet to be performed,

(c) the contract after it is made, becomes 'impossible'. A 1961 Cal 70 (73) ** A 1975 Cal 92 (97).

(14) The doctrine of frustration known to English law has been statutorily recognised under the Indian law, in this section. A 1954 Trav-Co 10 (20) ** 1965 All LJ 689. (It is not permissible to import the principles of English law 'dehors' statutory provisions of Section 56.) ** A 1964 Raj 205 (212) (DB) ** A 1960 J & K 91 (94). (Section 56 is exhaustive and it is not necessary to import principles of English law into it.)

(15) Section 56 lays down a rule of positive law and does not leave the matter to be determined according to the intention of the parties. A 1968 SC 522 (526, 527) ** A 1969 SC 110 (116).

(16) The real question is whether the event which has occurred is such and whether its relation to the contracts is such that a Judge considering the contract and the surrounding circumstances must hold that it would not be just and reasonable to hold the parties any longer to the terms of the contract. A 1952 Cal 397 (402) (DB).

(17) The doctrine of frustration is really an aspect or part of the law of discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done and hence comes within the purview of Section 56 of the Indian Contract Act. A 1954 SC 44 (47) ** A 1969 SC 110. (Appeal No. 367 of 1958, D/- 16-3-1962 (Mad), Reversed.) ** A 1968 SC 522 (527) ** A 1961 Raj 277 (279) ** ILR (1961) 11 Raj 390 (DB) ** A 1959 Assam 75 (93) (DB) ** A 1959 Cal 576 (580) (DB).

(18) Before the doctrine of frustration can be invoked, it must be shown that the event which has produced frustration was an event which the parties to the contract did not foresee and could not with a reasonable diligence, have foreseen. A 1955 Pepsu 51 (56) (DB) ** A 1958 Andh Pra 576 (580) (DB).

(19) If and when there is frustration the dissolution of the contract occurs automatically. It does not depend, as does rescission of a contract on the ground of repudiation or breach or on the choice or election of either party. It depends on the effect of what has actually happened on the possibility of performing the contract. The doctrine of frustration applies to cases, where the very foundation of a contract disappears by virtue of circumstances coming into existence which were not within the contemplation of the parties to the contract. ILR (1977) 1 Bom 26.

(20) If the contract is absolute in its terms and covers the frustrating event parties are bound by the contract. ILR (1949) Nag 718 (734) (DB).

(21) "Force majeure" clause should be construed with a close attention towards which precede or follow it and with due regard to the nature and general terms of the contract. Therefore, the words "any other happening" in such a clause must be given ejusdem generis construction so as to engulf within its fold only such happenings and eventualities which are of the nature and type illustrated in the same clause with close attention to the nature of terms of the contract and would not reasonably be within the power and control of the party. A 1969 Orissa 152 (162) (DB). (Overruled on another point in A 1972 Orissa 40 (FB).)

(22) The expression "force majeure" includes strikes, break down of machinery and such things which are normally not included in the expression "vis major". Where reference is made to "force majeure", the intention is to save the performing party from the consequences of anything of the nature stated above or over which he has no control. A 1969 Orissa 152 (162) (DB). (Overruled on another point in A 1972 Orissa 40 (FB).)

(23) If the adventure survives as a reasonable and recognisable whole with only a little damage here and there if a very small portion of the contract becomes impossible or difficult of performance, performance is not excused. ILR (1949) Nag 718 (736) (DB).

(24) Contract performed in part — Principle of compensation on account of frustration of contract could not come in aid. A 1955 Mad 606 (607).

(25) The doctrine of frustration is applicable to contracts for sale of land in India. A 1954 SC 44 (49) ** 1955-2 Mad LJ 339 (355) (DB) ** A 1951 Cal 332 (337) (DB).

(26) Doctrine of frustration — Provisions of Section 56 are exhaustive — Section 56 lays down a positive rule relating to frustration of contracts and it is not permissible for the Courts to travel outside the provision of that section and import the principles of English law dehors the statutory provisions. A 1954 SC 44 (47) ** A 1968 SC 1024 (1026). (A 1949 EP 301, Overruled.)

(27) Doctrine of 'frustration of venture' is based not upon existence of any actual impossibility in fact but upon existence in the circumstances of the case, of an implied condition, which must be absolutely necessary to give effect to the transaction which parties must have intended. A 1942 Cal 291 (292) ** A 1934 Mad 85 (86) (DB).

(28) Where at the time contract was entered into there were in fact some uncertainties and subsequently those uncertainties become realities, the commercial venture gets frustrated and both parties are excused from performing the contract. A 1966 Madh Pra 145 (150) (DB).

(29) Where it has not become impossible for a party to perform his obligation under contract, but merely burdensome to him, doctrine of frustration can have no application. A 1945 Pat 300 (303, 304) (DB) ** A 1960 SC 588 (593, 594). (Contract is not frustrated merely because of a wholly

Section 56 — Note 2 (contd.)

abnormal rise or fall in prices, a sudden depreciation of currency, or an unexpected obstacle to execution or the like.) ** A 1964 J and K 26 (28) ** A 1962 Mad 122 (125, 126) ** 1961 Ker LT 449 ** A 1961 Orissa 75 (78, 79) (DB).

(30) Disappointed expections do not lead to frustrated contracts. A 1964 Punj 482 (485) : 66 Pun LR 943. (Company agreeing to pay bonus to its employees — Ratification of agreement even after company incurred losses — Subsequent refusal of company to pay bonus on grounds of losses cannot be justified on the doctrine of frustration.)

(31) Whether frustration occurs or not depends on the nature of the contract and on the events which have occurred. The doctrine of frustration may apply to a contract of unascertained goods. Where the specification of goods to be supplied does not define what was to be the source of the goods the contract cannot be said to have frustrated if only one of the many ways of performing it has become illegal or impossible. **A 1945 PC 144 (145, 146)** ** A 1952 Cal 335 (338).

(32) Where a clause in a contract provided that alterations in specifications and designs during the progress of the work shall not invalidate the contract and the contractor carried out a certain additional item of work according to the altered specifications and also received payment for such work, it could not be said that the performance of the contract had become impossible or unlawful and thereby the contract was frustrated. Even otherwise a contract is not frustrated merely because the circumstances in which the contract was made are altered. A 1973 Raj 223 (231).

(33) If the seller has no goods at all ready for shipment, he cannot take advantage of the circumstance that shipment was impossible; that defence should be available only to a person who, but for the impossibility of shipment by reason of circumstances beyond his control, was in fact in a position to fulfil his engagement. A 1921 Cal 305 (306, 307, 308).

(34) When there is frustration the dissolution of the contract occurs automatically. It does not depend on the choice or election of either party. **A 1954 SC 44 (49)** ** A 1957 Pat 586 (597) (DB) ** A 1954 Mad 119 (124) (DB) ** A 1964 Raj 205 (212) (DB).

(35) The doctrine of frustration is applicable only where the frustrating event is outside the contemplation of the contracting parties. It is not applicable to an express contract to repay money in case of supervening impossibility of performance of a major obligation. A 1947 Bom 98 (104) ** A 1964 Pat 250 (251) (DB) ** A 1961 Raj 277 (279) ** 1958 Andh LT 960.

(36) Contract Act does not enable a party to a contract to ignore the express covenants thereof, and to claim payment of consideration for performance of the contract at rates different from the stipulated rates, on some vague plea of equity. **A 1960 SC 588 (594).**

Implied term.

(37) Sections 56, 73 — Contract between A and B that B should manufacture certain goods for A who was to sell them in Australia — A accepting delivery of goods for some time — Subsequent prohibition of import of such goods in Australia — A losing market for goods and asking B to cancel his orders — B ceasing to manufacture goods but claiming damages for breach of contract — Contract, held, did not contain implied term as to its enforceability depending upon A's finding customers and did not become impossible of performance and could be fulfilled — A, held, guilty of breach and liable to pay damages. A 1945 Mad 291 (293, 294) (DB).

(38) Contract to sell Penang tin "for forward delivery" — Contract held did not imply term that tin already ordered by sellers should arrive in Calcutta before delivery to purchasers — It was not such a necessary term that both parties must have intended it to be a term of the contract — Onus was on sellers to prove that contract became impossible of performance due to outbreak of war with Japan — Burden was not discharged. **A 1948 PC 217 (220).**

(39) Even if the parties had made a provision in their contract for the event which has frustrated, the law would imply for them what it assumes they would have agreed had they contemplated this unforeseen contingency at the time they entered into contract. 1958 Andh LT 960.

(40) It is not permissible to imply a term which is not consistent with the express terms of the contract. Even if such a term could be implied, it must at least be proved that the common intention of both the parties was that in the event of non-fulfilment of the implied term the defendant would be excused from performance of his obligations under the contract. A 1952 Cal 397 (400) (DB).

(41) If under the relevant statute at the relevant time a property cannot be transferred without the permission of the prescribed authority the agreement shall be deemed subject to the implied condition that requirements of the statute shall be complied with and the transferee will obtain necessary sanction of the prescribed authority. Merely because the conditions for grant of permission are onerous and prejudicial to the interest of the party applying for permission that does not make the performance of the contract impossible or has not the effect of frustrating the same. (1977) 4 Cal HC (N) 114 (116).

(42) Where the defendant agreed to supply the contract sugar after obtaining the release order and that his applying for the wagons was conditional upon his securing free sugar, free from control and free to move. A term that the defendant should apply for wagons after the release order is made can be implied in the suit contracts (1976) 1 Mad LJ 39 (49).

(43) In contract for delivery of goods, buyer is not entitled to claim damages on sinking of goods in the absence of any condition in contract specially providing for a contingency. **A 1930 Lah 193 (195).**

Section 56 — Note 2 (contd.)

(44) Hire-purchase — Covenant that hirer to make good loss by fire is valid and the stipulation cannot be avoided under Sec. 56, hirer being liable as bailee under Sections 151 and 152, Contract Act. A 1937 Sind 207 (207) (DB).

(45) Contract to supply tapestries manufactured to specification given by vendee for selling them in Australia — Australian Government prohibiting import of such goods — Market having been lost vendee informing vendor to cancel order — Sale to clients in Australia held was no term of contract — Vendee held liable for damages. A 1945 Mad 291 (293, 294) (DB).

Commercial impossibility.

(46) Impossibility must be physical or legal impossibility and not impossibility in reference to ability or circumstances. "Commercial impossibility" i.e., extreme or unforeseen cost or difficulty of performance is no excuse. A 1921 Cal 305 (307, 308) **** A 1923 PC 105 (111) ** A 1952 Punj 34 (38) (FB)** ** A 1957 Pat 256 (258, 259) (DB) ** A 1956 Hyd 190 (191) ** A 1951 Ajmer 65 (66) ** 1949-1 Madh BLR 244 (248) (DB) ** (1947) 52 Mys HCR 41 (45) (DB) ** A 1945 Pat 300 (303, 304) (DB) ** A 1931 Lah 347 (348, 349) (DB) ** A 1921 Nag 42 (45) ** A 1915 Bom 232 (236) ** A 1967 All 253 (255). (In absence of any incapacity to perform contract parties are not absolved from their obligation to carry out the contract.) ** A 1962 Mad 132 (137).

(47) The word "impossible" has not been used in the sense of physical or literal impossibility. The performance of an act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose which the parties had in view; and if an untoward event or change of circumstances totally upsets the very foundation which the parties rested their bargain it can be said that the promisor finds it impossible to do the act which he promised to do. **A 1954 SC 44 (46)** ** A 1957 Andh Pra 71 (72, 73) ** ILR (1957) Andh Pra 382 (387) ** 1955-2 Mad LJ 339 (355) (DB) ** A 1963 All 201 (203) ** A 1963 All 194 (197) ** 1963 Raj LW 621 ** A 1961 Mys 29 (33) (DB) ** A 1961 Pat 41 (55) (DB) ** A 1960 J and K 91 (94).

(47-A) English case under an agreement a company undertook to supply water at specified rate to Hospital. The agreement was a continuing one. Water charges were increased by 20 times during the period — **Held** that the contract became impossible of performance and could be terminated by reasonable notice. (1978) 3 All ER 769 (CA).

(48) The Court will not apply the doctrine of impossibility to assist a party which does not want to fulfil its obligations under the contract and relies on literal impossibility to back out of it. The doctrine of impossibility, which is based on equity and commonsense cannot be permitted to become a device for destroying the sanctity of contract. A 1963 All 201 (203).

(49) Any and every change of circumstance would not justify a Court in declaring a contract to be inoperative. The principal thing to be considered in each case is how far the altered circumstances affect the contract itself and the working of it. The change of circumstance must be such as would remove the very foundation of the contract itself. ILR (1951) 2 Cal 386 (394) (DB) ** A 1965 Mad 400 (402) (DB) ** 1961 Ker LT 449.

(50) Commercial men must not be asked to wait till the end of a long delay to find out from what in fact happens whether they are bound by a contract or not; they must be entitled to act on reasonable commercial probabilities at the time when they are called upon to make up their minds. ILR (1948) 2 Cal 11 (32).

(51) Where the clauses in a contract for sale of certain items of trust property made the passing of property dependent on tender of balance of the price by successful bidders and taking delivery of goods upon such payment and the Court, in the meanwhile restrained the trustees by ad interim injunction from finalising the sale, the grant of such injunction prevented the performance of the contracts which must be deemed to be frustrated. **A 1980 SC 17 (28).**

(52) Where there is a positive contract to do a thing, not itself unlawful, the contractor has to perform it or pay damages for not going it, although in consequence of unforeseen accidents the performance of contract may become unexpectedly burdensome or even impossible. A 1957 Madh B 53 (55) (DB).

(53) The change must be of a fundamental and sweeping character which kills the contract itself and not merely one of a temporary nature which leaves the contract alive and capable of being performed at a future date. That question is a question of fact to be determined on a consideration of all the facts. A 1953 Mad 300 (304) (DB) ** 1967 Ker LR 774 ** A 1964 Raj 205 (212) (DB) ** A 1962 Mad 132 (136) (DB). (Self-induced frustration — Party is not absolved from its obligations) ** A 1960 J and K 91 (94) ** (1958) 1 Andh WR 180 (DB).

(54) Lease of dry dock — Lessee covenanting to insure — Insurance Company not insuring at current premium — Covenant containing no limitation that insurance must be at current premium only — Covenant is not impossible of performance. **A 1919 PC 85 (90).**

(55) Strike of workmen employed by lessee of salt pans does not of itself make performance of contract impossible, when the strike was not unforeseen and there was no condition that in such contingency the parties were to be excused from further performance. The lessee is liable for rent and costs of repairs to the salt pans. A 1928 Bom 61 (62).

(56) Where the specification of goods to be supplied does not define what was to be the source of the goods, the contract cannot be said to have frustrated if only one of many ways of performing it has become illegal or impossible. **A 1945 PC 144 (145, 146).**

Default of party.

(57) Section does not apply to cases of impossibility due to the default of contract-

Section 56 — Note 2 (contd.)

ing party himself. A 1924 Pat 586 (589) ** A 1952 SC 9 (11) ** A 1935 PC 128 (131) ** A 1957 All 143 (146) (DB) ** A 1954 Tripura 17 (20, 21) ** A 1953 Mad 309 (308) (DB) ** A 1952 Cal 397 (403) (DB) ** A 1948 Pat 311 (312) ** A 1965 Mad 400 (402) (DB) ** A 1963 Cal 163 (174). (Self-induced frustration — Party is not absolved from its obligation.) ** A 1959 Assam 75 (90) (DB) ** ILR (1978) 1 Delhi 526.

(58) The provisions of Section 56 of the Contract Act cannot apply to a case of "self-induced frustration" i.e., where the event which is alleged to have frustrated the contract arises from the act or election of a party. **A 1969 SC 110 (118).**

(59) Auction-purchaser agreeing with judgment-debtor to reconvey property purchased at Court auction after applying for cancellation — Judgment-debtor depositing the amount as agreed upon — Auction-purchaser failing to get the sale cancelled — Suit for specific performance — Auction-purchaser held liable to perform the contract as failure to apply for cancellation did not make the contract impossible of performance. A 1917 Mad 67 (67, 68).

(60) Sections 56 and 2 (d) — Original patti divided into sub-pattis — Owner of one sub-patti agreeing to be responsible for rents of whole original patti — Agreement is for consideration and he is responsible for failure to realize amount — S. 56 does not apply. A 1944 Nag 307 (308).

(61) Contract for sale becoming impossible by act of defendant-seller — He is liable to refund advance paid by plaintiff purchaser. A 1963 Ker 247 (247).

Act of third party.

(62) Contract to sell goods on getting them "as and when" from a third party but third party failing — Original contract is not frustrated — "As and when" did not mean "if and when". **A 1923 PC 54 (56).**

(63) Where under a contract the client promised to pay lump sum remuneration to his solicitor if he negotiated and completed sale of his premises and the solicitor procured a purchaser prepared draft conveyance but the sale could not be completed due to breach on the part of the purchaser the solicitor cannot recover the remuneration and Section 70 cannot apply as there was an express contract nor can Section 56 apply as breach on the part of purchaser could be foreseen by the parties and did not lead to an impossibility of performance by the solicitor as contemplated by Section 56. A 1973 Cal 135 (138, 139, 140).

(64) Vendor agreeing to supply goods "under manufacture by mill" — Contract anticipating supply — Mill failing to supply goods to vendor — Neither party held liable to the other. A 1920 Bom 187 (188).

(65) Agreement to refer dispute to three named arbitrators — One arbitrator dying before reference — Agreement held impossible of performance. 1936 Mad WN 407 (408).

(66) Where plaintiff, who had contracted to cultivate indigo for defendant in different lands, lost possession of some of such lands, on account of failure of his immediate landlord to pay rent, the case falls under Section 56 and the mere possibility of plaintiff paying rent due and retaining possession is not enough to take the case out of section. Plaintiff therefore is entitled to have that portion of contract which related to such lands cancelled on ground of impossibility of performance through no neglect on his part. (1881) 7 Cal 474 (478, 479).

(67) Where a sub-lease is entered into in the belief that the original contract will be subsisting during the period, the cancellation of contract terminates the sub-contract as well. A 1916 Mad 619 (619) ** (1909) 6 Mad LT 375 (375) (DB).

(68) Where the elder brother agrees to execute sale deed along with his younger brother he cannot plead that the contract has become impossible of performance due to refusal of his younger brother to join. (1907) 17 Mad LJ 37 (38, 39).

(69) First part of 2nd para of Section 56 does not speak of act having become impossible by reason of the act of promisors. The Legislature did not intend to depart from general common law rule, which is that where party has not qualified his obligation under contract he is liable to make compensation in damages for non-performance although the performance has been rendered impracticable by some unforeseen cause beyond his control (such as failure to return hired lights due to damage caused by rioters.) A 1941 Pat 429 (429, 430).

Act of Government.

(70) Contract on C. I. F. terms to ship certain goods of a certain brand to a certain port in a certain period — Contract containing a force majeure clause — The steamer commandeered by the Government for purposes of war — Accommodation for that cargo on any other steamer not obtained — Force majeure clause held applicable — Contract is avoided and damages cannot be claimed. A 1925 Mad 626 (630).

(71) Contract for sale of goods — Parties aware of restrictions imposed by Government on the supply of wagons but expecting normal conditions by date of performance — Wagon restriction still existing at date of performance — Failure to supply — Contract held void being impossible of performance — Parties relieved of their liabilities. A 1920 Cal 1021 (1024) ** A 1952 Cal 335 (338).

(72) Flower garden acquired by the Government under the Land Acquisition Act, during the continuance of a lease — Contract having become impossible of performance becomes void and the lessor is bound to compensate the lessee. A 1922 All 6 (6, 7).

(73) Parties not liable if contract for delivery of goods becomes impossible of performance owing to Government requisitioning ships. A 1928 Sind 21 (24).

(74) Contract of suretyship to produce judgment-debtor in Court becomes void, the latter being in Criminal jail and cannot be enforced. A 1923 Rang 26 (26).

(75) Agreement between Corporation of district of North Vancouver and Electric

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Power Company for supply of electricity by latter — Corporation to be entitled to acquire the system after 10 years — Portion of district incorporated as City of North Vancouver in the meantime — Right of Corporation under agreement is not lost there being no abrogation of terms by supervening event. **A 1917 PC 103 (105).** (Case under British Columbia Act, 1909, Cl. 35, S. 23).

(76) A requisition by Government of the subject matter of a contract made during the period of performance creates a supervening impossibility and frustrates the contract unless the parties by express terms contemplated such an event and provided against it. A 1952 Cal 397 (402) (DB).

(77) **Held,** on the facts that having regard to the nature and terms of the contract (for sale of house sites by a development company) the actual existence of war conditions at the time when it was entered into, the extent of the work involved in the development scheme and the total absence of any definite period of time agreed to by the parties within which the work was to be completed it could not be said that the requisition order as to the lands in question under the Defence of India Rules vitally affected the contract or made its performance impossible. **A 1954 SC 44 (50). (A 1951 Cal 332, Reversed.)**

(78) Defendant contracting to supply jaggery by rail — Delivery by rail becoming impossible by issue of Government notification controlling movement of jaggery by rail — Plaintiff refusing to bear additional expenditure entailed by change in mode of transport — **Held,** that even assuming that contract had not become impossible of performance, defendant did not commit breach of the contract. A 1952 Mad 670 (670).

(79) Where the goods were imported for sale, but its sale became prohibited by law by the time the goods arrived, there is no self-induced frustration and the contract to supply goods becomes void. **A 1969 SC 110 (118).** (Appeal No. 367 of 1958, dated 16th March, 1962 (Mad), **Reversed.)**

(80) Agreement between Government of former Jodhpur State and plaintiff for setting up mill by latter — State agreeing to exempt plaintiff from payment of excise duty — Agreement not enforceable against State of Rajasthan or Union of India. A 1960 Raj 92.

(81) Contract for supply of rice outside State — Ban by Government on export of foodgrains to other States — Contract stands discharged. A 1966 MP 145 (150) (DB).

(82) Contract for supply of oil for export — Contract becoming impossible due to sudden imposition of ban on export — Contract frustrated under Section 56. (1972) 76 Cal WN 528.

Burden of proof.

(83) Where in a contract for sale of certain goods the seller alleges that it was impossible for him to supply them owing to the restrictions placed by the Government on their purchase and sale by various notifications, the burden is on him to prove that the performance had become impossible. 1949-1 Madh BLR 244 (247, 248) (DB) ** A 1957 Madh B 186 (187) ** A 1957 Madh B 53 (54).

(84) The burden of establishing that the frustration is self-induced is on the plaintiff. A 1953 Mad 300 (308) (DB).

(85) Performance of contract — Extraction of timber logs from land — Defendant not extracting timber from area not accessible by tractor — Possibility of such performance — Onus on balance of probabilities is on plaintiff. **(1978) 1 Malayan LJ 208.**

(86) The onus of proving neglect or default by the party pleading frustration as defence is on the opposite party. A 1955 Pepsu 51 (57) (DB).

Temporary interruption.

(87) Sale of right to collect tolls — Destruction of bridges by unprecedented floods and temporary obstructions to traffic — **Held,** (1) damage caused by temporary obstruction to traffic did not make any difference and (2) contract did not become impossible of performance. A 1934 Mad 85 (87) (DB).

(88) Temporary interruption followed by the possibility of proceeding with the contract does not avoid the contract. But unconditional contracts are, as a general rule, not dissolved by their performance becoming impossible owing to war. A 1917 Cal 411 (415).

(89) Where the requisition of a part of land comprised in a tenancy is not expected to last for a very long period of time and is in respect of less than half the area covered by the tenancy with the result that the tenant is left in possession of the greater part of the tenanted lands, the doctrine of frustration cannot be invoked. A 1952 Cal 380 (381) (DB).

(90) For cases of temporary interruptions due to war conditions, see Note 3 below.

Partial impossibility.

(19) A lease both for cultivation and manufacturing bricks is not void though land leased is found unfit for the manufacture of good bricks and cultivation. A 1930 Lah 772 (774).

(92) Portion of the contract becoming incapable of performance — Contract is not void or unenforceable — Toll contractor, purchasing right to collect tolls cannot recover the purchase money from District Board on the ground that certain nature of traffic (foodgrains) was stopped by Government Ordinance. A 1925 Mad 907 (908).

(93) There is a clear distinction between a completed conveyance and an executory contract, and events which discharge a contract do not invalidate a concluded transfer. By its express terms Section 56 does not apply to cases in which there is a completed transfer. A covenant to do an act may become void when the act becomes impossible or unlawful. **A 1968 SC 1024. (A 1952 Cal 380 and A 1950 Bom 89 and A 1963 Mad 94 and A 1962 Mad 132 and (1881) ILR 7 Cal 474, Approved; A 1963 Punj 49 (FB), Overruled.)**

Section 56 — Note 2 (contd.)

Landlord and tenant

(94) Tenant cannot refuse rent of lands under lease silted by floods when there is possibility of putting them right. A 1929 Mad 575 (576).

(95) Where the lease-deed makes it absolutely clear that the rent stipulated therein is not subject to acts of God and State and that under no condition whatever any remission in rent shall be given, the lessees cannot be relieved of their obligation to pay the stipulated rent either on account of a 'cyclone' or on account of the alleged presence of the cultivating tenants on the lands. (1974) 1 Mad LJ 184.

(96) Neither civil law nor Transfer of Property Act provides that contract to pay rent is to be void if owing to failure of rain the tenant does not get crop. 1910 Upp Bur Rul 2nd Qr 22 (24 and 25).

[See also A 1963 Mad 94 (DB). (Lease of shandy tope for a term of years at annual rent — No provision for remission on account of loss due to unexpected causes — (Lessee not entitled to remission for loss suffered due to cyclones.) (1962) 2 Mad LJ 203 (DB).]

(97) The provisions relating to the remission of rent are not intended to apply to the case of lessees of zamindari property — Section 56 is not applicable to such a case. A 1935 Oudh 433 (434) (DB).

(98) Doctrine of frustration does not apply where there is a lease as the estate vested in the lessee by the lease is not extinguished by the order of requisition under Rule 75 (a) of the Defence of India Rules (1939) which is of a temporary nature. A 1950 Bom 89 (92).

(99) The doctrine of frustration, even if it may be applicable to a contract for a lease, does not apply to a case where the contract had already been executed and the tenant had been put in possession of the land in question when the military authorities on whose behalf the Government requisitioned the land during the currency of the lease occupied it. A 1952 Cal 567 (570).

(100) The rights of the parties after a lease was granted rest not in contract. Though under Section 4 of the T. P. Act, the chapters and Sections of the said Act relating to contracts are to be taken as part of the Contract Act, that does not mean that the provisions of the Contract Act are to be read into the T. P. Act. Therefore, by the destruction of the building the lease cannot be said to have become void and thus discharged. A 1979 Ker 156 (159) : 1979 Ker LT 596.

(101) A lease is something more than a mere contract or agreement in so far as it results in the creation of an estate in favour of the lessee This additional feature present in a lease cannot by itself rule out the applicability of the doctrine of frustration to a lease transaction. At any rate, the applicability of this doctrine to a lease at least to a limited extent has been given statutory recognition in India as is clear from Cl. (e). Section 108, Transfer of Property Act. A 1956 Trav-Co 59 (60) (DB).

(102) Doctrine of frustration does not apply to leases — Only exception is provided in Section 108 (e), Transfer of Property Act — Reduction of rent in fair rent proceeding between lessee and sub-lessee — Landlord not party to that proceeding — No frustration of contract between lessee and his landlord. 1969 Ker LT 941.

(103) Section 56 is not applicable when the rights and obligations of the parties arise under a transfer of property under a lease. **A 1968 SC 1024 (1026, 1027).** (Doctrine of frustration does not apply to leases including those of agricultural land. A 1963 Punj 49 (FB). which **overruled** A 1961 Punj 143, **Overruled.**) ** 1965 All LJ 689 ** A 1962 Mad 132 (140) ** A 1961 Cal 70 (74). (Section 108 (e) of T. P. Act will apply so far as frustration relating to leases is concerned.) ** (1960) 64 Cal WN 932. ** A 1977 All 376 ** A 1971 Assam 160 (161, 162).

(104) Law of frustration embodied in the provision is not applicable to completed conveyances (like leases) as it applies only to agreement. **A 1971 SC 1756 (1758).** (F. A. No. 1 of 1960, D/- 14-12-1964 (J & K) **Reversed.**)

(105) Doctrine of frustration — Applicability — Agreement of lease — Demise in praesenti — Doctrine will not apply as the doctrine is applicable to executory contracts **A 1975 SC 261 (265).**

(106) Contract of lease — Subsequent destruction of leased premises by fire — Sec. 56 is not applicable — Lessee's right of a tenant did not come to an end and option is left with him to continue in possession. 1978 All LJ 1251 (1254).

(107) When a leased building is demolished following a notice under Section 263 (1), U. P. Municipalities Act, the lease does not become impossible of performance under Section 56, Contract Act because the doctrine of frustration which applies to purely contractual obligations and not to contracts creating estates or interests in land which had already accrued, does not apply to it. A 1971 All 16 (17).

(108) Where the contract was in the nature of a licence of executory character, contemplating cutting of timber and removal thereof within stipulated time, the impossibility of performance of contract within the time contemplated would attract Section 56 — Whatever applies to leases cannot ipso facto apply to licences. (1978) 91 Mad LW 225 (229).

Illustrative cases.

(109) Contract to supply cotton piecegoods on future dates — After certain number of delivery notifications by Government under Defence of India Rules — **Held** on construction of notification that the contract did not become impossible — Performance of contract under the notification held was left at the option of parties — Whether parties had agreed to treat contract as at an end or operative depended on facts. ILR (1950) All 215 (226) (DB).

(110) Mortgaged property in possession of tenants of mortgagor — Mortgagee to ob-

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tain possession by evicting tenants by filing suit if necessary — Mortgage to run for 12 years after mortgagee had reduced property to possession — Supervening legislation preventing obtaining of possession — Frustration — Term of 12 years for purposes of redemption begins from date of document and not from supervening impossibility — Result of frustration was to relieve parties from obligation. A 1958 Ker 245 (246).

(110A) The plaintiff let certain premises for a restaurant to the defendant at somewhat higher rent. The vital clause in the agreement was: "This agreement will remain in force so long as British European troops will remain in this town." After some months the locality where the restaurant was situated was declared out of bounds to British troops. **Held**, that the defendant was liable for rent the contract not being frustrated. A 1949 Cal 240 (240).

(111) Agreement to reconvey zamindari lands sold — Subsequently lands vesting in State under U. P. Zamindari Abolition and Land Reforms Act. 1950 (1 of 1951) — Agreement becomes impossible to perform in respect of land vested in State. A 1963 All 201 (202).

(112) Goods, the subject matter of contract damaged through fault of no party — Contract cannot be enforced. 1948 Bur LR (HC) 527 (536).

(113) Both parties, fully aware of the fact, bargaining that sale deed was to be executed within specified time and possession to be given to purchaser simultaneously — Time made essence of contract and whole contract proceeding on basis that purchaser getting possession was the all-important factor — Vendor's failure to persuade lessee to surrender possession — **Held**, case was one where contract as conceived by the parties had become wholly impossible of performance and not one where there was the possibility of substantial performance and therefore was not governed by Section 13, Specific Relief Act but was hit by 2nd para. of Section 56, Contract Act. A 1954 Trav-Co 10 (20) (DB).

(114) Contract for purchase of cotton seed bags for export requiring permit — Unexpected failure to obtain necessary permit — Case held was one of frustration. A 1958 Andh Pra 576 (580) (DB).

(115) The performance of contract of service is not rendered impossible by reason of Section 3 (1) of the Bombay Labour Welfare Fund Act (40 of 1953). **A 1958 SC 328 (338).**

(116) Contract for sale of land — Scheme for developing land — Agreement to construct roads on receipt of earnest money and to complete conveyance thereafter — Requisition of land by Government for indefinite period interrupting construction of roads — Contract held was frustrated. A 1951 Cal 332 (336, 337) (DB).

(117) Where the office held by an employee is abolished by statute and thereby it becomes illegal for the executive to continue him in that office and for the employee to exercise his office further performance of the contract becomes impossible and it stands discharged. A 1960 Raj 138 (148) (DB). (Abolition of post by a statute — Employee holding that post cannot claim damages)

[See also A 1963 Mad 297 (298) (DB). (Termination of service of employee of company because of its compulsory winding up — Doctrine of frustration applies — Employee not entitled to any compensation).]

(118) Licenced liquor shops — Licence fee payable monthly — Liquor supplied by licenced still owners — Distillers receiving rice for distillation from Government — Failure to supply rice, during subsistence of contract — Distillers unable to supply liquor to licensee for one month — Closure of shops for some period — Licensee is not entitled to claim refund of license fee for such period. A 1959 Assam 75 (98) (DB).

(119) Agreement between management and workers effective for three years — Clause in agreement to the effect that parties trust that industrial peace would exist for three years as a result of agreement — Clause held not a condition essential for continuance of contract — Strike by workers on demands other than those provided in agreement held did not amount to breach of contract — Workers not disentitled to claim bonus under the agreement. (1960) 1 Lab LJ 628 (Mad).

(120) Contract becoming impossible of performance by partition of India — Contract void. A 1961 Punj 66 (71) (DB).

(121) Purchase of right to levy octroi from Government — No undertaking given by Government that control on cloth would not be re-imposed — Allegation of reduction in recovery of octroi due to control — **Held** that there was neither a breach of contract nor frustration of contract due to re-imposition of control. A 1960 Him Pra 1 (10).

(122) Sureties in Criminal case — Transfer of case — Sureties will not stand discharged — Sec. 56 is not applicable. A 1960 All 419 (419): 1960 Cri LJ 873.

(123) Contract for sale of plots made during pendency of suit for ejectment of tenant under U. P. Tenancy Act — Condition to execute sale deed after passing of decree for ejectment — Ejectment suit dismissed in trial Court but decreed in appeal — Failure to execute sale deed — Suit for specific performance of contract — Meanwhile notification issued under U. P. Urban Area Zamindari Abolition and Land Reforms Act and plots vested in Government — Specific performance of contract not possible. A 1966 All 185 (187).

(124) Prohibition on future transactions in gur — Settlement of outstanding transactions not prohibited — Imposition of restraint on transport of gur except with Government's permission — No impossibility leading to frustration of outstanding contracts. **A 1968 SC 772 (779).**

(125) Contract of sale of goods at particular price — Subsequent Government order raising price without retrospective effect — No frustration of contract. A 1959 Pat 477 (480).

(126) Agreement to re-convey a particular land — Subsequent deprivation of

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ownership of land by the scheme of consolidation under Uttar Pradesh Consolidation of Holdings Act — Agreement not saved by exception to Section 168-A — Agreement becomes void and impossible of performance and is not saved by Sec. 30 of U. P. Consolidation of Holdings Act of 1951. (1966) All WR (HC) 641 (645). (Agreement to convey the entire holdings may however be specifically enforced by compelling the transferor to transfer the holding allotted to him in lieu of the former holding.)

(127) A sold his share in joint property to B a co-sharer and the latter agreed to reconvey property under certain conditions. Property of C another co-sharer of the joint property was declared evacuee and the whole property was brought to sale under Evacuee Interest (Separation) Act as being composite property. It was purchased by B;

Held, that the agreement to re-convey had become impossible of performance of supervening event. **A 1973 All 528 (531, 532).**

(128) Vendees had agreed to purchase a plot of "about" 500 sq. yards from the colonisers at an agreed rate. The plot had been only roughly demarcated and approximate measurements had been made in the layout plan. One of the conditions of sale reserved liberty to the colonisers "to effect suitable and necessary alterations in the plan, if required." ILR (1975) 1 Delhi 654 (DB)

(129) Foreign firm declared enemy firm by British Indian Govt. — Contract with such firm by subject of Jaipur State unenforceable. A 1971 Raj 88.

(130) Agreement between Ruler of erstwhile State and Company — Company agreeing to pay royalty to Ruler for monopoly rights granted to it for quarrying stone in certain area and also for exemption from payment of income-tax — No specific amount payable towards exemption from income-tax mentioned in agreement — **Held**, on enforcement of Finance Act to the State by Union of India on its formation as Part 'B' State under Constitution, agreement in respect of exemption from payment of Income-tax became void under Section 56 of Contract Act and since this part could not be separated from the agreements the entire agreement became void. A 1971 Raj 128 (133, 134).

(131) A a tenant of certain premises agreed to permit 'B' to display for sale at the premises goods, wares and merchandise belonging to 'B' in return for commission cf 2½% on all goods. Later the Collector of Land Revenue on 23rd May, 1975 by notice of possession served on A's landlord took possession of the premises which resulted in the termination of the agreement between the parties by operation of law. Therefore, even though the Collector did not take possession of the premises until December 31, 1975 the contract stood frustrated on 23rd May 1975 when the State became the owner of the premises. 'B' was therefore held entitled to refund of all Money paid on account of deposit and commission which was in fact rent, from 'A'. (1979) 2 Malayan LJ 168.

(132) Agreement of sale of vacant land entered into and possession of land given to vendee, prior to the enforcement of A. P. Vacant Lands in Urban Areas (Prohibition of Alienation) Act, 1972 — Agreement became unenforceable after the said Act came into force as it had become frustrated — When the contract itself became illegal, the doctirne enunciated under Sec. 53A of the T. P. Act 1882, could not be invoked. (1980) 2 AP LJ 53 (54).

3. Becomes unlawful — Effect of War — Trading with enemy.— (1) If after contract is entered into, it becomes illegal owing to declaration of war, etc., it cannot be enforced. A 1916 Low Bur 7 (8) ** A 1918 Cal 830 (834) ** A 1918 Low Bur 46 (48) ** A 1917 Bom 182 (185) ** A 1916 Bom 251 (252, 255).

(2) Contract of supply of goods by agent of enemy firm — Declaration of hostilities before arrival of vessel — Capture of vessel by condemnation by Prize Court and subsequent release — Agents, held not liable on the contract — Condemnation of goods divested owners of goods from date of seizure — Defendants were under no obligation to purchase goods subsequently from Prize authorities. A 1918 Mad 515 (516) ** A 1921 Cal 509 (514) ** A 1918 Mad 1124 (1128) ** A 1918 Mad 322 (323).

(3) Contract made before hostilities remains in abeyance during the continuance of hostilities and can be enforced when peace is established. But if the contract requires continuous performance of mutual duties by the parties to it and such duties cannot be so mutually performed during the war, and further if the suspension of such mutual rights and obligations for an indefinite period would go much beyond merely placing the contract in abeyance, the contract becomes on the outbreak of war, void. A 1917 Bom 182 (185).

(4) Unconditional contracts are, as a general rule, not dissolved by their performance becoming impossible owing to war. A 1917 Cal 411 (415)

(5) Contract between parties in India for purchase of goods — Condition that contract to become void if there was any fluctuation in rates of Syndicate composed of firms of German producers — War with Germany and deliveries ceasing — Considerable stocks in India: **Held**, that there was no fluctuation in rates by reason of Syndicate becoming inoperative; condition avoiding contract therefore, did not come into existence and that original obligation of sellers to give deliveries remained untouched. **A 1921 PC 46 (47).**

(6) Insurance contract — Issue of warranty before issue of policy — Both warranty and policy containing endorsement that settlement of claims and legal proceedings in respect thereof to be in Rangoon — Policy issued after fall of Rangoon — Continued occupation by enemy — Condition held became impossible of performance — Condition held was essence of contract — Whole contract held frustrated. A 1949 Cal 390 (394, 395).

(7) Where due to the outbreak of war the performance of the contract by the insured by making payments of the pre-

Section 56 — Note 3 (contd.)

mium to the enemy Insurance Company with whom the insured was insured became impossible and illegal under Rule 104 of Defence of India Rules, the contract became frustrated and void. A 1954 Pat 596 (605) (DB).

Total or partial prohibition.

(8) P firm contracting to purchase goods from D at Rs. 77 per cwt. on 16th September 1943 — Goods delivered to railway on 27th December 1943, D being consignee — Government order fixing price at Rs. 48 per cwt. as from 1st January 1944 — P company taking delivery and making payment at contract rate on 3rd January 1944 — Suit by P to recover difference between two prices — **Held,** Government order affected contract — Contract held void under Section 56 — **Held,** neither Sec. 65 nor Section 72 applied and P firm could not recover difference from D company. A 1946 Cal 245 (247, 248, 249).

(9) Where the control imposed on the sale and purchase of a certain commodity is only partial the performance cannot be said to be impossible. 1949-1 Madh B LR 244 (247) (DB).

(10) N. W. P. Rent Act, 1873, making right of occupancy tenant non-transferable — No provision saving contract entered into prior to enactment — Such contracts of sale became void on passing of enactment. 1884 All WN 160 (160).

(11) Contract of sale of rights of defendant conditional on sanction of Cantonment authority becomes void if subsequent to execution of sale deed sanction is refused. A 1929 All 837 (839).

(12) Defendants contracting to convey passengers arriving from Singapore to Jedda — Defendants refusing to take them on board their steamer on ground that passengers had arrived from Singapore on board a ship which was infected with smallpox and that by their conveyance defendants would commit offence under Section 269, I. P. C. — **Held** defendants had failed to show that carrying out of contract would have been in contravention of any law or regulation. If any special precautions were necessary, under the circumstances it was for the defendants to have taken such precautions. Contract on the part of the defendants was thus lawful as well as possible, so that they were bound to carry it out. (1890) 14 Bom 147 (156, 157).

(13) Contract to carry bales — Motor trucks demanded by Transport Authority under D. I. Rules — Breach punishable — **Held,** there was frustration of contract and no damages could be claimed. A 1945 Nag 192 (196).

(14) On December 4, 1939, defendant contracting to purchase from plaintiff fourteen bags of coriander seeds at Rs. 13-8-0 per maund — Plaintiff delivering bags to defendant on December 6, 1939, as per contract — On December 5, 1939, Government notification fixing maximum retail price of coriander seeds at 4 annas per seer — Plaintiff can recover at contract rate — Notification applied to retail price and it did not make it impossible or unlawful for defendant to pay — Doctrine of "frustration of venture" did not apply. A 1942 Cal 291 (292).

(15) Contract for rebate on freight paid for carriage of goods from Trinidad to New York made between British subjects in British territory — Meanwhile Act of U. S. A. penalizing such contract — Contract held not frustrated or rendered impossible of performance since British Law not prohibiting such contracts alone applied. A 1920 PC 117 (119). (Case from Trinidad and Tobago).

(16) An arrangement entered into between the Executive Officer and the Devadasis for rendering service by the latter in lieu of wages or remuneration became void when Madras Devadasis Act (31 of 1947) came into force and made the rendering of dancing service in a temple an offence punishable under Section 4. A 1957 Andh Pra 643 (649) (DB).

(17) No prohibition in sending goods outside State at time of contract — Subsequent prohibition and railway booking closed — Contract held became impossible of performance — Plaintiff has no right or title to goods in possession of defendant upon contract becoming void. A 1955 Hyd 233 (235) (DB).

(18) Where there is absolute prohibition as to sale, the fact that there is a legislation to that effect is sufficient to make the defence of frustration complete. But, where the prohibition is not absolute and complete, but qualified it has to be examined whether the party has discharged his obligation. A 1954 Mad 119 124 (DB).

(19) Unless the subsequent change in law rendered the entire contract illegal, the question of frustration does not arise at all. A 1957 Pat 586 (599) (DB).

(20) If the performance of contract is rendered unlawful either for determinate or indeterminate period of time, the contract would not stand discharged unless the ban on its performance existed on the day or during the time in which it has to be performed. **A 1965 SC 1523 (1525).** (A 1959 Cal 576, **Affirmed.**)

(21) Forward contracts in linseed subsisting on the date of the promulgation of the Oilseeds (Forward Contracts Prohibition) Order, 1943, are to be deemed to be closed out. As the performance of such contracts has been rendered unlawful, such contracts must be held to be void under Section 56. Parties to such a contract are under no obligation to perform his part of the contract. A 1951 Nag 320 (321).

(22) Goods purchased by plaintiff on behalf to defendant — Defendant refusing to take delivery on due dates — Contracts entered into in February 1952 — Section 3 of T. C. Act 5 of 1950 found to be valid — Relevant Prohibition Order prohibiting forward contracts continued to remain in force under Proviso to Section 17 (4) of Essential Supplies (Temporary Powers) Act (1946) — Contracts held to be against law — Suit for damages for breach of those contracts held to be not maintainable. **A 1969 SC 504 (513)** (A 1964 Ker 92, **Reversed.**)

(23) Where the performance of a contract to transfer immoveable property had been rendered unlawful by reason of some sub-

Section 56 — Note 3 (contd.)
sequent event, for instance a legislation prohibiting such transfers, the contracts would stand discharged, the parties would be absolved from further performance of it. To such case, the doctrine of frustration applies. 1978 MPLJ 279 (282).

(24) Where a dealer in export of silver executed an agreement with State Trading Corporation for purpose of exporting silver to foreign buyer, containing an indemnity clause to indemnify the State Trading Corporation on dealer's default and due to ban on export of silver by law the contract was frustrated, the indemnity clause was held not enforceable by the STC against the dealer even if the unlikely event of the STC being made liable by the foreign buyer takes place. **A 1980 SC 1149 (1156).**

(25) Karta of a Hindu undivided family got vacated two shops from the tenants on agreeing to re-let the shops to them on reconstruction — Property of the HUF subsequently partitioned of between the members, through Court — Coparcener to whom the shops got vacated were allotted on reconstruction refused to relet them to the tenants, alleging that the agreement became void as the subsequent event had rendered it impossible to be performed — **Held** that the doctrine of frustration enunciated in Section 56 of the Contract Act was not attracted as under the Hindu Law the Karta had implied authority to enter into the agreement. 1980 Kash LJ 254 (255, 256).

4. Contract containing arbitration clause. — (1) Frustration of contract containing arbitration clause — Arbitration clause may remain enforceable — It depends on the way in which the clause is worded — **Held** on facts that there was enforceable agreement to go to arbitration on all matters connected with contract including question whether contracts became void, and for those matters and that question to be decided by the arbitrators. ILR (1946) 1 Cal 312 (315, 316).

(2) In cases of frustration, it is the performance of the contract which comes to an end but the contract would still be in existence for purposes such as the resolution of disputes arising under or in connection with it. The question as to whether the contract became impossible of performance and was discharged under the doctrine of frustration would still have to be decided under the arbitration clause which operates in respect of such purposes. **A 1988 SC 522 (528).**

(3) A piecegoods contract C.I.F. Karachi was entered into between two parties at Amritsar before partition. The contract contained an arbitration clause. After partition, the seller called upon the buyer to refer the dispute arising consequent on the buyer's refusal to take delivery to arbitration in the manner provided by the arbitration clause, **Held** that the contract of arbitration was not frustrated by reason of the partition. **A 1952 Punj 34 (38) (FB).**

(4) Before the partition of India, the applicants had entered into a contract with the respondents, both of Amritsar. One of the terms of the contract was that any dispute or claim of whatever nature relating to or arising out of the contract should be referred to arbitration of two European Merchants at Karachi, one to be appointed by each party and in accordance with the provisions of the Arbitration Act. Karachi subsequently became a part of foreign Dominion, which contingency was never contemplated by the parties — **Held**, that due to change of circumstances the contract of arbitration was frustrated and must, therefore, be held to have been dissolved as a whole. **A 1951 Punj 189 (202) (DB).**

(5) Arbitrators are competent to decide the question of frustration of a contract. ILR (1973) 2 Cal 255.

(6) Where in a suit for damages for breach of contract the plea of frustration is taken as a defence there is no question of the contract having been frustrated ab initio or that it did not exist at all. Hence, in such a case the arbitration clause in the contract will operate. 1969 Mer LR 78 (Madh Pra).

5. Decree for specific performance.— (1) Reading Section 56 of the Contract Act with Section 35 of the Specific Relief Act the Court itself, which passed the decree for specific performance can and should declare its own decree void if the act becomes impossible of performance or by reason of some event which neither party could prevent. **A 1954 Mad 1040 (1041) (DB).**

(2) Where in a suit for specific performance of agreement for sale of plots, the seller pleaded that as New Plots had been allotted as a result of the consolidation of his holding, he could not perform the agreement, the buyer's suit for specific performance was liable to dismissal. **A 1977 SC 1226 (1229).**

(3) Land agreed to be sold allotted to others and some other land in lieu thereof allotted to defendant in consolidation of holdings operations — Suit for specific performance of contract cannot be decreed. 1978 All LJ 733 (734).

(4) Where a land is not to be sold except with the sanction of the Government and the breach of such condition entails forfeiture of the land and the plaintiff, with the knowledge of such conditions, seeks specific performance of a contract for sale of such land, specific performance can be granted. 1969 Raj LW 86.

6. Refund and compensation.— (1) Contract becoming impossible — Benefit under contract must be returned. A 1944 Mad 239 (243) ** A 1970 Raj 36 (47) (DB) ** A 1961 Raj 277 (280) ** A 1960 J and K 91 (96, 97) ** (1959) 2 Mad LJ 498.

(2) Contract to secure repayment of money advanced by usufructuary mortgage with possession to be given to lender — Land, however, already attached under decree and under management of Collector

57. Reciprocal promise to do things legal, and also other things illegal.— Where persons reciprocally promise, firstly, to do certain things which are legal, and, secondly, under specified circumstances to do certain other things which are illegal, the first set of promises is a contract, but the second is a void agreement.

Illustration

A and B agree that A shall sell B a house for 10,000 rupees, but that, if B uses it as a gambling house, he shall pay A 50,000 rupees for it.

The first set of reciprocal promises, namely, to sell the house and to pay 10,000 rupees for it, is a contract.

The second set is for an unlawful object, namely, that B may use the house as a gambling house, and is a void agreement.

[Malaysian Contract Act 1950, S. 58.]

Section 56 — Note 6 (contd.)

— Performance of contract becoming impossible — Lender held entitled to compensation, damages being amount of advance with interest from date when land should have been made over to him, had performance been possible. (1890) 17 Cal 432 (434).

(3) Contract with defendant German firm, having office in Bombay, becoming void on declaration of war — Plaintiff waiving breach committed by giving defendants time after breach — Defendants held were entitled to return of their deposit. A 1916 Bom 251 (255)

(4) Lease becoming void by acquisition of land by Government — Consideration for lease paid — Lessor is bound to compensate lessee. A 1922 All 6 (6, 7).

(5) In a Hindu family a betrothal is in the nature of a contract to which the Contract Act is applicable. Where the contract becomes impossible on account of the death of the bride the parties to the contract will be entitled to the return of the gifts made in consideration for the proposed marriage and also to expenses legitimately incurred in connection with the ceremonies preceding marriage. A 1950 All 592 (594, 595) (DB).

(6) Contract to obtain licence — Contract becoming impossible owing to defendant's negligence — Defendant is bound to compensate plaintiff for loss sustained by plaintiff through non-performance of contract. A 1955 Orissa 49 (54) (DB).

(7) Where the contract is not incapable of being performed, the seller can enforce the clause of forfeiture of earnest money provided the purchaser does not carry out his part of the contract. A 1967 All 253 (255)

(8) As to obligation of person who has received advantage under void agreement or contract that becomes void, see Sec. 65.

(9) The plaintiff was the highest bidder at a railway auction sale of slack coal under the honest and reasonable belief that he would be allowed to transport the coal to his destination but he could not transport it due to the unreasonable attitude of the Coal Commissioner, although no condition had been imposed by him at the time of granting permission for the auction that the coal would not be allowed to be transported as it was to be consumed locally. A 1973 SC 2380 (2384).

(10) Where the goods in custody of railway kept for transportation were seized by the Police in a theft case against the consignor, and on his acquittal the goods were returned back to him it had become completely impossible for the Railway Administration to perform the contract of carrying goods to their destination and the Administration was not liable for any damages claimed against it by the purchaser. A 1971 All 479 (481, 482).

(11) Sale of right to collect pig dung in municipal area — A sale of future contingent goods within Section 6 (2), Sale of Goods Act — Dung removed by pig owners in their right — No dung left for Contractor to collect — Contract becomes impossible of performance — Contractor not liable to pay price of dung. A 1972 Andh Pra 299 (301).

(12) If the contract is a divisible one, in the sense that a sum is to be paid over in respect of completion of defined portion of work it may well be that the sum is not returnable if the completion of the whole work is frustrated. ILR 1977 (1) Bom 26.

(13) A contract of sale on behalf of minors by a person incompetent to act as their guardian would be treated as void under Section 56 — On discovering it to be void, person acting on behalf of the minors would be bound under Section 65 to repay earnest money received by him. A 1971 Ker 239 (242, 243).

[A 1948 Cal 269, Dissented from.]

(14) Subsequent change in circumstances outside contemplation of parties — Payment on basis of quantum meruit cannot be claimed — Such payment can be claimed only when the contract is frustrated. A 1973 Raj 223.

Section 57

(1) Section 57 refers to persons who promise, firstly, to do certain things which are

58. Alternative promise, one branch being illegal.— In the case of an alternative promise, one branch of which is legal and the other illegal, the legal branch alone can be enforced.

Illustration

A and B agree that A shall pay B 1,000 rupees for which B shall afterwards deliver to A either rice or smuggled opium.

This is a valid contract to deliver rice, and a void agreement as to the opium.

[Malaysian Contract Act 1950, S. 59.]

Section 57 (contd.)

legal and, secondly, under specified circumstances to do certain other things which are illegal. A 1937 Rang 47 (49).

(2) In a contract consisting of legal and illegal parts separable from each other, Court is bound to give effect to the legal part and reject the illegal part unless the whole transaction is prohibited by statute or is otherwise void. **A 1938 Nag 335 (343) (FB)** ** 1879 Pun Re No. 106, p. 293 (294) (DB) ** (1875) 23 Suth WR 66 (68) (DB) ** (1968) 69 ITR 819 (DB) (All).

(3) Where the parties treat the legal as well as illegal parts as forming one indivisible contract the whole becomes void. (1885) 9 Bom 176 (178, 179) (DB) ** **A 1917 Mad 77 (77) (FB).**

Section 58

(1) Section 58 does not apply where there is no alternative promise separable from illegal portion of agreement. (1913) 18 Ind Cas 9 (10) (All).

(2) Promisee who had paid good consideration can enforce the legal promise where the contract contains also another distinct promise which is illegal. A 1942 Oudh 1 (6) (DB).

(3) Where an option is given to the executant either to transfer the inheritance or to transfer his share in a certain property, the case is directly covered by the illustration to Section 58. A 1931 All 589 (593) (DB).

(4) Where a debtor pledged certain shares with a Bank for moneys advanced by it, and the company issued bonus shares and right shares for the holding, the Bank is not entitled to such accretions. The accretions remain the property of the promisee. A 1969 Delhi 313 (315) (DB).

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CONSTITUTION OF INDIA

A. I. R. 1972 Ker. 27 (35) (Pr. 24) — Krishna Iyer J.— "Chitaley on the Constitution of India has made a critical reference to this aspect of the decision (A. I. R. 1952 Bom. 84) excluding personal law from Art. 13 (1)" (Constitution of India 2nd Edn. Vol. 1 P. 702).

A. I. R. 1961 Manipur 1 (4) (Pr. 11) [V 48 C 1] — Tirumalpad J. C.— "What is prohibited (in Art. 23 (1)) is begar and other similar forms of forced labour. The A.I.R. Commentaries on the Constitution of India at p. 635 define 'begar' as a system under which persons are pressed to carry burdens for individuals or public or to perform other forms of menial service under compulsion".

A. I. R. 1956 All 341 (345) (Pr. 33) [V 43 C 126] (DB) — Desai J.— "Shri Jagdish Sahai could not cite any authority in support of his contention that the right given to the Court to draw an adverse inference is equal to compelling the accused to be a witness against himself. We notice that Chitaley in his Commentary on Constitution, Vol. I, pp. 497-498, does not see any conflict between the provisions of Art. 20 (3) and those of S. 342, Cr.P.C."

A. I. R. 1956 J. & K. 1 (10) (Pr. 34) [V 43 C 1] (F. B.) — Kilam J.— "The learned author Chitaley in his luminous commentary on the Constitution has after discussing almost the whole case law on the subject, enunciated some principles which I might give more or less in his own language. According to the learned author....." (Points from Note 8 (g) under Art. 21, p. 533 quoted.)

CIVIL PROCEDURE CODE, 1908.

A. I. R. 1953 S. C. 23 (27) [V 40 C 7] — [Touching the revisional jurisdiction of the High Court set out in S. 115, Civil P. C.] **— Mahajan J.—** "A large number of cases have been collected in Edn. 4 of Chitaley & Rao's Code of Civil Procedure (Vol. I) which only serve to show that the High Courts have not always appreciated the limits of the jurisdiction conferred by this section."

AIR 1980 A. P. 283 (287) (DB) (Pr. 4) — Madhava Reddy J.— "As stated in the commentary on the Civil P. C. by Chitaley the general trend of opinion of the other High Courts (except Allahabad and Patna) is that O. 40, is not applicable to mortgage suits and a receiver can be appointed even if the mortgage is simple mortgage".

AIR 1980 Raj. 202 (206) (Pr. 13) — M. C. Jain J.— "Chitaley in his commentary on the Code of Civil Procedure, 9th Edition, Vol. 2 at page 520 has enumerated the following interlocutory orders, in which the High Courts have interfered under S. 115."

AIR 1979 A. P. 273 (274) (Pr. 3) — Narasinga Rao J.— "The Rule (O. 21, R. 35) contemplates only a symbolical possession. It does not contemplate the delivery of physical possession. It is useful to refer in this context to AIR Commentary by Chitaley to the said order. The relevant passage in Note 6 reads as follows.....". (8th Edition Vol. 3 P. 283.)

1978 Jab. L. J. 769 (775) (Pr. 11) — Mishra J.— "The view of Allahabad High Court on the point (effect of order by lower Court pending revision) is condensed in the AIR Commentaries CPC, 9th Edition, Vol. II at page 576 under (Note) 16B as under."

1977 K. L. T. 117 (119) (DB) (Para. 3) — Gopalan Nambiyar, Actg. C. J.— On the question whether application under O. 33, R. 3 is to be presented personally to the presiding officer of Court it was observed, "we are unable to discern any convincing reason in insisting on such requirement. In Chitaley's Code of Civil Procedure, 8th Edition, Vol. 3, Page 1156 it is stated "The object of the rule (O. 33, R. 3) is to enable the Court to examine the petitioner, apparently with a view to satisfy itself prima facie that the applicant is a real pauper.'"

4 A.M.—SP—1/82 (4 pp.)

A. I. R. 1975 Delhi 46 (48) (Pr. 5) (FB) — V. S. Deshpande J.—"A learned Commentator has, therefore, opined that Order VI, Rule 17 is also in two parts, namely (a) .....and (b) ..... The suggestion is that (a) is discretionary while (b) is mandatory (A. I. R. Commentaries on the Code of Civil Procedure, 8th Edn., Vol. II Page 800)."

A. I. R. 1975 Goa, Daman and Diu 24 (25) (Pr. 5) — K. N. Shukla, Addl. J. C.— "Executing Court has no jurisdiction to go behind the decree and spell out something which may amount to negation of the decree (See A.I.R. Commentaries 7th Edn., S. 38, N. 8, the Code of Civil Procedure by Chitaley and Appu Rao)."

A. I. R. 1970 Manipur 34 (36) (Pr. 6) [V 57 C 10] — R. S. Bindra J. C.— "At page 1569 of A. I. R. Commentaries on the Code of Civil Procedure, 7th Edition, it is stated that..... These observations of the learned commentators are founded on a large number of authorities mentioned in the footnote, and, if I may say so with respect, are quite helpful in understanding the true scope of cl. (c) of section 115".

A. I. R. 1968 J. & K. 13 (14) (Pr. 7) [V 55 C 4] — J. N. Bhat J.— "The principle as laid down in certain authorities as summarized in the Commentary on Chitaley's Civil P. C. (7th Edn., Vol. 2, Page 1327) is that the Court has to see whether the suit cannot be determined in the absence of the person who applies to be made party or whether his interests will not be prejudiced by not being joined as a party."

A. I. R. 1965 All. 527 (531) (Pr. 28) [V 52 C 148] — Oak J.— "Mr. Brij Lal Gupta pointed out that the Court dealing with the matter in April 1947 was a Munsif. The present suit was tried by a Civil Judge. The valuation of the suit was Rs. 35,000. The Munsif had no jurisdiction to try the present suit. Under S. 11, C. P. C., the Court trying the former suit should have been competent to try the subsequent suit itself. (See Chitaley's Commentary on the Code of Civil Procedure Volume I, Page 415), (Now see 1963 (7th Edn.) pp. 379-380)."

A. I. R. 1965 Punj 494 (496) [V 52 C 157 Pr. 7] — Shamsher Bahadur J.— "The words 'for any other substantial cause' (in O. 41, R. 27 (b)) must be read with the word 'requires' in the beginning of the sentence and need not be construed in the narrow sense suggested by the doctrine of ejusdem generis.....Reference may be made to Chitaley's Commentary on the Code of Civil Procedure, Vol. IV, at page 4319."

COURT-FEES ACT, 1870 & SUITS VALUATION ACT, 1887.

A. I. R. 1965 Punj 1 (11) (Pr 25) [V 52 C 1] (FB) — P. C. Pandit J.— "With regard to this definition (of 'consequential relief') Chitaley in his Commentaries on the 'Court-fees Act and the Suits Valuation Act (Second Edition), on page 135 has observed thus—",

CRIMINAL PROCEDURE CODE, 1898.

1973 Rajdhani L. R. 684 (687) (Pr. 6) — R. N. Aggarwal, J.— "Chitaley in Vol. 3 of Commentary on the Code of Criminal Procedure 6th (1966) Edition at p. 3563 has observed that latter part of the proposition in Purushottam Das Banarasi Das (A. I. R. 1952 All. 470) is too sweeping inasmuch as in some cases for example, where property is stolen, even an innocent transferee of the property will not be entitled to possession of it as against the real owner. I am inclined to agree in the observations of the commentator."

A. I. R. 1969 Manipur 56 (57) (Pr. 5) [V 56 C 19] — C. Jagannadhacharyulu, J. C.— "There is divergence of opinion as to whether a joint complaint can be filed by two or more persons. Vide Note 19 at page 1372 of A. I. R. Commentaries on the Criminal Procedure Code — Vol. I, 1965 Edition....."

A. I. R. 1969 Orissa 56 (57) (Pr. 5) [V 56 C 23] — S. Acharya J.— "Their Lordships of the Madras High Court in their decision reported in A. I. R. 1954 Mad. 214 in quoting a passage from Chitaley and Annaji Rao's Criminal Procedure Code, observed as follows: 'But a Criminal Court, as well pointed in

the exhaustive analysis in Chitaley and Annaji Rao's Criminal Procedure Code Vol. III, 4th (1950) Edn. at page 2862, is not expected, under the provisions of S. 517 to 'try' civil cases.....' This view has been reiterated in a decision of this Court in (1967) 33 Cut LT 868."

1967 Current L. J. 717 (719) — Shamsher Bahadur J.— "Prior to the enactment of this amendment (S. 139-A), the Court had by judicial decisions engrafted a law which according to Chitaley's Commentary on the Code of Criminal Procedure, Vol. I, Page 590 was this....."

CRIMINAL PROCEDURE CODE, 1973

A. I. R. 1980 S. C. 898 (932) (Pr. 148) — Sarkaria J. (Majority view)— "For such capital offences, it was left to the Court, on the facts of each case, to pass, in its discretion, for reasons to be recorded, the sentence of death or the lesser sentence. This led to some difference of opinion whether even after the amendment of 1955, in case of murder the normal punishment was death or imprisonment for life; (See A. I. R. Commentaries on the Code of Criminal Procedure, Vol. 3, Page 585 by D. V. Chitaley and S. Appurao).

LIMITATION ACT, 1963

ILR (1977) Ker 15 (47) (Pr. 33) — Chandrasekhara Menon J.— "The question has often arisen whether the co-heirs of a single debtor will be joint contractors within the meaning of section 20. There is a wide divergence of opinion with regard to this in the decisions of the various High Courts. This is because of the diverse meanings given to the word joint contractors, occurring in sub-section (2) of section 20. This difference of opinion on the point has been well summarised in Chitaley and Rao's 'Limitation Act' at p. 635, Vol. I of the 4th (1964) Edition. We may extract that here....."

1969 All. L. J. 1095 (1100) (Pr. 10) (DB) — Per Gangeshwar Prasad J.— "The principle is so firmly established that it does not appear necessary to cite decisions in support of it and we will only extract the following passage from Vol. II, page 1314 of the Commentary on the Limitation Act by Chitaley and Rao (1965 Edition)....." (Points 7 to 10 from Note 56, quoted.)

A. I. R. 1963 Punj. 457 (459) (Pr. 7) [V 50 C 127] — Grover J.— "As stated in Chitaley's Limitation Act, (3rd Edition), Volume I, Page 524, the words 'Stayed by an injunction or order' have reference to an order of a Court and not to a disability to sue or to apply arising from other causes."

TRANSFER OR PROPERTY ACT, 1882

A. I. R. 1974 Andhra Pra. 139 (142) (Pr. 30) (V 61 C 28) (FB) — Ekbote C. J.— "The law in India in regard to the waiver is the same. See the cases collected at page 2066 of Volume III of Transfer of Property Act by D. V. Chitaley and S. Appu Rao."

1974 Rajdhani L. R. 23 (31) (Pr. 11) — V. S. Deshpande J.— "The right of the landlord to hold all the co-tenants as liable to pay rent to him and, therefore, as being liable to be evicted by the landlord is not, therefore, affected by any internal partition among the co-tenants (See Note 6, A. I. R. Commentaries on the Transfer of Property Act, S. 108 (Fourth Edition).)"

1969 Current L. J. 989 (990) (Punj.) — D. K. Mahajan J. — "In fact, if a reference is made to Note 34 of Chitaley's Transfer of Property Act (IV of 1882) 3rd edition, page 1737, it will be found that the view enunciated by the Orissa High Court is the preponderant view."

A. I. R. 1964 Punj. 210 (211) (Pr. 4) [V 51 C 52] — S. S. Dulat Actg. C. J. and D. K. Mahajan J.— "It is significant that the provisions of the section (S. 111 T. P. Act) have never been applied as a rule of equity, justice or good conscience by any of the High Courts in the territories to which this provision is not made applicable under S. 1 of the T. P. Act, whereas a number of cases will be found at page 173, Note 4, of Chitaley's Transfer of Property Act, Vol. I, where principles underlying the provisions of the Transfer of Property Act have been so applied....."